

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2311738
Decision Date:	02/20/2024	Hearing Date:	01/02/2024
Hearing Officer:	Thomas Doyle	Record Open to:	01/09/2024

Appearance for Appellant:



Appearances for Respondent:

Director Social Services
Administrator
Director of Nursing
Director of Rehab
Long Term Care 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

Appeal Decision:	Denied	Issue:	Nursing Home Discharge
Decision Date:	02/20/2024	Hearing Date:	01/02/2024
Respondent Reps.:	Maria Casey, Stacey Brady	Appellant's Rep.:	Veranira Ochea, Esq.
Hearing Location:	Remote (phone)	Aid Pending:	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 October 23, 2023, [REDACTED] (hereinafter "the nursing facility" or "facility") issued a 30-Day Notice of Intent to Discharge Resident to appellant because the safety of the individuals in the nursing facility is endangered due to her clinical or behavioral status. (130 CMR 456.701 (A) (B); Ex. 1). Appellant filed this appeal in a timely manner on November 18, 2023. (130 CMR 610.015(F); Ex. 2). Notice of transfer or discharge from a nursing facility is valid grounds for appeal. (130 CMR 456.703; 130 CMR 610.032(C)).

Action Taken by Nursing Facility

The nursing facility issued a notice of intent to discharge the appellant with 30 days' notice.

Issue

The appeal issue is whether the facility satisfied its statutory and regulatory requirements pursuant to 130 CMR 456.701 (A) and (B), when it issued the appellant the 30-day notice of intent to discharge.

Summary of Evidence

The nursing facility was represented telephonically at the hearing by its Social Services Director, its Administrator, its Director of Nursing Services, Director of Rehabilitation and a Long-Term Care Social Worker. The Administrator testified that appellant was told if she continued to disobey the smoking policy by having lighters on her person and smoking marijuana, they would issue a 30-day notice. Because of appellant's continuing disregard of the smoking policy, the facility did issue the 30-day notice on October 23, 2023. (Ex. 1). Appellant acknowledged and initialed a Center Smoking Policy when she arrived at the facility. The Administrator referenced notes in the record. In October 2023, appellant had a half-smoked marijuana joint fall out of her jacket pocket while being assisted into bed. The Administrator took possession of the joint. (Testimony; Ex. 5, p. 24). In September 2023, appellant had a pack of cigarettes on her lap. She was requested to place them in a cigarette box at the nurse's station but she refused. (Ex. 5, p. 25). A few days earlier, appellant was found with a lighter on her person. It was taken from her and she was reminded she was not allowed to have a lighter on her person. The Administrator testified the facility was undergoing a DPH annual survey and the DPH surveyor observed appellant remove a lighter from her pocket and light her own cigarette. (Testimony; Ex. 5, p. 30).¹ In June 2023, a laundry supervisor found a lighter in a pocket of appellant's shirt. In April 2023, the Administrator of the facility spoke to the Ombudsman regarding appellant having marijuana cigarettes, completely rolled and a half smoked joint. Appellant was found behind a dumpster with a lighter and no smoking apron. (Testimony).

The appellant was admitted to the nursing facility in [REDACTED]. (Testimony; Ex. 5, p. 9). The Administrator testified that appellant told her she doesn't care about the smoking rules. Appellant was told if she was caught smoking again there would be discussions of a 30-day notice of discharge, to which appellant responded she did not care. (Ex. 5, p. 26). The Administrator stated appellant was educated several times by numerous staff members over a period of months about the smoking policy. Appellant was advised not to smoke marijuana because of the many medications she was taking and possible reactions that could occur. (Testimony). The Administrator stated the facility has over a hundred residents, many with physical mobility issues, and she stated nonadherence to the smoking policy is a safety issue. (Testimony).

The Director of Social Services (DSS) of the facility testified regarding a discharge plan. (Ex. 5, pp. 12-19). Appellant would be discharged to a [REDACTED] to a handicap-accessible room. Appellant would be provided transportation to the [REDACTED]. The facility ordered equipment for appellant for rehabilitation purposes. The facility did a virtual site visit with the Inn to ensure it met appellant's needs. Visiting Nurses Association (VNA) services were set up for appellant, along with a referral to elder services. The DSS stated that, when appellant left for the hotel, the facility would send water, sandwiches, and snacks to be placed in the fridge in appellant's room. The facility found a Nurse Practitioner to conduct follow up medical care for appellant once she was discharged. (Ex. 5, p. 13). The DSS also stated a Nurse Practitioner, working under the supervision of the facility's

¹ In the note, the DPH surveyor notes Resident #77. (Ex. 5, p. 30). This designation refers to appellant. (Ex. 8).

medical director, cleared appellant for discharge. Appellant can transfer independently and has no cognitive concerns and can advocate for what she needs. (Ex. 5, p. 20-21). Appellant can ambulate 240 feet with a roller walker and uses a Reacher to make her bed. (Testimony).

Appellant can do the following without any help: get up and down; move around, groom herself, dress, prepare her own meals, eat, and can communicate independently. (Ex. 5, pp. 15-16).

Appellant appeared by telephone, as did her attorney. Appellant testified she is in her early [REDACTED]. She cannot walk, has heart issues, and past head trauma. She stated that, since receiving the notice of discharge, she has not had a lighter in her possession. She said she never smoked cigarettes in the facility. Appellant, however, admitted that she did have a marijuana joint in her possession but said it was a one-time incident and has had none since. She stated she could abide by the smoking policy. When she was asked what would happen if discharged to the hotel, she said she would die because she has no money to live there and has no local contacts. Her son lives in Texas and she cannot rely on him. (Testimony).

Appellant had taken steps to find alternative housing by filling out paperwork. (Ex. 5, pp. 112-157.)

Counsel for appellant made numerous arguments why the appellant's appeal should be approved.

Findings of Fact

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

1. Appellant is a female in her early [REDACTED]. (Testimony; Ex. 5, p. 9).
2. The appellant was admitted to the nursing facility in March of 2020. (Testimony; Ex. 5, p. 9).
3. On October 23, 2023, the nursing facility issued to appellant a 30-Day Notice of Intent to Discharge Resident. (Testimony; Ex. 1; Ex. 5, p. 45).
4. Appellant timely appealed on November 18, 2023. (Ex. 2).
5. Appellant acknowledged and initialed a CENTER SMOKING POLICY when she arrived at the facility. (Testimony; Ex. 7). After the date of her admission, appellant was reeducated on the facility's smoking policy. (Testimony).
6. In October 2023, a half smoked marijuana joint fell out of appellant's pocket while she was being assisted into bed. (Ex. 5, p. 24).
7. From March 2022 until the date of notice of intent to discharge in October 2023, appellant

was found in violation of the facility's smoking policy multiple times by having smoking items in her room, including a lighter and cigarettes and marijuana cigarettes completely rolled and half smoked. (Ex. 5, pp. 24-26; 48; 378; 383-384).

8. On March 4, 2022, a facility social worker met with appellant to speak about the smoking policy. Appellant stated, "I am my own boss." (Ex. 5, p. 384). On April 7, 2022, appellant was educated about facility smoking policies/safety concerns/possibility of eviction. Appellant stated she understood policies. (Ex. 5, p. 383). On October 3, 2023, facility staff met with appellant and went over rules and regulations for smoking safety. Appellant confirmed understanding. (Ex. 5, p. 48).
9. Facility staff met with appellant on October 20, 2023 about notice of intent to discharge. Staff discussed with appellant where she would like to go when discharged and discharge planning would continue with appellant. (Ex. 5, p. 46).
10. Information regarding substance abuse support will be given to appellant if she needs it after discharge. (Ex. 5, pp. 36-41).
11. A discharge plan was drafted for appellant. Appellant acknowledged the discharge plan had been reviewed with her, she understood it, any questions she had were answered, and she was given a copy of the discharge plan. (Ex. 5, pp. 12-19).
12. On November 20, 2023, appellant was encouraged to participate in her discharge planning because she had not been participating. (Ex. 5, p. 377).
13. Appellant can transfer independently. Appellant has no cognitive concerns and can advocate for what she needs. (Testimony; Ex. 5, p. 20).
14. Appellant can ambulate 240 feet with a roller walker and uses a Reacher to make her bed. (Testimony).
15. Appellant can do the following without any help: get up and down; move around; groom herself; dress; prepare her own meals; eat and can communicate independently. (Ex. 5, p. 15-16).
16. Appellant had taken steps to find alternative housing by filling out paperwork. (Ex. 5, pp. 112-157.)

Analysis and Conclusions of Law

130 CMR 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 MassHealth 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 (4), 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 or PCP when a transfer or discharge is necessary under 130 CMR 456.701(A)(1) or (2); and
- (2) a physician or PCP when the transfer or discharge is necessary under 130 CMR 456.701(A)(3) or (4).

456.402: Definitions

Primary Care Provider (PCP). Any of the following: a physician, a physician assistant, or a nurse practitioner operating within the scope of their licensure and supervision requirements, as applicable.

The issue on appeal is whether the facility was correct in issuing the 30-day notice of intent to discharge because the safety of individuals in the facility is endangered due to the clinical or behavior status of the resident. The facility has provided support for this claim in the hearing record.

The appellant does not follow the nursing facility smoking policy prohibiting smoking material or lighters in her possession. (Ex. 7). Appellant has been in possession of lighters and marijuana cigarettes and the facility Administrator testified that appellant has several marijuana joints and lighters in a drawer that were taken from her. (Testimony). The appellant's disregard for the facility's smoking policy is all the more dangerous due to the fact that multiple residents in the facility have mobility issues, and a potential fire from unauthorized possession of smoking materials could be tragic. The appellant has shown no intention of following the facility's smoking

policy. In one incident, in September 2023, when asked to give up a pack of cigarettes that were on her lap, appellant stated “no”. (Ex. 5, p. 25). In March 2022, regarding noncompliance with the smoking policy, appellant said “I am my own boss.” (Ex. 5, p. 384). The record shows that, not only is appellant not keeping lighters on her person, she is hiding lighters and cigarettes in her room. (Ex. 5, p. 378, 383). The appellant’s nursing facility record supports that the health and safety of individuals in the nursing facility is endangered by the appellant’s actions and thus the nursing facility has met the requirements of 130 CMR 610.028(A).

Through counsel, Appellant advances several arguments as to why her appeal should be approved. Appellant states that she was incapable of knowing she was signing the facility smoking policy upon admission. Even if true, after her admission, the record reflects appellant was reeducated on the smoking policy numerous times before she was served the notice to discharge. Appellant’s counsel stated that she noticed others smoking outside the facility with no supervision. The facility representative stated that a staff member would have been in the doorway. The actions of the residents of the facility are irrelevant to appellant’s case.

Appellant’s counsel argues the notice of discharge was faulty because it did not provide appellant with sufficient notice of available legal aid. Once this was realized, the appeal was continued by the Board of Hearings at appellant’s request, and appellant retained counsel. (Ex. 3; Ex. 4; Ex. 5, pp. 1-2). Appellant argues the discharge plan was formulated without her participation. The record contradicts this argument and shows appellant was encouraged to participate in her discharge planning and appellant chose not to participate in the planning. (Ex. 5, p. 377). Appellant argued the discharge plan was not signed off by a medical doctor. There was no error because the plan was signed off by a nurse practitioner. The regulations allow a nurse practitioner to sign off on a discharge plan as long as they are operating within the scope of their licensure and supervision requirements. (130 CMR 456.701 (A), (B); 130 CMR 456.402). The facility Administrator testified that the nurse practitioner was under the authority of the facility’s medical director who is a medical doctor. (Testimony).

These arguments advanced by appellant’s counsel are unavailing.

The second issue is whether the nursing facility has met the requirements of MGL Chapter 111, Section 70E and 42 CFR 483.12(a)(7) in providing sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place. The federal Centers for Medicare and Medicaid defines “sufficient preparation” within the meaning of 42 CFR 483.12(a)(7) to mean that the facility informs the resident where he or she is going and takes steps under its control to assure safe transportation; the facility should actively involve, to the extent possible, the resident and the resident’s family in selecting the new residence. *Centennial Healthcare Investment Corp. v. Commissioner of the Division of Medical Assistance*, 61 Mass. App. Ct. 320 (2004).

The nursing facility has met its burden of providing sufficient preparation and orientation to the

appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place. The nursing facility intends to discharge the appellant to a [REDACTED]. The facility nurse practitioner has cleared the appellant medically for living in the community. (Ex. 5, p. 20-21). The facility has provided appellant with information once she is discharged for a Nurse Practitioner, VNA services, substance abuse help, transportation to the Inn, and ensured that the room at the Inn is wheelchair accessible. (Ex. 5, p. 15).

I determine that the place to which the nursing facility intends to discharge the appellant is safe and appropriate based on the appellant's nursing facility record and the testimony of the witnesses. The facility involved the appellant, to the extent possible, in discharge planning, and the fact that the appellant may have financial issues paying for the room for an extended time is out of the control of the nursing facility. The nursing facility's notice of discharge dated October 23, 2023 meets the requirements of 130 CMR 456.071 (A) and (B), 130 CMR 610.029, and MGL Chapter 111, section 70E.

The appeal is denied.

Order for Nursing Facility

Proceed with the discharge as set forth in the notice dated October 23, 2023, following 30 days from the date of this decision.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal 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.

Thomas Doyle
Hearing Officer
Board of Hearings

CC:

[Redacted]