

# Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2411769
Decision Date:	09/03/2024	Hearing Date:	08/14/2024
Hearing Officer:	Susan Burgess-Cox		

Appearance for Appellant:



Appearance for Nursing Facility:

Ann Marie Ester et. al.



*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

<b>Appeal Decision:</b>	Approved	<b>Issue:</b>	NF Discharge
<b>Decision Date:</b>	09/03/2024	<b>Hearing Date:</b>	08/14/2024
<b>Nursing Facility's Rep.:</b>	Ann Marie Ester et. al.	<b>Appellant's Rep.:</b>	Pro se
<b>Hearing Location:</b>	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 July 8, 2024, the nursing facility informed the appellant that he would be discharged to a [REDACTED] on August 8, 2024 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 appellant filed a timely appeal on July 30, 2024. (130 CMR 610.015(B)(3); Exhibit2). 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 a [REDACTED], [REDACTED] within 30 days of the date of the notice as the safety of the individuals in the nursing facility is endangered due to the appellant's behavioral status.

### Issue

Whether the nursing facility was correct in issuing a notice to discharge the appellant to an area motel as the safety of the individuals in the facility is endangered due to the appellant's 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 was sent to the appellant alone. The notice did not contain a section where the facility would indicate that they sent the notice to a designated family member or legal representative for the appellant. The notice just contains a section for the resident's contact information. The admission records for the appellant list another party as a contact for the appellant. The notice lists contact information for the Massachusetts Legal Assistance Corporation [REDACTED] as the "Local Legal Services Office" for the appellant's service area. The Massachusetts Legal Assistance Corporation MLAC provides funding and support to civil legal aid organizations across the Commonwealth. It is not a local legal services office.

Representatives from the facility present at the hearing included a licensed social worker, the director of rehabilitation and a nurse. The licensed social worker testified that the reason for the discharge was due to a food delivery ordered by the appellant that contained crack cocaine. The social worker testified that this was the third time that someone from the facility found the appellant in possession of illegal drugs. The licensed social worker testified that the facility believes that the appellant's use of drugs makes him a danger to himself and others in the facility. The plan for discharge is to a motel as area shelters informed representatives from the facility that they will not accept the appellant due to him having outstanding criminal warrants. The licensed social worker testified that representatives from the facility have performed outreach to area substance abuse programs but they would also not accept the appellant due to his outstanding criminal warrants.

Admission records and progress notes list the following diagnoses: other psychoactive substance abuse; primary osteoarthritis, other specified site; paroxysmal atrial fibrillation; morbid obesity; adjustment disorder with mixed anxiety and depressed mood; other lack of coordination; non-pressure chronic ulcer of the left calf, limited to breakdown of skin; lymphedema; cellulitis of left lower limb; cellulitis of right lower limb; other specified peripheral vascular diseases; essential (primary) hypertension; other chronic pain; other constipation; difficulty in walking; unsteadiness on feet; localized edema; weakness; long-term (current) use of anticoagulants; personal history of other venous thrombosis and embolism; muscle weakness (generalized). (Exhibit 4). Notes from July 2024 and August 2024 show that the appellant requires assistance with activities of daily living including total dependence with toileting, lower extremity dressing and transfers.

Occupational and Physical therapy notes from July 2024 state that the appellant had total dependence with toileting, lower body dressing and transfers. The appellant was discharged from occupational therapy (OT) on [REDACTED] to reside in the skilled nursing facility with

recommendations for assistance with Activities of Daily Living (ADLs), Instrumental Activities of Daily Living (IADLs), as well as the wheelchair for functional mobility.

A [REDACTED] discharge summary from physical therapy (PT) states that at one time the appellant performed a squat pivot transfer bed to chair but maximum assistance was required. It was noted that it was not safe for staff or the appellant to continue with this transfer and the appellant was being discharged at the level of a Hoyer lift for all transfers and should be encouraged to sit in a wheelchair at least twice daily. The appellant was discharged from PT because he had limited and/or declining participation or needed extensive motivational curing regarding the benefits of physical therapy. The discharge was to the skilled nursing facility.

An OT evaluation and plan of treatment with a certification period of August 12, 2024 to September 10, 2024 notes that the appellant has been a resident of the facility for a number of months with 4 trips to the hospital. OT evaluation and plan of treatment justifies the need for OT due to demonstrated difficulty with standing and transfers requiring maximum assistance or a Hoya lift and the appellant would benefit from skilled OT services to ensure a safe discharge.

A PT evaluation and plan of treatment with a certification period of August 12, 2024 to September 10, 2024 states that the appellant's bed mobility requires maximum assistance times 2; and side board transfers require moderate to maximum assistance. The August 2024 justification for PT includes assisting with discharge planning; minimizing falls; increasing functional activity tolerance; enhancing fall recovery abilities; improving dynamic balance; promoting safety awareness; and enhancing rehabilitation potential. The risk factors listed in the August 2024 physical therapy evaluation and plan of treatment include a decrease in the ability to return to the prior level of assistance and living environment with an increased dependency on caregivers.

Progress notes from the facility state that the appellant is on a side-board transfer and is being "discharged to a hotel per his request". At hearing, the appellant testified that he did not feel comfortable being discharged to a hotel as he was not sure when he would receive an evaluation for services.

The nurse from the facility testified that they made an appointment for the appellant with a primary care physician and will provide the appellant with 30 days of medications at the time of discharge. The nurse testified that the appellant will receive an evaluation from the visiting nurses association (VNA) within 24-48 hours of the discharge. The facility agreed to pay for one night at the motel. It was noted that the appellant's conditions are chronic and he will likely require services, including personal care attendant (PCA) services, in the community. It was noted that the original admission was for wound care but the appellant no longer requires those services daily. The director of rehabilitation testified that the appellant's current rehabilitation is focused on transfers and he felt that the appellant will be able to get the necessary services in the community. He also noted that the appellant will likely receive coverage for PCA services. It was noted that in the past the appellant was discharged to his sister's home but he cannot go there as he stayed in

the basement and he is unable to climb stairs.

The appellant testified that he cannot walk, is in chronic pain and requires a lot of care. The appellant testified that the food delivery was not in his possession. The appellant acknowledged that he made the call for the delivery and has a drug addiction. The appellant felt that he does not have any problems with other patients in the facility and the danger caused by the drug delivery was to himself alone. The appellant testified that he has not received PCA services in the past as he received assistance from his sister. The appellant asked for a referral to a substance abuse rehabilitation center. Representatives from the facility noted that no facility would accept the appellant upon discharge from a skilled nursing facility but if the appellant returned to the community and went to a substance abuse rehabilitation center on his own, they would likely admit him. The appellant testified that he did not feel comfortable being discharged to a motel as the representatives from the facility stated that a VNA assessment would occur within 24-48 hours and he may not be able to stay in the motel for that long as he would have to pay for his continued stay in the motel.

While those present at the hearing 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 motel with an order for a VNA assessment. As noted above, the facility agreed to pay for up to one night at the motel.

## **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 July 8, 2024, the appellant was served with a notice of discharge from the facility.
3. The notice was sent to the appellant alone.
4. The notice did not contain a section where the facility would indicate that they sent the notice to a family member or legal representative for the appellant.
5. The admission records for the appellant list another party as a contact for the appellant.
6. The notice lists contact information for the Massachusetts Legal Assistance Corporation in Boston, Massachusetts as the "Local Legal Services Office" for the appellant's service area.
7. The Massachusetts Legal Assistance Corporation MLAC provides funding and support to

civil legal aid organizations across the Commonwealth. It is not a local legal services office.

8. The reason for the discharge was that the safety of other individuals in the facility is endangered due to the status of the appellant.
9. The appellant had crack cocaine delivered to the facility through a food delivery.
10. Employees from the facility have found the appellant in possession of illegal drugs in the past.
11. The facility plans to discharge the appellant to a motel.
12. The facility agreed to pay for one night at the motel.
13. The facility has been in contact with agencies for the appellant to obtain services in the community.
14. It will likely take from 24-48 hours for the appellant to receive an evaluation from the Visiting Nurses Association (VNA) regarding to services needed in the community.
15. Admission records and progress notes list the following diagnoses: other psychoactive substance abuse; primary osteoarthritis, other specified site; paroxysmal atrial fibrillation; morbid obesity; adjustment disorder with mixed anxiety and depressed mood; other lack of coordination; non-pressure chronic ulcer of the left calf, limited to breakdown of skin; lymphedema; cellulitis of left lower limb; cellulitis of right lower limb; other specified peripheral vascular diseases; essential (primary) hypertension; other chronic pain; other constipation; difficulty in walking; unsteadiness on feet; localized edema; weakness; long-term (current) use of anticoagulants; personal history of other venous thrombosis and embolism; muscle weakness (generalized). (Exhibit 4).
16. Since the admission, the appellant had 4 trips to the hospital.
17. The appellant requires assistance with activities of daily living including total dependence with toileting, lower body dressing and transfers.
18. As of July 23, 2024, the appellant required the use of a Hoyer lift for transfers.
19. As of August 12, 2024, the appellant had difficulty with standing and transfers requiring maximum assistance or a Hoya lift.
20. As of August 12, 2024, the appellant's bed mobility required maximum assistance times

2.

21. As of August 12, 2024, the appellant was at risk of falls.
22. The appellant's conditions are chronic and the appellant will require services in the community.
23. While those present at the hearing 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 motel with an order for a VNA assessment.

## **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, 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.

In this case, in their attempt to discharge the appellant, the nursing facility violated some of the legal and regulatory requirements that serve to protect and provide due process to patients from 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 the appellant's sister but did not present any records of sending the notice to her. The regulations contain provisions such as this 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 lists contact information for the Massachusetts Legal Assistance Corporation in [REDACTED] as the “Local Legal Services Office” for the appellant’s service area. The Massachusetts Legal Assistance Corporation MLAC 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 motel for one night without a plan for services in place does not appear to provide sufficient preparation and orientation to return to the community. The records clearly indicate that the appellant will require services in the community and while representatives from the facility indicated that they have been in contact with VNA services, the timeline they presented for receiving an evaluation, 24-48 hours, along with a stay in a motel for one night is not a safe and orderly transfer to another safe and appropriate place.

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 adequate evidence to challenge the determination that the

safety of the individuals in the facility is endangered due to the appellant's status.

## **Order for Nursing Facility**

Rescind the discharge notice issued on July 8, 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.

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Susan Burgess-Cox  
Hearing Officer  
Board of Hearings

CC: