

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2409813
Decision Date:	07/02/2024	Hearing Date:	06/27/2024
Hearing Officer:	Casey Groff, Esq.		

Appearance for Appellant:



Appearances for Nursing Facility:

Miatta Edi-Osagie, Administrator;
Susan Castaneda, SUD Counselor;
Sarah Grase, Director of Nursing
Kate Palmer, Director of Rehabilitation
Seetha Kandimalla, Business Office Mgr.;
Lorie Kelley, Social Services, Social Worker;
Joe Fernandez, After Care Coordinator
(All from Marlborough Hills Rehab)



*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 - Expedited
Decision Date:	07/02/2024	Hearing Date:	06/27/2024
Nursing Facility Rep.:	Miatta Edi-Osagie, Administrator, <i>et. al.</i>	Appellant's Rep.:	██████████
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

Through a notice dated ██████████, the ██████████ ("the nursing facility") informed Appellant that it was seeking to discharge him from the facility to the community in fewer than 30-days. See Exhibit 1; 130 CMR 610.029(B). On 6/24/24, Appellant filed a timely appeal of the discharge notice with the Board of Hearings. See 130 CMR 610.015(B)(4); Exhibit 2. An attempt to discharge a nursing facility resident is valid grounds for appeal. See 130 CMR 610.032(C).

Action Taken by Nursing Facility

The nursing facility sought to discharge Appellant in fewer than 30 days based on grounds that (1) his health has improved sufficiently so that he no longer needs the services provided by the facility; and (2) the safety of the individuals in the facility is endangered due to his clinical or behavioral status.

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 a non-institutional setting in the community with fewer than 30-days' notice.

Summary of Evidence

Appearing on behalf of the nursing facility was the facility administrator, social work manager, after-care coordinator, business office manager, substance use disorder counselor; director of nursing, and director of rehabilitation (collectively "the nursing facility representatives"). Appellant represented himself. All parties appeared by telephone.

Through oral testimony and documentary submissions the facility presented the following evidence: Appellant is an adult male, under the age of 65, and was admitted the [REDACTED] ("the nursing facility") on [REDACTED]. See Exh. 3 p. 83. Appellant's diagnoses and medical history include type 2 diabetes mellitus with hyperglycemia, hypertension, history of polysubstance abuse, alcohol dependence with withdrawal, anxiety disorder, and chronic pain. See id. at 82. Prior to his admission, Appellant had been living in a sober home, but left after a relapse. Clinical records state that Appellant has been homeless since [REDACTED] Id. at 52. He was admitted to the facility to receive acute rehabilitation and wound care of chronic bilateral foot ulcers and for detox. Id. at 114.

The administrator testified that the facility seeks to discharge Appellant for two reasons. First, his condition has improved such that he no longer needs nursing facility services. Second, the safety of the residents at the facility is endangered due to the clinical or behavioral status of Appellant.

As to the first basis for discharge, the facility representatives testified that Appellant has completed the course of his short-term rehab and is independent in performing activities of daily living. The only skilled service Appellant receives at the facility is weekly wound care assessment and dressing changes. Clinical records show that Appellant has an open "surgical wound" to the right plantar foot. Id. at 88-95. The wound renders him "not weight bearing" and he has orders to ambulate with a wheelchair; although he is often non-compliant with these orders and seen walking or ambulating without an assistive device. Appellant has continued to stay at the facility following his completion of short-term services. Throughout his stay, he has been working with social services for discharge planning back into the community.¹

The need for discharge became expedited after Appellant was found to be in possession of illicit

¹ The business office manager testified that Appellant's authorization for six-month of short-term MassHealth services expired at the end of May. As of 6/1/24, Appellant has not had a payor source for his stay.

substances and drug paraphernalia. Pursuant to a physician-ordered search of Appellant's room on 6/18/24, facility staff confiscated a significant amount of prescription drugs that had been unknown to the facility and which were not prescribed by the medical director; as well as marijuana, alcohol, an unidentified white powdery substance, vaping devices, lighters and matches, syringes, a metal spoon, and knives/cutting utensils. See id. at pp. 2-4. The police were notified of the incident. On 6/21/24, during a conversation with the social worker, Appellant became "agitated and defensive" and verbally aggressive when he was confronted about the incident. Id. at 40. Social service notes indicate that during this conversation, Appellant denied wrongdoing and claimed that the contraband was planted by his roommate; however, Appellant also admitted the incident was "his first-time consuming alcohol in the facility." Id. On 6/24/24 Appellant entered into a "no harm agreement," also referred to as a "safety contract" for a one-week duration, through which he agreed to refrain in taking leave of absences (LOAs) or visits unless supervised and in a common area. Id. at 38, 85.

At hearing, the facility substance use disorder (SUD) counselor testified that Appellant's possession of the medications and cannabis, regardless of how obtained, are particularly unsafe where they can be accessed by other residents in the facility, many of whom are frail, unwell, and have a history of substance abuse, putting them at high risk for relapse. The facility representatives concurred that even if Appellant did not intend to harm other residents, his breach of facility policy, alone, posed a significant threat to other individuals in the facility.

The facility representatives also pointed to a 6/19/24 physician note in Appellant's clinical record entered by [REDACTED] the medical director for the facility who oversees the care of all residents, including Appellant. See id. at 43. In the note, [REDACTED] wrote the following:

[Appellant] is in possession of illicit substances that have not been prescribed to him. He is medically stable and is a risk to other residents as well as staff at the [nursing facility]. Social services and case management inputs are noted and appreciated, and an emergency discharged is planned.

Id.

On [REDACTED], the facility served Appellant with an "Notice of Discharge with Less than 30 Days' Notice," informing Appellant that it sought to discharge him on [REDACTED] to a specified address, which, at hearing, the facility identified as a homeless shelter. See Exh. 1. The notice informed Appellant that the reason for the expedited discharge was because (1) his health has improved sufficiently so that he no longer needs the services provided by the facility, and (2) the safety of the individuals in the facility is endangered due to his clinical or behavioral status. Id. The facility also sent a copy of the discharge notice to the long-term care Ombudsman's office. See Exh. 3, at 38. A social service entry in Appellant's clinical record indicates that "the short [discharge] notice period suggests that the facility believes the discharge is necessary for immediate health or safety reasons. Id. at 40.

Pursuant to a physician examination on 6/25/24, Dr. Anand did not note any abnormal findings or new concerns and found that Appellant showed “improvement” in several areas of care. Id. The note also indicates that [REDACTED] spoke with social services regarding Appellant’s discharge plan which was “in progress.” Id.

The facility after-care coordinator (ACC) testified that the facility has focused on transitioning Appellant to the shelter, which has an adjacent community clinical medical and family services center, which is jointly run with the shelter. According to social service notes, the ACC has received confirmation from the shelter that it is able to accommodate Appellant. Id. at 40. The ACC also contacted Appellant’s insurance through the Commonwealth Care Alliance (CCA) regarding home-based services, and as a result, CCA has placed a referral for Appellant to receive outpatient wound-care services. Id. at 38. The ACC coordinator is aware of Appellant’s efforts to obtain an apartment and Appellant has expressed his desire to leave once the apartment is available. Because this arrangement is contingent on Appellant’s agreement to enter into a private lease, the facility is not directly involved in the process. There have not been alternative options the facility has been able to secure regarding public or subsidized housing. If Appellant cannot obtain the apartment before the planned discharge date, the facility’s plan is to discharge Appellant to the shelter.

At hearing, Appellant disputed the basis for the intended discharge, asserting that he has never done harm to anyone in the facility or in general. Appellant noted that while he may have made mistakes, he did not bring unknown substances into the facility. The items were with him when he entered the building and had been validly prescribed to him.

Appellant testified that he has been actively searching for an apartment on his own, so that he could be discharged to a suitable living space at the appropriate time. He receives social security disability income (SSDI) and would use such income to pay rent. Appellant testified that he has gotten stronger and has less pain from when he was initially admitted to the facility. He is ready to leave. He was able to secure an apartment. Initially, he was told that the unit would be ready in mid-June. The Monday prior to hearing, however, he was told the date would be adjusted to either July 8th or July 12th as his unit is being remodeled.

Findings of Fact

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

1. Appellant is an adult male, under the age of 65, that and is a current resident of the nursing facility.
2. Appellant’s diagnoses and medical history include type 2 diabetes mellitus with

hyperglycemia, hypertension, history of polysubstance abuse, alcohol dependence with withdrawal, anxiety disorder, and chronic pain.

3. Appellant was admitted the facility to receive short term rehabilitation and wound care for treatment of chronic bilateral foot ulcers and for detox; and he has since completed this care.
4. Appellant is independent in performing activities of daily living; he has orders to remain non-weight bearing through use of a wheelchair; but he is often non-compliant with such orders and observed ambulating without an assistive device.
5. Pursuant to a physician-ordered search of Appellant's room on 6/18/24, facility staff found Appellant to be in possession of a significant amount of prescription drugs that had been unknown to the facility and which were not prescribed by the medical director; as well as marijuana, alcohol, an unidentified white powdery substance, vaping devices, lighters and matches, syringes, a metal spoon, and knives/cutting utensils.
6. On 6/21/24, during a conversation with the social worker, Appellant became "agitated and defensive" about the incident and admitted to having consumed alcohol in the facility.
7. [REDACTED], the medical director for the facility who oversees Appellant's care made the following entry in Appellant's clinical record following the 6/18/24 incident: *"[Appellant] is in possession of illicit substances that have not been prescribed to him. He is medically stable and is a risk to other residents as well as staff at the [nursing facility]. Social services and case management inputs are noted and appreciated, and an emergency discharged is planned."*
8. On [REDACTED], the facility served Appellant with an "Notice of Discharge with Less than 30 Days' Notice," informing Appellant that it sought to discharge him on [REDACTED] to a specified address, which at hearing, was identified by the facility as a homeless shelter, because (1) his health has improved sufficiently so that he no longer needs the services provided by the facility, and (2) the safety of the individuals in the facility is endangered due to his clinical or behavioral status.
9. Pursuant to a physician examination on 6/25/24, Dr. Anand noted Appellant showed "improvement" in several areas of care; and that he had spoken with social services regarding Appellant's discharge plan which was "in progress." Id.
10. The shelter has confirmed with the facility that it can accommodate Appellant; and the shelter has an adjacent community clinical medical and family services center, which is jointly run with the shelter.

11. The facility's after-care coordinator has contacted Appellant's CCA plan and placed referrals so that Appellant can receive home-based services including outpatient wound-care services.
12. Appellant is currently waiting for an apartment to become available.

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 transfer or discharge is necessary under subsections (1) or (2) above, the resident's clinical record must be documented by the "*resident's physician*." See 130 CMR 610.028(B)(1); 130 CMR 456.701(B)(1) (emphasis added). When a discharge is necessary under subsections (3) or (4) above, the resident's clinical record must be documented by "*a physician*." See 130 CMR 610.028(B)(2) (emphasis added).

Typically, 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 lieu of the 30-day notice requirement, however, the facility may give notice "as soon as practicable," i.e., less than 30-days, in any one of the following circumstances, which would constitute an "emergency discharge:"

- (1) The health or safety of individuals in the nursing facility would be endangered and this is documented in the resident's record by a physician.
- (2) The resident's health improves sufficiently to allow a more immediate transfer or discharge and the resident's attending physician documents this in the resident's record.
- (3) An immediate transfer or discharge is required by the resident's urgent medical needs and this is documented in the medical record by the resident's attending physician.
- (4) The resident has not lived in the nursing facility for 30 days immediately before receipt of the notice.

See 130 CMR 610.029(B); see also 130 CMR 456.701(B).²

Based on the regulatory authority and in consideration of the evidence in the record, Appellant has not demonstrated that the facility issued the [REDACTED] discharge notice in error. The facility cited proper grounds for an emergency discharge under 130 CMR 610.028(A); specifically, that (1) it considers Appellant's behavior to endanger the safety of other individuals in the nursing facility, and (2) that Appellant no longer has a medical need to remain at the nursing facility. The evidence shows that Appellant was found to be in possession of marijuana, multiple unknown prescription medications, miscellaneous pills, and drug paraphernalia, including lighter materials – all in violation of facility policy. The nursing facility explained that such behavior not only places Appellant at risk of harm, but also other residents in the facility, many of whom are medically frail and/or suffer from substance abuse disorders of their own, placing them at further risk of relapse. In addition, the evidence shows that Appellant has completed the short-term care for which he was initially admitted. Appellant is independent in performing his ADLs; and while he does receive weekly wound assessments and dressing changes; such care, as the facility explained, can be appropriately managed and treated through home and community-based services. Appellant's physician has approved the discharge plan and has documented the grounds for discharge in Appellant's clinical record in accordance with 130 CMR §§ 610.028(B)(1), 610.028(B)(2) (listing grounds for a nursing facility discharge), as well as 130 CMR 610 §§ 029(B)(1), 610.029(B)(2) (grounds for an "emergency discharge" with less-than 30-days' notice). See Exh. 3, p. 43.

² Fair Hearing Rules at 130 CMR 610.028(C) set forth requirements the facility must adhere to related to the format and content of the discharge notices it issues to a resident. A review of the 6/21/24 discharge letter indicates that the facility hand delivered the notice to Appellant; that the letter was presented in a readable format; it included a description of the intended action, the basis for the discharge, the effective date of discharge, the location of discharge, and Appellant's right to appeal the discharge notice, among the other enumerated requirements. See 130 CMR 610.028(C). There is no evidence or suggestion that the facility failed to comply with any of these requirements.

Finally, before a nursing facility may discharge a resident, it must comply with the requirements set forth 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.***

The evidence shows that the facility has been actively engaged in discharge planning efforts over the course of Appellant's admission. This includes coordinating community based medical services, and in particular, wound care services; as well as confirming that the shelter is able to accommodate Appellant. The facility asserts, and Appellant agrees, that his condition has improved such that he is capable of being discharged to the community. Appellant's physician has deemed Appellant "medically stable" for release and has authorized the discharge as described in the [REDACTED] notice. There is no evidence to indicate that the facility failed to take adequate measures in exploring alternative viable discharge locations. Based on the foregoing, the facility demonstrated that it met the requirements of G.L. c.111, § 70E, above.

The appeal is DENIED.

Order for Nursing Facility

Proceed with the discharge plan as described in the 6/21/24 notice, provided that the date of discharge take place no sooner than five days from the date of this decision pursuant to 130 CMR 610.030(B).

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
Board of Hearings

CC: