

STATE OF CONNECTICUT
DEPARTMENT OF SOCIAL SERVICES
OFFICE OF LEGAL COUNSEL, REGULATION AND ADMINISTRATIVE HEARINGS
55 FARMINGTON AVENUE
HARTFORD, CONNECTICUT 06105-3725

██████████ 2020
Signature Confirmation

CL ID # ██████████
Request ID #149534

NOTICE OF DECISION

PARTY

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PROCEDURAL BACKGROUND

On ██████████, ██████████ (the "Facility") issued a letter proposing to involuntarily discharge ██████████ (the "Appellant") to ██████████ Facility.

On ██████████ 2019, the Appellant requested an administrative hearing to contest the Facility's proposed discharge.

On ██████████, 2019, the Office of Legal Counsel, Regulations, and Administrative Hearings ("OLCRAH") issued a notice scheduling an administrative hearing for ██████████, 2019.

On ██████████ 2019, in accordance with Connecticut General Statutes § 19a-535 and § 4-176e to § 4-189, inclusive, OLCRAH held an administrative hearing at ██████████.

The following individuals were present at the hearing:

██████████, Appellant

[REDACTED], Appellant's Conservator
 [REDACTED], Administrator, [REDACTED]
 [REDACTED] RN, Director of Nursing Services, [REDACTED]
 [REDACTED] Legal Counsel, [REDACTED]
 Patricia Calderone, Regional Ombudsman, Long Term Care Ombudsman Program
 Miklos Mencseli, Hearing Officer

The hearing record closed on [REDACTED], 2019.

STATEMENT OF THE ISSUE

The issue to be decided is whether the Facility's proposal to discharge/involuntary transfer the Appellant to another skilled nursing facility complied with all applicable laws.

FINDING OF FACTS

1. On [REDACTED] 2019, the Appellant re-entered the Facility as a long term resident. ([REDACTED] Testimony)
2. On [REDACTED] 2019, the Appellant's Conservator signed and dated the Resident Admissions Agreement. The form states: "Smoking Policy: The facility does not permit smoking on the premises." (Facility Exhibit B: Resident Admissions Agreement dated [REDACTED]-19)
3. Smoking is not permitted inside the facility or on the grounds. There are no designated areas to smoke. Residents are prohibited from possessing smoking material such as cigarettes and lighters in their rooms. ([REDACTED] Testimony)
4. The Facility's front lobby contains a clearly posted "No Smoking" sign by the front doorbell. ([REDACTED] Testimony)
5. On [REDACTED], 2019, a Facility social worker observed the Appellant and her son smoking cigarettes in the Facility's courtyard. The social worker informed the Appellant and family member that smoking is not allowed on the Facility's premises. (Facility Exhibit C: Program Notes dated [REDACTED]19)
6. On [REDACTED], 2019, the Appellant requested to go outside and smoke. Facility staff explained to the Appellant that the Facility is a smoke-free facility. The Appellant was asked to hand over cigarettes and a lighter for the safety of the Appellant, the residents, staff and the facility. The Appellant relinquished the cigarettes and a lighter to staff. The Conservator was called. (Facility Exhibit C: Program Notes dated [REDACTED]19)

7. When the Conservator arrived, Facility staff gave the cigarettes and the lighter to the Conservator with instructions to remove them from the premises. (Facility Exhibit C: Program Notes dated [REDACTED]19)
8. On [REDACTED] 2019, a facility social worker reeducated the Appellant that the facility is a smoke free facility. (Facility Exhibit C: Program Notes dated [REDACTED]/19)
9. On [REDACTED], 2019, Facility staff searched the Appellant's room due to safety concerns. Facility staff removed cigarettes and a lighter from her room. (Facility Exhibit C: Program Notes dated [REDACTED]/19)
10. On [REDACTED], 2019, Facility staff informed the Appellant that she could not keep cigarettes in her possession, and those cigarettes could be kept at nursing station until such time a family member or a friend came to take the Appellant out for a Leave of Absence ("LOA") to smoke. Facility staff handed the Conservator a cigarette pack to remove from the premises. Facility staff observed the Appellant smoking cigarettes in the Conservator's car in the Facility's parking lot. (Facility Exhibit C: Program Notes dated [REDACTED]/19)
11. On [REDACTED], 2019, the Facility social worker offered the Appellant a nicotine patch: the Appellant refused to accept the patch. (Facility Exhibit C: Program Notes dated [REDACTED]/19, [REDACTED] Testimony)
12. On [REDACTED], 2019, Facility staff member with social worker present read the smoking policy to Appellant and reiterated safety measures. Conducted check of room for smoking materials. Located two packs of cigarettes and lighter in the Appellant's top drawer of nightstand. (Facility Exhibit C: Program Notes dated [REDACTED]19)
13. In a [REDACTED], 2019 conference call with the Conservator, the Facility Informed the Conservator that two packs of cigarettes had been removed from the Appellant's room on this date. Facility staff explained the Facility's smoking policy to the Conservator. (Facility Exhibit C: Program Notes dated [REDACTED]/19)
14. On [REDACTED] 2019, the Appellant attempted to smoke outside the Facility building. The Appellant is trying to get down to the street. The Facility social worker explained to the Appellant that the facility is a smoke free building, and that a family member or friend can take Appellant out for LOA to smoke. The facility can return her smoking materials at that time. (Facility Exhibit C: Program Notes dated [REDACTED]19)
15. On [REDACTED] 2019, the Appellant in a wheel chair exited the facility with a care provider. The Appellant in her wheel chair self-propelled down the parking lot toward the street. The aide and administrator protected the Appellant from rolling into the street. The Appellant then attempted to roll into crosswalk and when redirected by staff stood up and attempted to cross street without her

wheelchair. (Facility Exhibit C: Program Notes dated [REDACTED]/19)

16. The Facility is concerned for the Appellant's safety, as the Appellant attempts to leave the Facility grounds to smoke without supervision by a family member or a friend. ([REDACTED] Testimony, Facility Exhibit C: Program Notes)
17. The Facility is concerned for the safety of the other residents, staff and the Facility due to the Appellant's disregard of the smoking policy. ([REDACTED] [REDACTED] Testimony)
18. On [REDACTED], 2019, the Facility issued to the Appellant a 30-day discharge Notice. The reason for the discharge; "is that your continued stay in the facility poses a danger to the health and safety of other residents due to your refusal to comply with our smoking policies." The discharge date was [REDACTED], 2019. (Facility Exhibit A: Discharge notice dated [REDACTED]/19)
19. The [REDACTED], 2019 discharge notice proposed to discharge the Appellant to [REDACTED] Facility [REDACTED]. (Facility Exhibit A)
20. [REDACTED] Facility can accommodate the Appellant's smoking habit as it is not a smoke-free facility. ([REDACTED] Testimony)
21. The Facility's medical director in conjunction with the Facility's social worker developed a discharge plan for the Appellant that evaluated the effects of the proposed discharge to another skilled nursing facility and the actions to be taken to minimize such effects for the Appellant. (Facility Exhibit A)
22. The [REDACTED] Medical Director was assigned as the Appellant's attending physician. The Appellant has refused medical care from the director due to trust concerns. The facility has been coordinating care with the Appellant's primary care physician. The director is aware of the Appellant's documented non-compliance with [REDACTED] non-smoking policy. The Medical Director states: "Personally, I believe it is of the best interest for [REDACTED] to find more suitable accommodations in a different setting. Possible solutions are assisted living and 24-hour caregiver." (Facility Exhibit A1: Medical Director Statement)
23. The Facility has spoken to the Appellant and her Conservator as to a discharge to a facility that permits smoking by its residents. ([REDACTED] Testimony)
24. The hearing record does not support the Conservator's assertion that the Facility Inconsistently enforces its non-smoking policy.
25. The Facility provided the Conservator with a document regarding Safe Smoking (Resident) that states the policy of the Facility is to allow residents to smoke with the opportunity to do so within a framework to ensure their safety and well-being in

July [REDACTED]. (Conservator Testimony, Facility Exhibit F: Clinical Services document)

26. Smoking materials (i.e. cigarettes and lighters) are not permitted in residents' rooms. The corporation of which the Facility is a part contains no facilities that allow smoking on their premises. [REDACTED] is not a facility that allows smoking. The form was provided the Conservator in July [REDACTED]. ([REDACTED] Testimony)
27. The issuance of this decision is timely under Connecticut General Statutes 19a-535(h)(1) which requires that a decision be issued not later than thirty days after the termination of the hearing or not later than sixty days after the date of the hearing request, whichever occurs sooner. Sixty days from [REDACTED], 2019 is [REDACTED], 2020 and thirty days from [REDACTED], 2019 is [REDACTED], 2020. Therefore, this hearing decision is due not later than [REDACTED], 2020.

CONCLUSION OF LAW

1. Section 19a-535(h)(1) of the Connecticut General Statutes (Conn. Gen. Stat.) authorizes the Commissioner of the Department of Social Services to hold a hearing to determine whether the transfer or discharge is in accordance with this section.
2. Conn. Gen. Stat. §19a-535(c)(1) provides that before effecting a transfer or discharge of a resident from the facility, the facility shall notify, in writing, the resident and resident's guardian or conservator, if any, or legally liable relative or other responsible party if known, of the proposed transfer or discharge the reasons therefore, the effective date of the proposed transfer or discharge, the location to which the resident is to be transferred or discharged, the right to appeal the proposed transfer or discharge and the procedures for initiating such an appeal as determined by the Department of Social Services, the date by which an appeal must be initiated in order to preserve the resident's right to an appeal hearing and the date by which an appeal must be initiated in order to stay the proposed transfer or discharge and the possibility of an exception to the date by which an appeal must be initiated in order to stay the proposed transfer or discharge for good cause, that the resident may represent himself or herself or be represented by legal counsel, a relative, a friend or other spokesperson, and information as to bed hold and nursing home readmission policy when required in accordance with section 19a-537. The notice shall also include the name, mailing address and telephone number of the State Long-Term Care Ombudsman. If the resident is, or the facility alleges a resident is, mentally ill or developmentally disabled, the notice shall include the name, mailing address and telephone number of the Office of Protection and Advocacy for Persons with Disabilities. The notice shall be given at least thirty days and no more than sixty days prior to the resident's proposed transfer or discharge, except where the health or safety of individuals in the facility are endangered, or where the resident's health improves sufficiently to allow a more immediate transfer or discharge, or where immediate transfer or discharge is necessitated by urgent

medical needs or where a resident has not resided in the facility for thirty days, in which cases notice shall be given as many days before the transfer or discharge as practicable.

3. The Facility's [REDACTED] 2019 notice does not meet the criteria provided in Conn. Gen. Stat. § 19a-535(c)(1), as the notice was not issued at least 30 days prior to the Appellant's proposed discharge date of [REDACTED] 2019. The Facility's notice was issued 29 days prior to the Appellant's proposed date of discharge to the [REDACTED] Facility.
4. The Facility's proposed discharge/involuntary transfer the Appellant to another skilled nursing facility that permits smoking on that facility's premises does not meet the statutory guidelines of Conn. Gen. Stat. § 19a-535 (e).

DECISION

The Appellant's appeal is GRANTED.

ORDER

1. The Facility will rescind in writing its [REDACTED], 2019 notice of intent to discharge the Appellant to [REDACTED] Facility. The Facility will issue its rescission to the Appellant and to the Conservator.
2. Within 14 days of the date of this decision, documentation of compliance with this order is due to the undersigned.


Miklos Mencseli
Hearing Officer

C: Patricia Calderone, LTC Ombudsman Program
[REDACTED]

RIGHT TO REQUEST RECONSIDERATION

The appellant has the right to file a written reconsideration request within **15** days of the mailing date of the decision on the grounds there was an error of fact or law, new evidence has been discovered or other good cause exists. If the request for reconsideration is granted, the appellant will be notified within 25 days of the request date. No response within 25 days means that the request for reconsideration has been denied. The right to request a reconsideration is based on §4-181a (a) of the Connecticut General Statutes.

Reconsideration requests should include specific grounds for the request: for example, indicate what error of fact or law, what new evidence, or what other good cause exists.

Reconsideration requests should be sent to: Department of Social Services, Director, Office of Administrative Hearings and Appeals, 55 Farmington Avenue Hartford, CT 06105.

RIGHT TO APPEAL

The appellant has the right to appeal this decision to Superior Court within 45 days of the mailing of this decision, or 45 days after the agency denies a petition for reconsideration of this decision, provided that the petition for reconsideration was filed timely with the Department. The right to appeal is based on §4-183 of the Connecticut General Statutes. To appeal, a petition must be filed at Superior Court. A copy of the petition must be served upon the Office of the Attorney General, 55 Elm Street, Hartford, CT 06106 or the Commissioner of the Department of Social Services, 55 Farmington Avenue Hartford, CT 06105. A copy of the petition must also be served on all parties to the hearing.

The 45 day appeal period may be extended in certain instances if there is good cause. The extension request must be filed with the Commissioner of the Department of Social Services in writing no later than 90 days from the mailing of the decision. Good cause circumstances are evaluated by the Commissioner or the Commissioner's designee in accordance with §17b-61 of the Connecticut General Statutes. The Agency's decision to grant an extension is final and is not subject to review or appeal.

The appeal should be filed with the clerk of the Superior Court in the Judicial District of New Britain or the Judicial District in which the appellant resides.