

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2404353
Decision Date:	05/24/2024	Hearing Date:	4/23/2024
Hearing Officer:	Cynthia Kopka	Record Open to:	4/30/2024

Appearance for Appellant:



Appearance for Respondent:

Augustine Aiguosatile, administrator
Susana Macary, RN



*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:	Nursing facility discharge
Decision Date:	05/24/2024	Hearing Date:	4/23/2024
Respondent's Rep.:	Augustine Aiguosatile, Susana Macary	Appellant's Rep.:	
Hearing Location:	Taunton (remote)	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

By notice dated February 6, 2024, Vantage Health & Rehabilitation ("Respondent" or "the facility") informed Appellant of its intent to discharge Appellant from the facility on Exhibit 1. Respondent also issued a notice not to readmit on Exhibit 4 at 58. Appellant filed a timely appeal on March 19, 2024. Exhibit 2. 130 CMR 610.615. Challenging the discharge or transfer from a nursing facility is a valid basis for appeal. 130 CMR 610.032. The hearing record was held open through April 30, 2024 for the submission of additional evidence. Exhibit 6.

Action Taken by Respondent

Respondent informed Appellant of its intent to discharge Appellant from the facility.

Issue

The appeal issue is whether Respondent satisfied its statutory and regulatory requirements when it issued the notice of intent to discharge Appellant.

Summary of Evidence

Respondent, a skilled nursing facility licensed in Massachusetts, was represented by its administrator and a registered nurse. Appellant appeared with his representative family members. Records were submitted by both parties prior to and after hearing during the record open period. Exhibits 4 and 5. A summary of testimony and documentary evidence follows.

By letter dated February 6, 2024, Respondent informed Appellant of its intent to discharge Appellant from the facility to a shelter. Exhibit 1. Respondent's representative testified that the letter was hand-delivered to Appellant and a copy was mailed to Appellant's sister. The notice stated that Respondent sought to discharge Appellant on [REDACTED] because the safety of the individuals in the facility is endangered due to the clinical or behavioral status of the resident. *Id.* The notice identified the administrator as the person responsible for supervising the discharge and explained Appellant's appeal rights. The notice included contact information for a local long term care ombudsman, the disability law center, centers for public representation (including a disabled persons' protection commission) and local legal service offices. *Id.* The administrator testified that Appellant was given a copy of the notice and a copy was sent to Appellant's sister via certified mail. Respondent provided evidence that the letter was sent certified with a return receipt requested, but did not provide a copy of the return receipt green card for the certified letter and argued that its obligation was met upon mailing the letter. Exhibit 4 at 331-332.

Appellant admitted to the facility on [REDACTED] from home for ongoing management of generalized weakness and cognitive decline. Appellant had a medical history which included cognitive decline, multi-infarct dementia, history of alcohol abuse and tobacco use. Exhibit 4 at 151, 155, 158-159.¹ Appellant's health care proxy was not invoked and he did not designate anyone as a representative upon admission. *Id.* at 32-33. Included in the admission paperwork signed by Appellant was the smoking policy, which prohibits smoking in the building and on the grounds except in designated areas. Exhibit 4 at 28. Respondent's representative testified that the no smoking policy is posted on signs in the building.

Respondent alleged that there were continuous incidents leading to the decision to discharge Appellant and not readmit him. Two such incidents appear to be documented in Appellant's chart. First, Respondent alleged that Appellant smoked cigarettes in his room on January 14, 2024. The nurse on staff smelled smoke in the hallway and Appellant's room. Respondent's representative testified that he spoke to Appellant after the nurse called him. Appellant handed over a pack of cigarettes and two lighters. This incident is documented in Appellant's chart. Exhibit 4 at 150. Appellant's chart also included a note dated January 30, 2024 by a social worker which stated that the social worker told Appellant's sister that Appellant is not allowed to have cigarettes. *Id.* at 139.

¹ Exhibit 4 contains some errors in page numbering. Citations are to the page number of the electronic pdf of the document and may be one or two pages off from the physical paginated numbers.

Second, on February 4, 2024, Appellant eloped by leaving the building and going outside to sit on a bench to smoke. As a result, a nurse placed a wander guard on Appellant. *Id.* at 135. Appellant removed the wander guard on February 9, 2024 and refused to wear it. *Id.* at 128.

Respondent's representative testified that Appellant was a pack-a-day smoker, something the facility could not accommodate. However, Appellant was free to smoke during social visits off site. Appellant was permitted to leave his cigarettes with visitors or turn them over to staff to hold after a visit. Respondent's representative testified that he told Appellant's sister the policy.

According to a social services note dated February 6, 2024, two social workers and a unit manager hand delivered the notice of discharge to Appellant. *Id.* at 132, 318. The note provided that a copy was mailed to Appellant's sister and that Appellant's sister was made aware that Appellant would be receiving the notice. *Id.*

According to a social service note dated [REDACTED], a social worker met with Appellant and informed Appellant that he would be transported to the shelter the following morning at 9:30 AM to arrive in time for 10:00 AM admission. The social worker wrote that Appellant acknowledged the directions for discharge. *Id.* at 59.

A note from a nurse practitioner (NP) dated [REDACTED] states that Appellant is in his [REDACTED] with a history of, inter alia, cognitive decline and multi-infarct dementia. The note specifically states that Appellant "**will be transferring to another facility** prescriptions provided just in case." *Id.* at 106 (emphasis added). The discharge summary dated [REDACTED] also states that Appellant will be transferring to another facility. *Id.* at 166. This note does not make any reference or mention of violations of the smoking policy, safety concerns of residents, or elopement. *Id.* at 106, 166. All of the other physician (MD) or NP notes also make no reference to smoking, safety, or elopement. *Id.* at 158-166. This includes notes from the encounters immediately after those incidents. *Id.* at 160 (encounter date January 15, 2024) and 164 (encounter date February 15, 2024).

Respondent's representative testified that on the day of discharge, Appellant's sister called the facility to stop the discharge and came to the facility. Appellant's sister called the police to intervene and there was a commotion. Respondent's representative testified that the shelter was listed as the discharge location because he was told Appellant's sister could not accommodate Appellant at her home. Appellant was ultimately transported to the hospital via ambulance.

Appellant testified that he never smoked in the facility and answered questions demonstrating that he knew the smoking policy. Appellant testified that he never received a copy of the discharge notice. Appellant's roommate offered a letter in support stating that Appellant never smoked in the room. Exhibit 5.

Appellant's sister testified that she did not receive the discharge notice because it was inadequately addressed and therefore held at the post office. Exhibit 5. Appellant's sister would have appealed the notice immediately had she received it.

Appellant's sister was informed of the situation on February 5, 2024 by receiving a phone call and being told that her brother had escaped after someone left a locked door open. Appellant's sister inquired as to why her brother should be evicted but not the person who carelessly left a door open in a locked facility. Appellant's sister argued that Appellant was compliant when he was found outside in the smoking area and went back in willingly. Appellant's sister spoke to Respondent's administrator after this incident and the administrator told her that Appellant would not be discharged for this incident.

Appellant's sister testified that she was first made aware that Appellant was being evicted by a phone call from an employee at the facility on March 4, 2024. She asked for additional information and was told she would get a follow-up call. On [REDACTED], Appellant called his sister and asked if she knew he was leaving that day. Appellant's sister told Appellant not to get in the van and that she would go to the facility. Appellant's sister went to the facility and asked to speak to the administrator. When she was finally able to speak to the administrator, he referenced incidents of which Appellant's sister was not aware. Appellant's sister asked for specificity about the allegations and to see the reports. As the administrator did not seem to understand the questions, Appellant's sister decided to call the police so she could have witnesses to the administrator's claims. When the police came, the decision was made to have Appellant taken via ambulance to the hospital because the facility was kicking him out and no family could take him. Appellant was transported to a local hospital and eventually transferred to a major hospital, where he has been admitted for several weeks.

Appellant's sister testified that the shelter is not a safe or appropriate place for Appellant given his dementia. He would have to be on the street all day as the shelter is closed and he cannot navigate the city. Appellant's sister raised issues with Appellant's diagnoses not being correct, as there was confusion among some of the employees and the EMTs as to whether Appellant has dementia.

Appellant's sister argued that she never heard about the eviction notice despite visiting Appellant very frequently and speaking with many different staff members. A community services representative was also not informed of the discharge notice. Appellant's sister defended Appellant's right to smoke but acknowledged that it must be done according to policy. Had Appellant's sister been informed of the violations, she would have worked with employees to develop a plan to help Appellant succeed. Appellant's sister testified that she is Appellant's health care proxy and that the hospital is petitioning to have her appointed Appellant's legal guardian.

Appellant seeks readmission to the facility despite this negative interaction because it is the best place for him. The facility is central to Appellant's family and the staff provide good care. If Appellant is readmitted, Appellant's sister will cooperate with the staff to ensure Appellant can

comply with the smoking policy.

Findings of Fact

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

1. Appellant admitted to the facility on [REDACTED] from home for ongoing management of generalized weakness and cognitive decline. Appellant had a medical history which included cognitive decline, multi-infarct dementia, history of alcohol abuse and tobacco use. Exhibit 4 at 151, 155, 158-159.
2. Appellant did not designate anyone as a representative upon admission. *Id.* at 32-33.
3. On February 6, 2024, Respondent informed Appellant of its intent to discharge Appellant from the facility to a shelter. Exhibit 1.
4. The notice stated that Respondent sought to discharge Appellant on [REDACTED] because the safety of the individuals in the facility is endangered due to the clinical or behavioral status of the resident. *Id.*
5. The notice identified the administrator as the person responsible for supervising the discharge and explained Appellant's appeal rights. The notice included contact information for a local long term care ombudsman, the disability law center, centers for public representation (including a disabled persons' protection commission) and local legal service offices. *Id.*
6. Respondent mailed a certified letter of the notice of discharge to Appellant's sister, but this was not delivered/received until March 7, 2024. Exhibit 1, Exhibit 4 at 331-332, Exhibit 5.
7. On [REDACTED], Respondent issued Appellant a notice not to be readmitted. Exhibit 4 at 58.
8. Appellant filed a timely appeal on March 19, 2024. Exhibit 2.
9. Included in the admission paperwork signed by Appellant was the smoking policy, which prohibits smoking in the building and on the grounds except in designated areas. Exhibit 4 at 28.
10. A nursing note dated January 14, 2024, indicated that a nurse suspected Appellant of smoking in his room. The nurse wrote that they smelled smoke in the hallway and Appellant's room. Appellant handed over a pack of cigarettes and two lighters. *Id.* at 150.

11. On February 4, 2024, Appellant eloped by leaving the building and going outside to sit on a bench to smoke. As a result, a nurse placed a wander guard on Appellant. *Id.* at 135.
12. According to a social services note dated February 6, 2024, two social workers and a unit manager hand delivered the notice of discharge to Appellant. *Id.* at 132, 318.
13. According to a social service note dated [REDACTED], a social worker met with Appellant and informed Appellant that he would be transported to the shelter the following morning at 9:30 AM to arrive in time for 10:00 AM admission. The social worker wrote that Appellant acknowledged the directions for discharge. *Id.* at 59.
14. An NP note dated [REDACTED] states that Appellant “**will be transferring to another facility prescriptions provided just in case.**” *Id.* at 106.
15. The discharge summary dated [REDACTED] states that Appellant will be transferring to another facility. *Id.* at 166.
16. No NP or MD notes in Appellant’s file contain a reference to Appellant violating the smoking policy, elopement, or causing a safety concern, including those notes for encounters immediately after the incidents. *Id.* at 158-166, 160 (encounter date January 15, 2024) and 164 (encounter date February 15, 2024).

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 action initiated by a nursing facility. Massachusetts has enacted regulations that follow and implement the federal requirements concerning a resident’s right to appeal a transfer or discharge, and some of the relevant regulations may be found in both (1) the MassHealth Nursing Facility Manual regulations at 130 CMR 456.000 *et seq.*, and (2) the Fair Hearing Rules at 130 CMR 610.000 *et seq.*

Per 130 CMR 456.701(A) and 130 CMR 610.028(A), a nursing facility resident may be transferred or discharged 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.

When the facility transfers or discharges a resident under any of the circumstances specified in (1) through (4) above, 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).

130 CMR 456.701(B); *see also* 130 CMR 610.028(B).

Prior to discharge or transfer, the nursing facility must hand deliver to the resident and mail to a designated family member or legal representative (if the resident has made such a person known to the facility), 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 MassHealth agency 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 610.029; and
 - (c) the effect of requesting a hearing as provided for under 130 CMR 610.030;
- (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.

130 CMR 610.028(C).

Pursuant to 130 CMR 610.029(A), the notice of discharge or transfer required under 130 CMR 610.028 must be made by the nursing facility at least 30 days before the date the resident is to be discharged or transferred, except as provided for under 130 CMR 610.029(B) and (C) when the discharge is being made on an emergency basis. *See also* 130 CMR 456.702(A). If a resident is discharged before a timely request for hearing is submitted to the Board of Hearings, “the nursing facility must, upon receipt of the appeal decision favorable to the resident, promptly readmit the resident to the next available bed in the facility.” 130 CMR 610.030(C).

Further, Mass. Gen. Laws ch. 111, §70E provides that “[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.” Finally, federal regulations require that a nursing facility “provide and document sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. This orientation must be provided in a form and manner that the resident can understand.” 42 CFR 483.15(c)(7).

In this appeal, Appellant challenges Respondent’s discharge and seeks readmission. Both sides expended time and energy disputing the events leading to discharge and providing requested documentation in support of their position. However, this hearing decision rests on one important fact.

Regardless of whether Respondent offered sufficient evidence to justify the basis for discharge, Respondent violated 130 CMR 456.701(B)(2) and 130 CMR 610.028(B)(2) because the explanation for discharge was not **provided by a physician**. None of the NP or MD notes make any reference to Appellant violating the smoking policy, causing a safety concern, or eloping. In fact, the NP’s discharge note not only contains no reference to safety, but it incorrectly states that Appellant would be **transferred to another facility**. This phrasing is particularly important given that the difference between a “transfer” and “discharge” implicates whether the facility’s legal responsibility for the care of Appellant would cease. *See* 130 CMR 456.402. The decision for

Appellant to be transported to the hospital, instead of the shelter, came after the NP wrote this note.

Respondent has not met its documentary requirements for discharge. Accordingly, this appeal is approved and Appellant is to be readmitted to the next available bed.

Appellant and family should be keenly aware that any violation of the facility's smoking policy is sufficient justification for discharge as long as the other requirements for discharge under the law are met.

Order for Respondent

Rescind the 30-day notice of intent to discharge Appellant and notice not to readmit. Readmit Appellant to the next available bed in the facility.

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 the director of the Board of Hearings in writing at the address on the first page of this decision.

Cynthia Kopka
Hearing Officer
Board of Hearings

cc:

Vantage Health & Rehab [REDACTED], Attn: Augustine Aiguosatile, [REDACTED]
[REDACTED]

Copy to – MH Legal – Sharon Boyle

Dept. of Public Health, Steven Chilian 250 Washington St., #2, Boston MA 02109