

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2406265
Decision Date:	5/16/2024	Hearing Date:	05/06/2024
Hearing Officer:	Susan Burgess-Cox		

Appearance for Appellant:
Pro se

Appearance for Nursing Facility:
Greg Logan, Administrator



*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:	NF Discharge
Decision Date:	5/16/2024	Hearing Date:	05/06/2024
Nursing Facility's Rep.:	Greg Logan	Appellant's Rep.:	Pro se
Hearing Location:	All Parties Appeared by Telephone		

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 March 28, 2024, the nursing facility informed the appellant that he would be discharged to an address in [REDACTED] on [REDACTED] as the safety of the individuals in the nursing facility is endangered due to the appellant's clinical or behavioral status. (130 CMR 610.028; Exhibit 1). The behavioral status includes ongoing violations of the facility's substance use and smoking policy. (Exhibit 1). The address listed on the notice is an address of a hotel. The 30-day notice of intent to discharge states that the appellant must file a request for hearing within 14 days of receiving the notice. (Exhibit 1).

The appellant filed an appeal on April 21, 2024. (130 CMR 610.029). The Board of Hearings accepted and processed this request for hearing as it was received within 30 days of the date of the notice and the notice from the facility stated it was a notice to discharge within 30 days rather than an expedited discharge. (130 CMR 610.028; 130 CMR 610.029). The notice from the facility was incorrect in providing the appellant only 14 days to appeal a 30-day notice of intent to discharge. (130 CMR 610.028; 130 CMR 610.029). While this could be the sole basis for approving this appeal, the facility made other notice errors that are discussed below.

Nursing facility residents have the right to request an appeal of any nursing facility-initiated transfer or discharge. (130 CMR 610.032(C)).

Action Taken by the Nursing Facility

The nursing facility issued a notice to discharge the appellant to an address in [REDACTED] within 30 days of the date of the notice as the safety of the individuals in the nursing facility is endangered due to ongoing violations of the facility's substance abuse and smoking policy.

Issue

Whether the nursing facility was correct in issuing a notice to discharge the appellant as the safety of the individuals in the facility is endangered due to the appellant's clinical or behavioral status. (130 CMR 610.028).

Summary of Evidence

All parties appeared by telephone. The facility presented documents that were incorporated into the hearing record as Exhibit 4. The notice lists a discharge address of [REDACTED]. The notice does not indicate what is at that address. At hearing, the facility administrator testified that it was a hotel. The administrator did not provide a name or type of accommodations, only the address. The notice was sent to the appellant alone. The facility administrator acknowledged having the name of more than one contact for the appellant but did not believe it was necessary to send a copy of the notice to another party as it was determined that the appellant could make decisions on his own.

The heading on the notice issued by the facility indicates that it is a "Notice of Intent to Discharge With 30 Days Notice". The discharge date is 30 days from the date of the notice. The notice states that the appellant has 14 days to file an appeal. The title to the notice and date of discharge do not indicate that the facility was taking action on an emergency discharge. The notice states that the individual responsible for supervising the transfer or discharge "is Nursing Director." No name or contact information is provided for an individual with that title. The notice lists contact information for the [REDACTED] as the "Local Legal Services Office" for the appellant's service area. [REDACTED] provides funding and support to civil legal aid organizations across the Commonwealth. It is not a local legal services office.

When these errors were noted at the hearing, the administrator responded that they utilized a template that they believed followed the correct notice requirements noting that any errors were technical. The administrator testified that the appellant knows the name and location of the nursing director who appeared at hearing with the administrator. Despite discussions of these errors and attempts to enter into a agreement with the appellant, the facility would not agree to rescind the notice on appeal.

Documents presented by the facility include an admission record, nursing progress notes, physician progress notes, social service progress notes, and the facility's smoking policy. (Exhibit 4). Admission records and progress notes list the following diagnoses: hyperlipidemia, chronic hepatitis, alcohol use, non-pressure chronic ulcer of the right heel and mid-foot, varicose veins of the bilateral lower extremities, opioid dependence and weakness. (Exhibit 4).

Records from the facility contain physician progress notes with the most recent indicating that the appellant is doing well, vital signs are stable, pain is controlled, he can ambulate independently, and he can perform wound care on his own and is followed by a wound center. The appellant acknowledged that he has been going to a wound center for care and can perform all activities of daily living on his own.

The administrator testified that the appellant was admitted to the facility approximately [REDACTED] prior to the date of the hearing. The appellant was previously incarcerated, living in a sober living center and admitted to the facility for therapy and wound care. The administrator testified that the appellant demonstrates consistent disregard toward facility policies. Representatives from the facility have discussed these policies with the appellant, the appellant signed a copy of the smoking policy in September, 2023, but violated the policy by keeping cigarettes and smoking articles in his possession and providing smoking articles to other residents.

The administrator testified that the appellant consumes alcohol and illegal drugs on the facility property. The appellant has not participated in any drug or alcohol rehabilitation that the facility has offered, and has not been responsive to offers from facility staff to help find placement in the community. The administrator testified that the appellant is seen walking to the liquor store almost daily and alcohol, drugs, lighters and a potential weapon were found in his room. Physician's progress notes from the date of the discharge state that the appellant was found intoxicated in his room with an alcohol smell on his breath. Notes indicate that during a room search conducted one day prior to the date of the discharge, the nursing director found a small amount of partially smoked marijuana along with a lighter. On that same day, a social worker observed a "window punch" type of device left on the appellant's bedside table.

The administrator noted that the police have intervened at the facility to address some of the appellant's behaviors, including an incident where the facility contacted Emergency Medical Services (EMS) as they attempted to transfer the appellant to the Emergency Department (ED) of an area hospital as the appellant was suspected of drinking alcohol and called or texted a staff member threatening to hurt himself.

While the administrator and nursing director indicated that they were working with the appellant regarding a discharge plan, as of the date of the hearing, no definitive plan was in place other than sending the appellant to a hotel. The administrator noted that they would pay for the appellant to stay for up to one week at an area hotel until he found a safe place to stay. The representatives from the facility stated that the appellant is currently receiving outpatient wound care, does not

require assistance with any activities of daily living and does not require any skilled nursing services.

The appellant acknowledged having a “window punch” on his key chain but did not see it as a weapon. The appellant testified that it was given to him as a gift and it is a tool, not a weapon. The appellant testified that he goes for walks a few days each week and while other patients ask him to purchase cigarettes, lighters and alcohol for them, he does not. The appellant acknowledged having part of a “pot cigarette” in his room but was not sure how long it was there. The appellant acknowledged that he did consume alcohol at times, but was told by an Ombudsman that it was OK to consume alcohol if he did not become intoxicated. The appellant testified that he was concerned about returning to the community, as he is unable to perform wound care on his own and the outpatient clinic where he currently receives care is within walking distance to the facility. Relocating due to a discharge would make it more difficult to go to the outpatient clinic.

The appellant did not dispute the fact that he is able to perform activities of daily living independently. The appellant did not dispute the fact that he no longer receives any nursing interventions other than assistance with medications.

Findings of Fact

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

1. The appellant is currently a patient in a long-term care facility.
2. On March 28, 2024, the nursing facility issued a notice to discharge the appellant.
3. The notice heading states, “Notice of Intent to Discharge with 30 Days Notice”.
4. The discharge date is 30 days from the date of the notice.
5. The notice states that the appellant has 14 days to file an appeal.
6. The notice does not state that the facility is taking action on an emergency discharge.
7. The Board of Hearings accepted an appeal filed within 30 days of the date of the notice of discharge.
8. The notice lists discharge to an address of [REDACTED]
[REDACTED]

9. The discharge location is a hotel.
10. The notice was sent to the appellant alone.
11. The facility has contact information for more than one individual serving as a contact for the appellant.
12. The notice states that the individual responsible for supervising the transfer or discharge "is Nursing Director."
13. No name or contact information is provided for an individual with that title.
14. The notice lists contact information for the [REDACTED] in [REDACTED] as the "Local Legal Services Office" for the appellant's service area.
15. [REDACTED] provides funding and support to civil legal aid organizations across the Commonwealth. It is not a local legal services office.
16. The appellant has the following diagnoses: hyperlipidemia, chronic hepatitis, alcohol use, non-pressure chronic ulcer of the right heel and mid-foot, varicose veins of the bilateral lower extremities, opioid dependence and weakness.
17. The appellant has been going to an outpatient wound center for care, and can perform all activities of daily living on his own.
18. The appellant was admitted to the facility approximately [REDACTED] prior to the date of the hearing.
19. The appellant was previously incarcerated, living in a sober living center and admitted to the facility for therapy and wound care.
20. The appellant signed a facility smoking policy in September, 2023.
21. The appellant keeps cigarettes and smoking articles in his possession.
22. The appellant walks to an area liquor store almost daily.
23. The appellant consumes alcohol and appears intoxicated when on the facility property.
24. During a room search, the director or nursing found a small amount of partially smoked marijuana along with a lighter in the appellant's room.

25. A social worker observed a “window punch” type of device left on the appellant’s bedside table.
26. The police have been called to the facility to address some of the appellant’s behaviors.
27. The appellant was taken to the ED of an area hospital as a staff member said that the appellant threatened to hurt himself.
28. As of the date of the hearing, the facility did not have a definitive discharge plan in place other than providing the appellant up to one week at an area hotel.
29. The appellant is currently receiving outpatient wound care, does not require assistance with activities of daily living and does not require any skilled nursing services.

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 many regulations that follow and implement the federal requirements concerning a resident’s right to appeal a transfer or discharge. Some of the relevant regulations can 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.*

Pursuant to 130 CMR 610.028(A) which governs the rules for actions initiated by a nursing facility, 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 Medicaid or Medicare pay for) a stay at the nursing facility;
or
- (6) the nursing facility ceases to operate.

In the present case, the notice states that the discharge was appropriate because the safety of the individuals in the facility is endangered. While this is an acceptable reason for discharge, the

facility did not meet the regulatory notice requirements or procedures for a discharge.

Pursuant to 130 CMR 610.028(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 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.

Here, in their attempt to discharge the appellant, the nursing facility violated several of the legal and regulatory requirements that serve to protect and provide due process to patients belonging to an extremely vulnerable population.

First, the facility failed to send a copy of the notice to a designated family member or legal representative as required under the regulations at 130 CMR 610.028(C). Representatives from the facility acknowledged having contact information for family members or legal

representatives, but felt that the appellant could make decisions on his own. This assumption was made for a patient who has a substance abuse disorder and was sent to the hospital following a reported threat of suicide. Additionally, the representatives from the facility provided testimony and evidence regarding difficulties they have encountered in trying to work with the appellant. It is difficult to understand why the facility did not think that someone with the appellant's physical, behavioral and mental health issues would not require any representation or assistance with the discharge or transfer process. The regulations contain provisions to protect the rights of this vulnerable population. If the designated family member or legal representative does not appear or a member chooses to proceed on their own, that is the decision of the individual, not the facility.

Second, the notice with the heading "Notice of Intent to Discharge With 30 Days Notice" states that the appellant has 14 days to appeal that notice. This statement is provided after listing all of the various grounds for appeal and provide this time limit for filing an appeal for all reasons for a discharge including failure to pay or closing of the facility. This timeline for filing an appeal is not correct for the notice at issue. The regulations governing the timeline for filing an appeal state that the BOH must receive the request for a fair hearing within 30 days after a resident receives written notice of an intent to discharge or transfer pursuant to 130 CMR 610.029(A) where a facility provides a 30-day notice to discharge. (130 CMR 610.015(B)(3)). The Board of Hearings must receive a request for hearing within 14 days after a resident receives written notice of an emergency discharge or emergency transfer pursuant to 130 CMR 610.029(B)). (130 CMR 610.015(B)(5)). Nothing on the notice under appeal notes that this is an emergency discharge or emergency transfer. Additionally, the fact that the notice provides only 14-days for an individual to appeal any type of discharge notice is incorrect and misleading.

Third, the notice states that the individual responsible for supervising the transfer or discharge "is Nursing Director." No name or contact information is provided for an individual with that title. The regulations at 130 CMR 610.028(C)(10) require the notice to provide 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, not just the title of an individual. While the representatives from the facility noted that the appellant knew the nursing director, that does not mean that the notice meets the regulatory requirements which are in place to protect the rights of this vulnerable population.

Fourth, the notice lists contact information for the [REDACTED] in [REDACTED] as the "Local Legal Services Office" for the appellant's service area. [REDACTED] provides funding and support to civil legal aid organizations across the Commonwealth. It is not a local legal services office. The regulations at 130 CMR 610.028(C)(9) state that the notice should contain the address of the nearest legal services office.

Finally, in addition to being obligated to comply with all of the notice requirements that ensure

individuals from such a vulnerable population are provided due process, a nursing facility has an obligation to comply with all other applicable state laws, including M.G.L. c. 111, §70E, which went into effect in November of 2008. The key paragraph of that statute, which is directly relevant to any type of appeal involving a transfer or discharge, reads 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.

Federal regulations also require that a nursing facility provide and document sufficient preparation and orientation to ensure a safe and orderly discharge. (42 CFR 483.15(c)(7)). This orientation must be provided in a form and manner that the resident can understand. Federal regulations at 42 CFR 483.21(c)(1) speak to the discharge planning process. These regulations require the facility to involve the resident and resident representative in the development of the discharge plan. (130 CMR 483.21(c)(1)(v)). In this case, sending the appellant to an area hotel without a plan for services in place does not appear to involve the appellant or provide sufficient preparation and orientation to return to the community.

This appeal is APPROVED to ensure that the facility takes action in compliance with the law and regulations governing a nursing home discharge. The facility may issue a proper notice and take proper action at any time.

The appellant should be aware that the facility appears to have adequate grounds to discharge. Simply making notice and planning errors does not make the reason for discharge incorrect. The appellant did not present sufficient evidence to challenge the determination that the safety of the individuals in the facility is endangered due to the appellant's behavioral status.

Order for Nursing Facility

Rescind the discharge notice issued on March 28, 2024.

Compliance with this Decision

If this nursing facility fails to comply with the above order, you should report this in writing to the Director of the Board of Hearings, Office of Medicaid, 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.

Susan Burgess-Cox
Hearing Officer
Board of Hearings

cc: Respondent: Plymouth Harborside Healthcare, Attn: Administrator, 19 Obery Street,
Plymouth, MA 02360