

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2408528
Decision Date:	7/29/2024	Hearing Date:	07/01/2024
Hearing Officer:	Casey Groff, Esq.		

Appearance for Appellant:

Pro se



Appearances for Nursing Facility:

From AdviniaCare Wilmington:

Michelle Figucia, Administrator;
Deborah Morrissey, Social Worker;
Melissa Mahoney, Director of Nursing



*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 Facility Discharge; 30-Days
Decision Date:	7/29/2024	Hearing Date:	07/01/2024
Nursing Facility Reps.:	Michelle Figucia, Administrator, <i>et. al.</i>	Appellant's Rep.:	<i>Pro se</i>
Hearing Location:	Board of Hearings, 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

On 5/17/24, AdviniaCare Wilmington, a licensed nursing facility, served Appellant with a 30-Day Intent to Discharge notice, which informed her that she would be discharged from the facility on 6/17/24. See Exh. 3. On 5/30/24, Appellant filed a timely request for a fair hearing to appeal the facility's intended action; however, she did not identify, or include copy of, the underlying discharge notice with her request. See Exh. 1. On 5/30/24, BOH dismissed the matter for failure to submit a copy of the notice giving rise to the appeal. See Exh. 2. On 6/13/24, Appellant sent the Board of Hearings (BOH) a copy of a 5/17/24 notice. See Exh. 3. An attempt to discharge a nursing facility resident is valid grounds for appeal. See 130 CMR 610.032(C). Having demonstrated an appealable action, BOH vacated the dismissal and proceeded to schedule a hearing on the matter. See Exh. 4.¹

Action Taken by Nursing Facility

¹ BOH denied Appellant's 6/26/24 request to have the hearing rescheduled.

The nursing facility sought to discharge Appellant in 30 days based on grounds that (1) her health improved sufficiently so that she no longer required nursing facility services; and (2) she repeatedly failed to adhere to facility policies which endangered the safety of individuals at the facility.

Issue

The issue on appeal is whether the nursing facility complied with the requirements set forth in 130 CMR 610.00 et. seq., 130 CMR 456.00 et. seq., and MGL c. 111, § 70E in seeking to discharge Appellant to her sister's residence in the community, pursuant to its 5/17/24 notice.

Summary of Evidence

At the hearing, the nursing facility was represented by its administrator, a social worker, and its director of nursing (collectively "the facility representatives"). Appellant appeared *pro se* and was accompanied by an ombudsman from Minuteman Senior Services.² All parties appeared by telephone.

Through oral testimony and documentary submissions the facility presented the following evidence: Appellant is an adult female, under the age of 65. On [REDACTED] 22, Appellant was transferred from a hospital to AdviniaCare Wilmington ("the nursing facility") to receive short-term rehabilitation after having sustained injuries related to a fall. See Exh. 5, p. 31. The referral from the hospital indicated that she had been treated for a L5 compression fracture and bilateral pelvic fractures. Id. Additionally, Appellant's diagnoses and past relevant medical history include polyneuropathy, major depressive disorder, hypertension, nicotine dependence, alcohol abuse, malnutrition, failure to thrive, hyperlipidemia, panic and anxiety disorder, sleep disorder, repeated falls, and a history of malignant neoplasm of bronchus. Id. at 5, 68.

Based on the short-term nature of her intended stay, the facility began discharge planning discussions with Appellant "immediately" upon her admission. Id. at 68. Progress notes indicate during an initial intake on 8/29/22, Appellant informed social services that she was unable to return to her sister's home, where she had stayed prior to her hospitalization. Id. Social services at the facility sought a referral for an options counselor through Elder Services to assist Appellant in seeking housing and support in the community. Id. at 64-67. By 9/15/22, Appellant was progressing and had transitioned from a wheelchair to a rolling walker. Id. at 67. During discharge planning discussions, Appellant initially requested to be discharged to a hotel. Because the facility felt a hotel was not a suitable or long-standing option, they continued

² The parties stated that the ombudsman assigned to their facility requested another ombudsman, with whom she works, attend the hearing in her place as she was not available. It was noted there was no designated appeal representative identified on the fair hearing request or elsewhere in the hearing file.

exploring alternative housing options. Id. Between October and December of 2022, Appellant was actively working with two case workers from Tufts case management and submitting multiple housing applications. Id. at 66-67. Because she had not secured housing by her short-term end date of 11/23/22, Appellant's admission status changed to custodial care, and she began paying the facility a patient paid amount (PPA). Id. at 65.

The director of nursing testified that for the past year and a half, Appellant has been "100% independent" with care. She does not require any nursing facility services and is independent with her activities of daily living (ADLs). Id. at 19-26; 47-58. She is no longer in a wheelchair and walks independently, though, she does have a walker for assistance. She is not elderly and is capable of managing, and attending, all outpatient medical appointments on her own.

On 5/17/24, the facility served Appellant with a 30-day discharge notice, informing her that it sought to discharge her from the facility to her sister's address on 6/17/24 because (1) "[Appellant's] health has improved sufficiently so that [she] no longer require[s] the services provided by the facility," and (2) because Appellant "fail[ed] to adhere to facility policies," such as its leave of absence (LoA) policy, its smoking policy, and substance abuse policy. See Exh. 3. At hearing, the facility testified that Appellant's repeated violation of facility policy was the impetus for issuing the discharge notice because it presented a significant risk to the health and safety of the individuals of the facility.

The facility testified that, in the same month Appellant transitioned to custodial care, i.e., November 2022, she began leaving the facility without notice and without a physician's order. She would walk to the local store or the local restaurant and return after buying and/or consuming alcohol. The social worker testified that she was "very hard to find" because she did not notify staff of her whereabouts or signed out. Id. at 82. In addition, the facility testified, Appellant is routinely non-compliant with the facility smoking policy. For example, Appellant does not adhere to the requirements that residents smoke in designated smoking areas, at designated times, and to relinquish all smoking materials in a locked area for safe keeping. Id. at 79-80. The facility testified that Appellant does not turn over lighters, presenting a risk of fire. The facility testified they need Appellant to comply so that they can accommodate the needs of other residents and maintain safe environment. Appellant refused to sign the policies because she does not agree with them. Id. at 87-88. The facility made efforts to educate Appellant on the facility policies; however, when confronted she becomes agitated. Copies of the policies at issue were submitted into the record. Id. at 79-88.

On [REDACTED] 24, the facility called the local police to report suspicious activity involving Appellant and two other residents. According to the police report, which was submitted into evidence, the facility alleged that Appellant and the other residents had been arranging for alcohol and marijuana to be delivered to the facility at night, which they would then distribute/share with other residents at the facility, posing a "big safety concern for the residents and staff." Id. at 101. The report noted that multiple residents at the facility have prior/current substance abuse

issues, and that residents on the floor range from 21 years old to 80 years of age. Id. As a result, the facility issued discharge notices to Appellant and other involved individuals. Id.

On [REDACTED] 24, after serving Appellant with its 5/17/24 discharge notice, a facility nurse found pills and drug paraphernalia in Appellant's room, prompting another call to the police, who completed a room search upon arrival. Id. at 102-103. Pursuant to the room search, police found a bottle of vodka, marijuana paraphernalia, including e-z wider cigarette papers, a vape, a small glassine Ziplock plastic bag with a variety of pills in the bedside nightstand, and additional loose pills that were in a plastic cup mixed with miscellaneous items. Police later matched some of the pills as consistent with Appellant's prescribed medications and returned the medication to the facility. Other pills, which could not be identified, were confiscated by police. Id.

The facility testified that the medical director, who oversees Appellant's care, is aware of, and has approved, the planned discharge. Physician progress notes stated that Appellant is able to ambulate independently and that she has "completed [her] rehab course and her pain is stable on [medications]." Id. at 87-88; 108-120. The facility pointed to physician notes, which cited Appellant's repeated non-compliance with facility policies, as well as her possession of illicit items that prompted police involvement. Id.

The administrator testified that Appellant cannot remain at the facility when she refuses to comply with facility policies which are designed to accommodate the needs and safety of the individuals at the facility. The facility has been actively trying to find Appellant a suitable housing for over a year and a half. Social services found housing options, which all have been rejected by Appellant. Id. at 44, 64-67. In a clinical entry, one social worker noted that when she recently provided Appellant with a list of additional housing options, which had been provided by the Elder Service housing liaison, Appellant "slapped [the list] on the desk and started yelling that this isn't what she wants." Id. at 44. Because Appellant has declined all other options presented, the facility seeks to discharge Appellant to her last place of residence, which is her sister's home. Id. at 94; 108.

In response, Appellant testified the facility was falsely accusing her of violations that never occurred and that the information in her clinical record was incorrect. Appellant testified that she has been "doing everything they have asked" with respect to policy rules, including signing out and turning over her lighters, which she alleged, "no one else follows." Appellant testified that the pills found in her room were either validly prescribed medications or ones she legally purchased over the counter, such as melatonin. Appellant denied bringing alcohol into the facility. Rather, she found an empty bottle and decided to keep it because she collects vodka bottles. There was no alcohol in it. Appellant testified that another resident had given her the rolling papers and pipe before he left and she had never touched them.

When asked if she requires any nursing care or assistance at the facility, Appellant responded,

“No. I am well on my own.” Appellant testified that she has declined the housing options because she refuses to go to a shelter or a rooming house and would rather be on the street. Appellant testified that she is “not going back” to live with her sister and noted that she is not wanted in the home. Appellant explained that her sister took her in several years ago when she needed chemotherapy and surgery. While she was living with her sister, she stopped paying rent and lost her apartment. She lived with her sister during two years of treatment, and afterwards, covid hit, causing her to stay there another three years. She lived with her sister for a total of five years, before being hospitalized. Her sister still resides at the same address.

Findings of Fact

1. Appellant is an adult female, under the age of 65; and has diagnoses including polyneuropathy, major depressive disorder, hypertension, nicotine dependence, alcohol abuse, malnutrition, failure to thrive, hyperlipidemia, panic and anxiety disorder, sleep disorder, repeated falls, and a history of malignant neoplasm of bronchus.
2. After receiving acute hospital treatment for a fall and related fractures, Appellant was admitted to the nursing facility to receive short-term rehabilitation.
3. In the five years prior to her admission, Appellant resided at her sister’s residence.
4. The facility began discharge planning “immediately” upon Appellant’s admission, which including coordinating with other community service resources including two case workers from Tufts case management, as well as an options counselor and housing liaison through Elder Services.
5. After completing rehabilitation in November of 2022, Appellant has been independent with care, is no longer in a wheelchair, walks independently, does not require any nursing facility services or assistance with ADLs; and is capable of managing and attending all outpatient medical appointments on her own.
6. Appellant rejected housing options that were presented to her by the facility.
7. Appellant routinely leaves the facility during the day without signing in or out or notifying staff, without a physician’s order, and during these occasions she will purchase and/or consume alcohol.
8. Appellant refuses to sign the facility smoking policy and has been documented by the facility, for failing to sign in/out to smoke, smoking at designated times and in designated locations, and turning over lighters for safe keeping, as required.

9. On [REDACTED] 24, the facility called the local police with an allegation that Appellant and two other residents had been arranging for alcohol and marijuana to be delivered to the facility at night, which they would distribute/share with other residents at the facility.
10. On 5/17/24, the facility served Appellant with a 30-day discharge notice, informing her that it sought to discharge her from the facility to her sister's address on [REDACTED] 24 because (1) her health improved sufficiently so that she no longer requires nursing facility services, and (2) because she failed to adhere to facility policies, thereby endangering the safety of individuals at the facility.
11. On [REDACTED] 24, a search of Appellant's room, which was conducted with police assistance, yielded findings of miscellaneous pills, an empty bottle of vodka, drug paraphernalia, including e-z wider cigarette papers, a vape, a small glassine Ziplock plastic.

Analysis and Conclusions of Law

The federal Nursing Home Reform Act (NHRA) of 1987, now codified at 42 USC §§ 1396r(c), guarantees all residents the right to advance notice of, and the right to appeal, any transfer or discharge initiated by a nursing facility. See 42 U.S.C. § 1396r; 42 CFR § 483.204 § 483.206. Massachusetts has enacted statutory and regulatory requirements that mirror the federal resident rights protections, which are found in M.G.L. c. 111 § 70E and MassHealth regulations at 130 CMR 456.000 et seq., and 130 CMR 610.00 et. seq. The applicable MassHealth regulations set forth the following notice requirements that a nursing facility must provide a resident to initiate a transfer or discharge:

(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); see also 130 CMR 456.701(A).

When a discharge is necessary under subsections (1) through (4) above, the resident's clinical record must be documented by a physician, and specifically, with respect to subsections (1) and (2), the documentation must be made by the resident's physician. See 130 CMR 610.028(B); 130 CMR 456.701(B). With the exception of emergency discharge or transfers, the facility must provide the resident with at least 30-days' notice before the date of the intended transfer or discharge. See 130 CMR 610.029(A).

In consideration of the applicable law, Appellant has not demonstrated that the facility issued the 5/17/24 discharge notice in error. The facility cited proper grounds for discharge under subsections (2) and (3) of 130 CMR 610.028(A); specifically, that Appellant no longer has a medical need to remain at the nursing facility, *and* that her failure to adhere to facility policies has endangered the safety of individuals in the facility. The evidence shows that Appellant completed her short-term rehabilitation by November of 2022, at which point, she was largely independent with care. Appellant's clinical record shows that for the past year and a half, she has not required any nursing services or assistance in performing ADLs. She ambulates independently as evidenced by her ability to leave the facility on a daily basis and attend her own outpatient medical appointments. Progress notes from the attending physician who oversees Appellant's care indicate that Appellant has completed rehab and that her pain is stable on medications. See Exh. 5, pp. 89 – 94. Appellant does not dispute that she is capable of living in the community or that she otherwise requires a nursing facility level of care. Additionally, nursing and physician progress notes reflect Appellant's failure to comply with the facility's smoking policy, substance abuse policy, and LoA policy. The facility testified, and documented, that Appellant does not turn over her lighter or smoking materials, which jeopardizes the safety of the residents and staff in the building. The clinical record also detailed instances in which Appellant was found in possession of drug paraphernalia and unknown pills, prompting police involvement. The nursing facility has demonstrated appropriate legal grounds for the intended discharge, and this has been adequately documented in Appellant's record under 130 CMR 610.028(B).³

Finally, before a nursing facility may discharge a resident, it must comply with the following requirements set forth under M.G.L. c.111, §70E:

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.

The evidence shows that the facility has been actively engaged in discharge planning efforts over

³ Appellant did not dispute that the facility failed to provide sufficient and adequate notice of the discharge as required under 130 CMR 610.028 and 610.029. The evidence shows that the facility presented Appellant with a hand-delivered notice 30-days prior to the intended discharge date, stated the grounds for the discharge, and notified her of her right to appeal.

the course of Appellant's admission. It is undisputed that Appellant's health has improved such that she is capable of being discharged to the community. Currently, Appellant manages and attends her own outpatient medical appointments. The facility has evidenced its nearly two-year long effort to help Appellant find safe and appropriate housing and has coordinated such efforts with additional resources, including Elder Services and Appellant's case management team. With the goal of securing her a stable housing arrangement, the facility declined to discharge Appellant to a hotel as she initially requested. The facility has successfully found and presented Appellant with housing options, all of which she has rejected. In light of these circumstances, the facility appropriately designated Appellant's sister's address – where Appellant lived for the five years preceding her admission - as the intended discharge location. Her sister still resides in the home, and, aside from Appellant's expressed unwillingness to return to this location, there is no evidence to suggest that it is not an otherwise safe and appropriate place. The facility has complied with the standards imposed under M.G.L. c.111, §70E.

Based on the foregoing, the appeal is DENIED.

Order for Nursing Facility

Proceed with the discharge plan as described in the 5/17/24 notice, provided that the date of discharge take place no sooner than 30 days from the date of this decision pursuant to 130 CMR 610.030(A).⁴

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.

Casey Groff, Esq.
Hearing Officer

⁴ Regarding an appeal of a 30-Day Notice of Discharge letter, MassHealth Fair Hearing Rules at 130 CMR 610.030(A) states that "the nursing facility must stay the planned discharge or transfer until 30 days after the decision is rendered. While this stay is in effect, the resident must not be transferred or discharged from the nursing facility."

