

STATE OF CONNECTICUT
DEPARTMENT OF SOCIAL SERVICES
OFFICE OF LEGAL COUNSEL, REGULATIONS, AND ADMINISTRATIVE HEARINGS
55 FARMINGTON AVENUE
HARTFORD, CT 06105

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

Client ID ██████████
Case ID ██████████
Request # 154368

NOTICE OF DECISION

PARTY

██████████
██████████
██████████
██████████

PROCEDURAL BACKGROUND

On, ██████████ 2020, ██████████ (the "Facility") issued a Notice of Intent to Discharge to ██████████ (the "Appellant"), informing him of its intent to discharge him from its care on or after ██████████ 2020 to a homeless shelter located in ██████████ or ██████████.

On ██████████ ██████████ 2020, the Appellant requested an administrative hearing by the Department of Social Services' Office of Legal Counsel, Administrative Hearings and Regulations ("OLCRAH") to contest the Facility's proposed action to discharge him from the Facility to a homeless shelter.

Due to Executive Order 7E, Section 5, dated March 17, 2020 that suspended in-person hearings due to the COVID-19 public health emergency, OLCRAH did not schedule a hearing right away and the proposed discharge was stayed pending the outcome of the hearing.

On ██████████ 2020, the Facility issued an Addendum to the ██████████ 2020 Notice of Intent to Discharge to the Appellant, informing him of its intent to discharge him from its care as soon as practicable to a homeless shelter located in ██████████ or ██████████.

On ██████████ 2020, the OLCRAH issued a notice scheduling the administrative hearing for ██████████ 2020.

On [REDACTED] 2020, in accordance with sections 19a-535 and 4-176e to 4-189 inclusive, of the Connecticut General Statutes, OLCRAH held an administrative hearing via video conference with the Appellant and the Facility.

The following individuals were present at the hearing:

[REDACTED], Appellant
 [REDACTED] Administrator, [REDACTED]
 [REDACTED], Director of Social Services, [REDACTED]
 [REDACTED], Director of Nursing, [REDACTED]
 [REDACTED] Interpreters and Translators, Inc., Interpreter
 Lisa Nyren, Fair Hearing Officer

STATEMENT OF THE ISSUE

The issue is whether the Appellant's actions at the Facility constitute an emergency situation in which the Facility's failure to effect the Appellant's immediate discharge would endanger the health, safety or welfare of the Appellant or other residents, including, but not limited to, the Appellant's refusal to comply with established infection control or social distancing measures intended to reduce the transmission of COVID-19, which could also endanger staff, thereby meeting the exception provided by Section 3 of Executive Order 7XX and permitting the Facility to discharge him to a homeless shelter.

FINDINGS OF FACT

1. On [REDACTED] 2019, the Facility, a skilled nursing Facility, admitted the Appellant with a diagnosis of [REDACTED], [REDACTED]
 [REDACTED]. (Director of Nursing's Testimony)
2. The Facility continues to provide the Appellant with [REDACTED] medical care for [REDACTED] and medication administration, including [REDACTED] (Director of Nursing's Testimony)
3. The Appellant is [REDACTED] old. (Appellant's Testimony)
4. Prior to [REDACTED] the Facility was a smoking facility, yet its smoking policy prohibited residents from keeping lighters in their rooms. (Director of Nursing's Testimony)
5. In [REDACTED] 2020, the Facility discovered a lighter in the Appellant's room in violation of its smoking policy. (Director of Nursing's Testimony)

6. On [REDACTED] 2020, the Appellant began shouting in the Facility's hallway and flipped a table because he disagreed with the Facility's meal option and dislikes the food served at the Facility. (Director of Nursing's Testimony and Appellant's Testimony).
7. On [REDACTED] 2020, the Facility issued the Appellant a Notice of Intent to Discharge signed by the Administrator of the Facility. The Facility informed the Appellant of its intent to discharge the Appellant to a homeless shelter on or after [REDACTED] 2020 because the Appellant's "behaviors are a risk to the safety and welfare of others in the building." The Facility cites the reason for discharge as "You have been found to be in possession of a lighter on Facility grounds, you were physically aggressive towards staff and have been non-compliant with safety protocol secondary to an influenza outbreak and resulting quarantine, all of which have placed the safety and welfare of you and others at significant risk." (Exhibit 1: Notice of Intent to Discharge)¹
8. On [REDACTED] 2020, the Facility issued the Appellant a written discharge plan signed by the Administrator, Medical Director, Director of Nursing, and Social Worker. The plan outlined the Facility's proposal to discharge the Appellant to a homeless shelter in [REDACTED] [REDACTED] with the assistance of the Facility's social work staff and Infoline's Unified Intake Process to arrange for appropriate referrals to community-based services, including case management services; home health agency referrals; and medical, behavioral, and recovery services. Facility staff would provide education on self-management of medical care and assist with the Appellant's adjustment to the proposed plan. (Exhibit 1: Notice of Intent to Discharge)
9. In [REDACTED] 2020, the Facility established infection control and social distancing measures intended to reduce the transmission of COVID-19. These measures require residents to: wear a face mask when not in their rooms; stay with their assigned cohorts; and comply with limits to their access to other units at the Facility where there are residents who had been diagnosed with COVID-19 or who were suspected of having COVID-19. In addition, the established infection control measures require the Facility to assess residents three times a day, as ordered by Facility physicians, even if the resident is sleeping. Assessments consist of temperature checks, lung assessments, and breathing/sound assessments. The Facility also instituted a no smoking policy, which prohibited smoking both inside and outside of the Facility, and continued to prohibit residents from keeping lighters in their rooms. The purpose of the no-smoking policy is to reduce the spread of droplets caused by smoking to lower the transmission of COVID-19 among residents who smoke. (Director of Nursing's Testimony)

¹ On [REDACTED] 2020, the Facility issued an "addendum" to the [REDACTED] 2020 Notice of Intent to Discharge, which does not reference the Appellant's non-compliance with a quarantine due to an influenza outbreak. I am interpreting the [REDACTED] 2020 Notice of Intent to Discharge as superseding the [REDACTED] 2020 Notice of Intent to Discharge in this regard and do not find facts relating to it.

10. The Facility informed residents of the established infection control and social distancing measures intended to reduce the transmission of COVID-19, in English and in Spanish, through meetings between recreation staff and residents, posting of rules on Facility bulletin boards, and weekly letters to residents or their conservators. (Director of Nursing's Testimony and Director of Social Services' Testimony)
11. The Facility issued these weekly letters to the Appellant himself because he is not conserved. (Director of Social Work Testimony)
12. The Appellant understands the Facility's established infection control and social distancing measures intended to prevent the transmission of COVID-19. (Appellant's Testimony)
13. Since the onset of the pandemic, the Facility has identified 74 residents with COVID-19 with a census of 140. Of these 74 residents, six residents died due to COVID-19. (Director of Nursing's Testimony)
14. Since the onset of the pandemic, the Facility has identified 24 staff members with COVID-19. The Facility is not aware of any deaths of staff members due to COVID-19. (Director of Nursing's Testimony)
15. Starting in [REDACTED] or [REDACTED] 2020, the Facility mandated bi-weekly COVID-19 testing for residents and staff. (Director of Nursing's Testimony)
16. The Facility's last outbreak of COVID-19 was in [REDACTED] 2020. After [REDACTED], 2020, the Facility reduced its mandatory testing of residents and staff to monthly. The Facility has not identified any new COVID-19 cases since [REDACTED] 2020. (Director of Nursing's Testimony)
17. The Appellant has refused to be tested for COVID-19 since [REDACTED] or [REDACTED] 2020, when he tested negative for COVID-19. (Director of Nursing's Testimony and Appellant's Testimony)
18. The Appellant has refused to be tested for COVID-19 because he thinks that, since he had already been tested and the result was negative, there is no need for further COVID-19 testing. (Appellant's Testimony).
19. On the following dates, the Appellant refused to allow Facility staff to complete all three shift assessments when conducting the assessment required disturbing him when he was sleeping: [REDACTED] 2020, [REDACTED] 2020, [REDACTED] 2020, [REDACTED], 2020, [REDACTED] 2020, [REDACTED] 2020, [REDACTED] 2020, [REDACTED] 2020, and [REDACTED], 2020. (Director of Nursing Testimony and Appellant's Testimony)

20. The Appellant walks the halls of the Facility without wearing a face mask “sometimes.” “To tell you the truth,” he said, “sometimes I put it on, sometimes I don’t.” (Appellant’s Testimony)
21. The Appellant refused to stay within assigned cohorts by visiting other cohorts. (Director of Nursing Testimony)
22. The Appellant acknowledges that he has refused to wear a face mask when he is not in his assigned room. (Appellant’s Testimony)
23. On ██████████ 2020, in the course of a room search of his room, the Appellant told Facility staff that he had a lighter in his possession. (Director of Nursing’s Testimony and Appellant’s Testimony)
24. The Appellant violated the Facility’s smoking/no smoking policies by keeping a lighter in his room at the Facility.
25. The Facility staff redirected and re-educated the Appellant when he refused to comply with the Facility’s established infection control and social distancing measures intended to avoid the transmission of COVID-19. (Hearing Record)
26. The Facility staff continued to point out to the Appellant that he was violating its established infection control and social distancing measures intended to avoid the transmission of COVID-19 and its smoking/no smoking policy by keeping a lighter in his room. (Hearing Record)
27. On ██████████ 2020, the Facility issued the Appellant an Addendum to Notice of Intent to Discharge signed by the Administrator of the Facility. The Facility informed the Appellant of its intent to discharge the Appellant to a homeless shelter as soon as practicable because the Appellant’s “behaviors are a risk to the safety and welfare of others in the building.” The Facility cites the reason for discharge as “You have been found to be in possession of a lighter on Facility grounds, you were physically aggressive towards staff and have been non-compliant with safety protocol secondary to the Coronavirus outbreak and resulting quarantine, all of which have placed the safety and welfare of you and others at significant risk.” (Exhibit 2: Addendum to Notice of Intent to Discharge)²
28. On ██████████, 2020, the Appellant remained outside on the patio after the Facility closed patio access and ended patio supervision. The Appellant refused to wear a mask and return to the building. (Director of Nursing’s Testimony and Appellant’s Testimony)

² It is assumed that the Facility is referencing the ██████████ 2020 incident of the Appellant’s shouting and flipping a table in the Facility’s hallway when it alleges that the Appellant was “physically aggressive toward staff.”

29. The Appellant understands the Facility's COVID-19 policies and acknowledges he violated the Facility's policies by refusing to wear a face mask while not in his assigned room. (Appellant's Testimony)
30. The Appellant's wandering the halls of the Facility without a mask, and his refusal to remain with his assigned cohort, be tested for COVID-19 as required by the Facility and comply with the all temperature and lung/breathing assessments, violate the Facility's established infection control and social distancing measures intended to reduce the transmission of COVID-19.
31. The Appellant's refusal to comply with the Facility's established infection control and social distancing measures intended to reduce the transmission of COVID-19 by wandering the halls of the Facility without a mask, and his refusal to remain with his assigned cohort, be tested for COVID-19 as required by the Facility, and his violation of the Facility's smoking/no smoking policy by keeping a lighter in his room, endangers his own health and safety and the health and safety of other residents and of Facility staff.

CONCLUSIONS OF LAW

1. State statute provides, in pertinent part, as follows:

A Facility shall not . . . discharge a resident from the Facility except to meet the welfare of the resident which cannot be met in the Facility, or unless the resident no longer needs the services of the Facility due to improved health . . . or the health or safety of individuals in the Facility is endangered In each case the basis for transfer or discharge shall be documented in the resident's medical record by a physician. In each case where the welfare, health or safety of the resident is concerned the documentation shall be by the resident's physician.

Conn. Gen. Stat. § 19a-535(b)

2. When a nursing facility resident requests a hearing to appeal a proposed discharge, "the Commissioner of Social Services or the commissioner's designee shall hold a hearing to determine whether the . . . discharge is being effected in accordance with this section," and the nursing facility must "prove by a preponderance of evidence that it has complied with the provisions of this section." Conn. Gen. Stat. § 19a-535(h)(1).
3. Connecticut Executive Order No 7XX, Section 3, dated June 5, 2020 provides, in pertinent part, that "effective immediately and for the duration of the COVID 19 declared public health emergency," hearings regarding involuntary discharges of nursing facility resident to homeless shelters are stayed and involuntary discharges of nursing facility residents to homeless shelters are suspended,

except for the following: “any emergency situation in which a failure to effect an immediate discharge of a resident would endanger the health, safety or welfare of the resident or other residents, including, but not limited to, the resident’s refusal to comply with established infection control or social distancing measures intended to reduce the transmission of COVID-19 that could also endanger staff; “. . . (emphasis added).

The Appellant’s violation of and refusal to comply with the Facility’s no smoking policy and established infection control or social distancing measures intended to reduce the transmission of COVID-19 by keeping a lighter in his room, walking the halls of the Facility without a face mask, refusing to remain with his assigned cohorts at the Facility, refusing to comply with the Facility’s required COVID-19 testing, constitutes an emergency situation in which the failure to effect an immediate discharge of a resident would endanger the health, safety or welfare of the Appellant, other residents, and Facility staff and meets the exception set forth in Section 3 of Executive Order No. 7XX.

4. State statute provides that “[n]o resident shall be involuntarily . . . discharged from a facility if such . . . discharge is medically contraindicated.” Conn. Gen. Stat. § 19a-535(f).

The proposed involuntary discharge of the Appellant is not medically contraindicated.

5. State statute provides as follows:

Before effecting any . . . discharge of a resident from the facility, the facility shall notify, in writing, the resident and the resident’s guardian or conservator, if any, or legally liable relative or other responsible party if known, of the proposed . . . discharge, the reasons therefor, the effective date of the proposed . . . discharge, the location to which the resident is to be . . . discharged, the right to appeal the proposed . . . 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 . . . discharge and the possibility of an exception to the date by which an appeal must be initiated in order to stay the proposed . . . 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 nonprofit entity designated by the Governor in accordance with section 46a-10b to serve as the Connecticut protection and advocacy system. The notice shall be given at least thirty days and no more than sixty days prior to the resident's proposed . . . discharge, except where the health or safety of individuals in the facility are endangered . . . in which cases notice shall be given as many days before the . . . discharge as practicable.

Conn. Gen. Stat. § 19a-535(c)(1)

On [REDACTED] [REDACTED] 2020 and [REDACTED] [REDACTED] 2020, the Facility established by a preponderance of the evidence that it complied with the notice requirements in section 19a-535(c)(1) of the Connecticut General Statutes when proposing to involuntarily discharge the Appellant.

6. State statute provides that, as follows:

Except in an emergency or in the case of transfer to a hospital, no resident shall be . . . discharged from a facility unless a discharge plan has been developed by the personal physician of the resident or the medical director in conjunction with the nursing director, social worker or other health care provider. To minimize the disruptive effects of the . . . discharge on the resident, the person responsible for developing the plan shall consider the feasibility of placement near the resident's relatives, the acceptability of the placement to the resident and the resident's guardian or conservator, if any, or the resident's legally liable relative or other responsible party, if known, and any other relevant factors which affect the resident's adjustment to the move. The plan shall contain a written evaluation of the effects of the . . . discharge on the resident and a statement of the action taken to minimize such effects. In addition, the plan shall outline the care and kinds of services which the resident shall receive upon . . . discharge. Not less than thirty days prior to an involuntary . . . discharge, a copy of the discharge plan shall be provided to the resident's personal physician if the discharge plan was prepared by the medical director, to the resident or the resident's guardian or conservator, if any or legally liable relative or other responsible party, if known.

Conn. Gen. Stat. 19a-535(e)

7. State statute provides that “the facility shall be responsible for assisting the resident in finding an appropriate placement.” Conn. Gen. Stat. 19a-535(g)

The Facility established by a preponderance of the evidence that, in its ██████████ 2020 discharge plan, it complied with the statutory requirements to formulate a discharge plan for the Appellant that included a written evaluation of the effects of the discharge on the Appellant, a statement of action taken to minimize such effects, and an outline of care and services that the Appellant would receive upon discharge.

The Facility established by a preponderance of the evidence that it complied with the requirements of section 19a-535 of the Connecticut General Statutes and Section 3 of Executive Order 7XX when it proposed to involuntarily discharge the Appellant to a homeless shelter.

DISCUSSION

Although the facts in this appeal establish that the Appellant was physically aggressive one time in ██████████ of 2020 when he shouted and overturned a table in the hallway because he didn't like the food at the Facility and that the Appellant didn't allow Facility staff to conduct temperature checks and breathing assessments for him when he was asleep, these behaviors do not establish that the “failure to effect an immediate discharge” would “endanger the health, safety or welfare of the resident or other residents,” as required by Section 3 of Executive Order No. 7XX (June 5, 2020). If only these behaviors were at issue, therefore, the Facility's proposed discharge of the Appellant would not be upheld.

But the facts also establish, and the Appellant acknowledges, that he “sometimes” doesn't wear a mask when he is outside of his room, he wanders the halls, and he interacts with other residents who are not in his cohort, even though he has been redirected and educated about the Facility's established infection control and social distancing measure intended to reduce the transmission of COVID-19.

Moreover, although not imposed by a state mandate, since ██████████, 2020, the Facility, as part of its infection control measures, requires residents and staff to be tested for COVID-19 on a

monthly basis. This is reasonable for a Facility that had 74 of 140 residents test positive for COVID-19 and experienced the death of six residents, to want to test on a more regular basis than perhaps other facilities test. It is especially important in this situation where the Appellant is wandering the halls of the Facility without a mask.

The Appellant stated that he is bored in his room due to limited access to all of the Facility and feels stuck there watching television. This is understandable, but does not justify his endangering his own health and safety and the health and safety of other residents and Facility staff.

Similarly, the Facility's smoking/no smoking policy that includes a prohibition against allowing residents to keep lighters in their rooms is designed to protect the health, safety and welfare of Facility residents. The Appellant's failure to comply with this policy, possibly resulting in a fire at the Facility, may reasonably constitute an emergency situation in which a failure to discharge the resident would endanger the health, safety or welfare of the resident or other residents.

DECISION

The Appellant's appeal of the Facility's involuntary discharge is denied.



Lisa A. Nyren
Fair Hearing Officer

CC: [REDACTED]
Administrator
[REDACTED]
[REDACTED]
[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 Legal Counsel, Regulations, and Administrative Hearings, 55 Farmington Ave., 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 Ave., 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 his 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.