

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved	Appeal Number:	1803838
Decision Date:	2/28/18	Hearing Date:	02/15/2018
Hearing Officer:	Paul C. Moore		

Appellant Representatives:

Nursing Facility Representatives:

Caitlin Lawson, licensed social worker and
Rachelle Ibbitson, R.N., nursing director (both
by telephone)



*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:	Nursing Facility Discharge
Decision Date:	2/28/18	Hearing Date:	02/15/2018
Nursing Facility Reps.:	Social worker et al.	Appellant Rep.:	
Hearing Location:	Quincy Harbor South Tower		

Authority

This hearing was conducted pursuant to Massachusetts General Laws (“M.G.L.”) Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a Notice of Intent to Discharge Resident with 30 Days’ Notice dated January 22, 2018 (“discharge notice”), Plymouth Rehabilitation and Health Care Center (“the facility”) notified the appellant that it sought to discharge her effective February 20, 2018 to Father Bill’s Place, 38 Broad Street, Quincy, MA because “the safety of the individuals in the facility is endangered by [the appellant] being here” (130 Code of Massachusetts Regulations (CMR) 610.028; Ex. 1). The appellant filed a timely appeal with the Board of Hearings (BOH) on January 24, 2018 (130 CMR 610.015(B); 130 CMR 456.703; Ex. 2). Challenging a notice of transfer or discharge initiated by a nursing facility is a valid ground for appeal to BOH (130 CMR 610.032(C)).

Action Taken by Nursing Facility

The nursing facility notified the appellant that it sought to discharge the appellant because the safety of the individuals in the facility is endangered by the resident’s presence.

Issues

The appeal issues are whether: (1) the appellant’s discharge to Father Bill’s Place is justified

because the appellant presents a danger to other residents at the facility; (2) the discharge notice meets the regulatory requirements set forth in the Fair Hearing Rules at 130 CMR 610.028; (3) the facility has provided sufficient preparation and orientation to the appellant to ensure safe and orderly transfer from the facility to another safe and appropriate place; and (4) whether a physician has documented the reasons for the intended discharge in the appellant's medical record, pursuant to 130 CMR 456.701(B)(2).

Summary of Evidence

A. Testimony and documentary evidence

Prior to hearing, the facility submitted a set of documents for inclusion in the record, including progress notes about the appellant as well as a copy of the facility's smoking policy dated April, 2015, and a more recent, amended smoking policy (Ex. 4). The facility's social worker, Ms. Lawson, testified that the appellant violated the facility's smoking policy on multiple occasions, and further, was found to have marijuana on her person. Ms. Lawson pointed out several documented instances in the progress notes when the appellant was found smoking without supervision, including the following dates: January 19, 2018; January 9, 2018; January 2, 2018; December 16, 2017; and November 27, 2017. In addition, Ms. Lawson stated that on January 9, 2018, the appellant was found with marijuana cigarettes, lighters and rolling papers on her person during a search (Ex. 4, p. 11). On January 8, 2018, a facility social worker documented in the progress notes that the appellant had an odor of marijuana, and that she admitted to the use of this drug (*Id.*, p. 12).

Ms. Lawson testified that the facility's current smoking policy, a copy of which was signed by the appellant on January 4, 2018, is that all residents who smoke must be supervised by a staff member while smoking, that smoking materials must be secured at the nurses station, that smoking is permitted only in front of the facility on a porch, and that smoking is scheduled four times a day only (at 11 am, 1:30 pm, 4 pm, and 7:30 pm). Ms. Lawson noted that the facility's smoking policy became more detailed effective January, 2018 to incorporate the "mega-rules" for smoking in nursing facilities implemented by the Department of Public Health in November, 2017. The new policy permits, in instances of a resident's repeated noncompliance with the facility smoking policy, re-education of the resident; random, periodic checks of the resident's room, belongings, or person; fifteen-minute checks of the resident as appropriate; searches of the resident upon return from leaves of absence or appointment; and immediate discharge from the facility if warranted (Testimony, Ex. 4, p. 20).

Ms. Lawson noted that the appellant's clinical record documents that on November 27, 2017, at 9 am, a smell of smoke was noted emanating from the appellant's room, and her door was closed. A room search ensued, at which time cigarette butts were located in the trash in the appellant's room (Testimony, Ex. 4, p. 14).

Ms. Ibbitson, the facility's nursing director, stated that the appellant, who is 28 years old, was admitted to the facility on September 27, 2017, with diagnoses of generalized muscle weakness,

unspecified ankle and joint pain, neuropathy caused by alcoholism, major depressive disorder, anxiety disorder, and attention deficit hyperactivity disorder (ADHD). She received both physical and occupational therapy at the facility, met her goals in therapy, and has been discharged from both. She ambulates via wheelchair in the facility, and can walk short distances without an assistive device. MassHealth has been paying for her stay at the facility (Testimony).

Ms. Lawson stated that prior to entering the facility, the appellant was living in a hotel. The contemplated discharge location, Father Bill's Place in Quincy ("the shelter"), is a homeless shelter that allows residents to store medications there during the day when the shelter is not open. She noted that the shelter takes individuals on a first-come, first-serve basis, and that check in there is at 4 pm daily. Ms. Lawson noted that the appellant has been working with a representative from Old Colony Elder Services to secure housing in the community, as an alternative to living in a shelter (Testimony).

The appellant attended the hearing accompanied by a friend. She stated that she is on both scheduled and PRN, or "as-needed," pain medication for her neuropathy, including morphine and Tramadol. She asserted that she knows of instances where individuals at the shelter have been injured by other drug-addicted residents who stole their pain medications. She believes it is too dangerous for her to stay at the shelter. She was living at a hotel in Middleboro, MA prior to being admitted to the facility. She testified that she understands the facility's smoking policy. Upon questioning by the hearing officer, the appellant admitted that she has smoked cigarettes without staff supervision at the facility on a number of occasions. She denied ever smoking marijuana at the facility. With regard to the incident where cigarette butts were found in the trash in her room at her facility, she stated that these cigarettes belonged to her roommate (Testimony).¹

Mr. Young, the appellant's friend, testified that frequently when he arrives to visit the appellant at the facility in the morning, at about 7:30 am, there are other facility residents smoking unsupervised at the front of the facility (Testimony).

The appellant asserted that she has applied to receive services under the MassHealth Money Follows the Person community living waiver. She stated that is in the process of trying to find a two-bedroom apartment in the community, where she can live with her daughter, who is currently in the custody of the Department of Children and Families (DCF). However, until such time as she finds appropriate housing, she would like to remain at the facility.

B. Content of the discharge notice/clinical record

The discharge notice at issue in this matter contains: a specific statement of the reasons for the intended discharge, the location to which the appellant is to be discharged, the effective date of the intended discharge, the right of the appellant to request a fair hearing on the intended discharge, the address of the Board of Hearings, the time frame for requesting a hearing, the effect of requesting a

¹ With regard to this testimony, Ms. Lawson responded that the appellant's roommate was actually discharged from the facility on November 25, 2017.

hearing as provided for under 130 CMR 610.030 (*to wit*, that the facility cannot discharge the appellant until 30 days after the hearing officer's decision is received), the name of the person at the facility who can answer any questions about the discharge notice and about the right to file an appeal, the name and address of the local legal-services office, the name and address of the local long-term care ombudsman office, and the mailing addresses of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy of developmentally disabled individuals, respectively (Ex. 5).

There is no documentation by a physician in the appellant's clinical record of the reasons for the appellant's intended discharge (Ex. 4).

Findings of Fact

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

1. The appellant is a 28 year-old female admitted to the facility on September 27, 2017 for rehabilitation (Testimony).
2. Through a Notice of Intent to Discharge Resident with 30 Days' Notice dated January 22, 2018, the facility notified the appellant that it sought to discharge her effective February 20, 2018 to Father Bill's Place, 38 Broad Street, Quincy, MA because "the safety of the individuals in the facility is endangered by [the appellant] being here" (Ex. 1, Ex. 5).
3. The appellant filed a timely appeal of the facility's discharge notice with the Board of Hearings on January 24, 2018 (Ex. 2).
4. The appellant has diagnoses including generalized muscle weakness, unspecified ankle and joint pain, neuropathy caused by alcoholism, major depressive disorder, anxiety disorder, and attention deficit hyperactivity disorder (ADHD) (Testimony, Ex. 4).
5. The facility's current smoking policy, a copy of which was signed by the appellant on January 4, 2018, is that all residents who smoke must be supervised by a staff member while smoking, that smoking materials must be secured at the nurses station, that smoking is permitted only in front of the facility on a porch, and that smoking is scheduled four times a day only (at 11 am, 1:30 pm, 4 pm, and 7:30 pm) (Testimony, Ex. 4).
6. The appellant repeatedly violated the facility's smoking policy by smoking unsupervised on multiple occasions, and by having smoking materials on her person, between November, 2017 through January, 2018 (Testimony, Ex. 4).

7. The appellant has smoked marijuana at the facility (Testimony, Ex. 4).
8. The appellant is prescribed both scheduled and PRN pain medication for her neuropathy (Testimony).
9. The appellant contends that Father Bill's Place is an unsafe discharge location for her because drug-addicted shelter guests will try to steal her pain medication (Testimony).
10. The appellant lived in a hotel prior to her admission to the facility (Testimony).
11. The appellant ambulates via wheelchair, but can walk short distances without an assistive device (Testimony).
12. The appellant has been working with an advocate from Old Colony Elder Services to try to locate a two-bedroom apartment in the community (Testimony).
13. The discharge notice at issue in this matter contains: a specific statement of the reasons for the intended discharge, the location to which the appellant is to be discharged, the effective date of the intended discharge, the right of the appellant to request a fair hearing on the intended discharge, the address of the Board of Hearings, the time frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (*to wit*, that the facility cannot discharge the appellant until 30 days after the hearing officer's decision is received), the name of the person at the facility who can answer any questions about the discharge notice and about the right to file an appeal, the name and address of the local legal-services office, the name and address of the local long-term care ombudsman office, and the mailing addresses of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy of developmentally disabled individuals, respectively (Ex. 5).
14. There is no documentation by a physician in the appellant's clinical record of the reasons for the appellant's intended discharge (Ex. 4).

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 initiated by a nursing facility. MassHealth has enacted regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in both (1) the Nursing Facility Manual regulations at 130 CMR 456.000 *et seq.*, and (2) the Fair Hearing Rules at 130 CMR 610.000 *et seq.*

The Nursing Facility Manual regulations at 130 CMR 456.701 provide in relevant part:

Notice Requirements for Transfers and Discharges Initiated by a Nursing

Facility

(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.

(B) When the facility transfers or discharges a resident under any of the circumstances specified in 130 CMR 456.701(A)(1) through (5), the resident's clinical record must contain documentation to explain the transfer or discharge. The documentation must be made by:

- (1) the resident's physician when a transfer or discharge is necessary under 130 CMR 456.701(A)(1) or (2); and

(2) a physician when the transfer or discharge is necessary under 130 CMR 456.701(A)(3) or(4).

(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 Division's Board of Hearings 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 456.702; and
 - (c) the effect of requesting a hearing as provided for under 130 CMR 456.704;
- (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.

(Emphasis added)

In this appeal, based on the evidence in the record, I agree that the facility has sufficient grounds to discharge the appellant. The appellant's conduct in repeatedly smoking without supervision in the facility, including inside her room, indeed presents a danger to other residents at the facility. I also do not find the appellant's testimony that she has never smoked marijuana at the facility, and that it was her roommate who was responsible for putting out cigarettes in the trash, to be credible. It is clear that while the appellant understands the facility smoking rules, which aim to protect both herself and other residents, she continues to violate this policy with impunity.

I also find that the discharge notice issued by the facility to the appellant meets the regulatory requirements set forth at 130 CMR 456.701(C).

While the appellant's clinical record in evidence contains progress notes by a licensed social worker explaining the reasons for the planned discharge, it does *not* contain documentation by a physician of these reasons. This is *required* by 130 CMR 456.701(B)(2), above. In fact, there are no progress notes by any physician at all contained in the clinical records submitted into evidence by the facility at hearing.

Also relevant to this appeal, an amendment to M.G.L. c. 111, §70E, which went into effect in November of 2008, states 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.**

(Emphasis added)

Because I have found that the facility did not meet the requirements in the Nursing Facility Manual regulations regarding physician documentation, I need not decide at this time whether the

facility has provided sufficient preparation and orientation to the appellant to ensure her safe and orderly transfer or discharge from the facility to another safe and appropriate place. Based on the record and the above analysis, this appeal is APPROVED.²

Order for Nursing Facility

Rescind notice of January 22, 2018, and do not discharge the appellant under this notice.

Implementation of this Decision

If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings 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.

Paul C. Moore
Hearing Officer
Board of Hearings

² At any time, the facility may issue a new discharge notice to the appellant if the facility believes that her actions present a continued danger to the safety of the individuals at the facility.