

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2502908
<b>Decision Date:</b>	03/04/2025	<b>Hearing Date:</b>	2/27/2025
<b>Hearing Officer:</b>	Cynthia Kopka		

**Appearance for Appellant:**



**Appearances for Respondent Nursing Facility:**

Darby Joseph, Administrator  
Deborah Desimone, Director of Nursing  
Norma Robertson, Assistant Director of Nursing  
Hannah Murphy, Social Worker



*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>	Expedited nursing facility discharge
<b>Decision Date:</b>	03/04/2025	<b>Hearing Date:</b>	2/27/2025
<b>Respondent's Reps.:</b>	Administrator et al.	<b>Appellant's Rep.:</b>	Pro se
<b>Hearing Location:</b>	Charlestown (remote)	<b>Aid Pending:</b>	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 11, 2025, [REDACTED] ("Respondent" or "the facility") informed Appellant of its intent to discharge Appellant from the facility on February 21, 2025. Exhibit 1. Appellant filed a timely appeal on February 20, 2025. 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.

### Action Taken by Respondent

Respondent informed Appellant of its intent to discharge Appellant from the facility on an expedited basis.

### 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, was represented by telephone by the following: the administrator, director of nurses, assistant director of nurses, and a social worker. Respondent submitted records in support, Exhibit 4. Appellant appeared by telephone. A summary of testimony and documents follows.

By hand-delivered letter dated February 11, 2025, Respondent informed Appellant of its intent to discharge Appellant from the facility to the [REDACTED] ("the hotel") on February 21, 2025. Exhibit 1. The notice stated that Respondent sought to discharge Appellant because the safety of the individuals in the facility is endangered due to the clinical and behavioral status of the resident. The notice states that:

The resident is smoking in a non-smoking designated area with her oxygen tank while encouraging two other residents to sit and smoke with her.

The resident refused to move away from the portable oxygen tank after multiple pleas and supplications from the staff. The resident is endangering the safety of other residents, the staff and herself.

*Id.* The notice explained Appellant's appeal rights and identified a social worker as being responsible for supervising the discharge. *Id.* The notice included a sheet that provided contact information for the long term care ombudsman, the disability law center, centers for public representation, and a local legal assistance office. *Id.* A copy of the notice was not provided to another party because Appellant is her own responsible party, and had not designated a representative.

Respondent's administrator testified that discharge was based on events that occurred on February 11, 2025 ("the February 11 incident"). Respondent's administrator testified that, on February 11th, he was told by the facility's receptionist that Appellant was smoking near the bushes with her oxygen tank. Respondent's administrator went outside and observed Appellant smoking with her oxygen tank approximately 15 inches away from her. Two other residents and a certified nursing assistant ("CNA") were nearby and expressed fear for their safety. Appellant yelled and cursed when addressed about this concern. Respondent's administrator testified that this was not the first time Appellant had smoked in proximity to her oxygen tank. Respondent asserted that Appellant's actions were highly dangerous and could result in an explosion or fire, potentially causing injury or death. Respondent provided incident reports and notes in the record regarding the incident, including reports signed by the receptionist and CNA. Exhibit 4 at 2-7, 61. Nursing notes indicated that Appellant continued to smoke outside with her oxygen tank on February 14 and 16, 2025. *Id.* at 50. Another nursing note dated February 13, 2025, stated that Appellant leaves her oxygen tank inside when she goes outside to smoke. *Id.* at 56. Respondent's medical records in submitted into evidence go back 30 days prior to the date of hearing, the earliest being January 26, 2025.

Appellant was admitted to the facility on [REDACTED] from the hospital with pneumonia. Appellant's other diagnoses include chronic pulmonary obstructive disorder (COPD) and fibromyalgia. *Id.* at 6. Respondent's administrator testified that Appellant no longer has a clinical need for the nursing facility stay, as she is not receiving therapies or other nursing interventions. Appellant is ambulatory and does not require assistance in the community. Respondent's administrator testified that Appellant's physician provided a discharge note as part of the record, *id.* at 129-135. According to this note, Appellant is being discharged to the hotel because she is at baseline. *Id.* at 130. The note shows that Appellant is independent with activities of daily living (ADLs) and is a fall risk. *Id.* at 132. Sections regarding therapy, social services, education, and medication reconciliation are incomplete. *Id.* at 133-135. The note is electronically signed by an LPN, not by Dr. Restituyo or another physician. *Id.* at 133-135.

When asked to provide evidence of discharge planning, Respondent's administrator testified that Appellant had a Section 8 voucher and it was up to her to pursue her housing situation. Appellant had been working with a social worker to pursue housing, but those notes were not in the file because the documentation only went back 30 days. Respondent's social worker testified that she was new to the case and that notes in the file from October 2024 indicated that there was discussion of Appellant moving to [REDACTED] to live with her son, which did not happen. The last note regarding discharge in the file prior to the February 11 incident was from December 2024.

Appellant testified that she felt at a disadvantage at the hearing, as she was on her own and there were four representatives on the other side. Appellant did not have enough time to prepare for hearing.

Appellant testified that during the February 11 incident, she was smoking outside and her oxygen tank was 30 feet away from her. Appellant testified that she complied with Respondent's requests to move away from the tank and admitted that she got angry. Appellant cannot go to a shelter because of her medical issues. She was hospitalized twelve times in the past year and got pneumonia. Appellant was weak upon admission and required physical therapy, despite Respondent's testimony. Appellant admitted that the DON and ADON have expressed to her safety concerns about her smoking near her tank. Appellant testified that she has had her oxygen tank stolen in the past and has to use a concentrator unit that is meant for traveling, not home use. Appellant is reluctant to leave her oxygen tank behind after the theft.

Appellant argued that she has not had sufficient help in obtaining housing from the facility. A facility social worker that was assisting her left the facility, and there was no one else to assist for approximately two months. Appellant had received assistance from Open Sky Community Service and rural community assistance partnership (RCAP) with housing and getting her Section 8 voucher approved and extended. Appellant testified that her voucher expired February 22, 2025. Appellant does not have funds for the hotel stay beyond the first night. Appellant argued that it is inappropriate to send her to a hotel in [REDACTED] which is suburban and has no bus line. Appellant would be stranded there. Appellant testified that she has fallen and hit her head

recently at the facility. Respondent's records indicate that Appellant had transferred to a hospital for two days in February 2025. *Id.* at 38. Appellant testified that she is independent with things only because she is stubborn and refuses help.

Respondent's records include a reservation for a room at the hotel for February 21, 2025 for one night at a cost of \$94.95. *Id.* at 127. When asked why Respondent chose a hotel in Sturbridge for discharge, Respondent's administrator argued that Appellant did not object to it. Respondent acknowledged that there are hotels in [REDACTED], but the [REDACTED] hotel was cheaper by approximately \$100 per night and the facility was paying for one night. Respondent's administrator testified that Respondent would pay for transportation to the hotel. The distance between the facility and the hotel is approximately 30 miles.

Appellant testified that she does not smoke a lot, only one or two cigarettes a week. Appellant began leaving her tank with the receptionist after the February 11 incident. Appellant argued that Respondent is trying to get rid of all of the methadone patients. Appellant argued that there would be nowhere to plug in her oxygen tank if she's discharged.

## Findings of Fact

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

1. Appellant admitted to the facility on [REDACTED] from the hospital with pneumonia. Appellant's diagnoses and medical history include COPD and fibromyalgia. Exhibit 4 at 6.
2. According to a discharge note, Appellant is currently independent with activities of daily living (ADLs) and is a fall risk. Sections regarding therapy, social services, education, and medication reconciliation are incomplete. The discharge note is electronically signed by an LPN. *Id.* at 132-135.
3. By hand-delivered letter dated February 11, 2025, Respondent informed Appellant of its intent to discharge Appellant from the facility to the hotel on February 21, 2025. Exhibit 1.
4. The notice stated that Respondent sought to discharge Appellant because the safety of the individuals in the facility is endangered due to the clinical and behavioral status of the resident. The notice states that:

The resident is smoking in a non-smoking designated area with her oxygen tank while encouraging two other residents to sit and smoke with her.

The resident refused to move away from the portable oxygen tank after multiple please and supplications from the staff. The resident is endangering the safety of other residents, the staff and herself.

*Id.*

5. The notice explained Appellant's appeal rights and identified a social worker as responsible for supervising the discharge. The notice included a sheet that provided contact information for the state long term care ombudsman, the disability law center, centers for public representation, and a local legal assistance office. *Id.*
6. Appellant filed a timely appeal on February 20, 2025. Exhibit 2.
7. On February 11, 2025, Appellant was observed smoking outside in the vicinity of her oxygen tank. Appellant yelled and cursed when addressed about this concern. Respondent provided incident reports and notes in the record regarding the incident, including reports signed by the receptionist and a CNA. Exhibit 4 at 2-7, 61.
8. Nursing notes indicated that Appellant continued to smoke outside with her oxygen tank on February 14 and 16, 2025. *Id.* at 50.
9. Another nursing note dated February 13, 2025 stated that Appellant leaves her oxygen tank inside when she goes outside to smoke. *Id.* at 56.
10. Respondent's records include a reservation for a room at the hotel for February 21, 2025 for one night at a cost of \$94.95. *Id.* at 127.
11. The distance between the facility and the hotel is approximately 30 miles. Respondent testified that it would cover transportation to the hotel.
12. Respondent's submitted records did not include any notes regarding discharge planning.

## **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, the resident's clinical record must contain documentation to explain the transfer or discharge. 130 CMR 456.701(B); 130 CMR 610.028(B). If the discharge is necessary because the safety of individuals in the nursing facility is endangered, **the documentation explaining the discharge must be made by a physician or PCP.** 130 CMR 456.701(B)(2), 130 CMR 610.028(B)(2).

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).

The notice of discharge or transfer must be made by the nursing facility at least 30 days before the date the resident is to be discharged or transferred except in certain circumstances identified in 130 CMR 610.029 (*see also* 130 CMR 456.702(B) and (C)):

(B) In lieu of the 30-day-notice requirement set forth in 130 CMR 610.029(A), the notice of discharge or transfer required under 130 CMR 610.028 must be made as soon as practicable before the discharge or transfer in any of the following circumstances, which are considered to be emergency discharges or emergency transfers.

(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.

(C) When the transfer or discharge is the result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, the notice of transfer or discharge, including that which is required under 130 CMR 456.429: *Medical Leave of Absence: Failure to Readmit*, must comply with the requirements set forth in 130 CMR 456.701: *Notice Requirements for Transfers and Discharges Initiated by a Nursing Facility*, and must be provided to the resident and an immediate family member or legal representative, if such person is known to the nursing facility, at the time the nursing facility determines that it will not readmit the resident.

(D) Appeals of discharges and transfers listed in 130 CMR 610.029(B) and (C) are handled under the expedited appeals process described in 130 CMR 610.015(F).

(Emphasis added)

Per 130 CMR 610.032(C), a nursing facility resident has the right to request an appeal of any nursing-facility initiated transfer or discharge. A nursing facility resident must appeal a written notice of an emergency discharge pursuant to 130 CMR 610.029(B) within 14 days. 130 CMR 610.015(B)(5).

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) (emphasis added).

In this matter, Respondent initiated an emergency discharge following the February 11 incident. The notice at issue is sufficient and cites permissible reasons for the discharge pursuant to 130 CMR 456.701(A)(3) and 130 CMR 610.028(A)(3), and permissible reasons for an emergency discharge pursuant to 130 CMR 610.029(B)(1) and 130 CMR 456.702(B)(1). Respondent presented credible and corroborated evidence that Appellant posed a safety risk to herself, staff, and other residents by smoking in the vicinity of her oxygen tank. Respondent’s rationale for evicting Appellant is justified and proper.

However, Respondent must still abide by regulations in issuing the discharge notice. The most glaring omission from the record is documentation explaining the discharge **made by a physician**. The discharge note Respondent provided is not signed by a physician and makes no reference to the proffered reason for discharge: Appellant’s behavior endangering the safety of others. This fact alone invalidates the discharge notice pursuant to 130 CMR 456.701(B)(2) and 456.702(B), and 130 CMR 610.028(B)(2) and 610.029(B)(1).

In addition, there is no documentation in the record that Respondent has provided sufficient preparation and orientation to Appellant regarding the discharge. Respondent did not provide evidence of the effort to ensure Appellant would discharge to another safe or appropriate place. While it is true that Appellant is responsible for engaging in the housing process, Respondent did not document and provide evidence of instances of Appellant’s failure to cooperate with discharge. Additionally, Respondent booked Appellant a hotel room 30 miles away in an area that

would effectively strand Appellant, and there are no notes in the record supporting Respondent's assertion that Appellant did not object to the discharge location at the time the notice issued, or a valid reason, other than cost, why the hotel is more suitable than other discharge locations.

Accordingly, this appeal is APPROVED. Appellant should note that the approval is due to defects in the notice and discharge planning. Otherwise, the reason for discharge was justified based on her behavior and could form the basis for a corrected discharge note to be issued forthwith.<sup>1</sup>

## **Order for Respondent**

Rescind the February 11, 2025 notice of discharge.

## **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 Board of Hearings.

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Cynthia Kopka

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<sup>1</sup> Appellant's testimony that she was smoking farther away from her oxygen tank than reported by Respondent was neither credible nor relevant.

Hearing Officer  
Board of Hearings

cc: Respondent: Regal Care Worcester, Attn: Administrator, 25 Oriol Drive, Worcester, MA  
01605, 508-852-3330