

**STATE OF CONNECTICUT
OFFICE OF HEALTH STRATEGY
HEALTH SYSTEMS PLANNING UNIT**

IN RE: CIVIL PENALTY PROCEEDING	:	
FOR TERMINATION OF INPATIENT	:	DOCKET NO. 22-32517-CON
OBSTETRICS SERVICES AT	:	
WINDHAM HOSPITAL	:	
	:	
	:	
	:	
	:	
	:	Aug. 12, 2022

**OFFICE OF HEALTH STRATEGY’S POST HEARING BRIEF IN FAVOR OF
IMPOSITION OF A CIVIL PENALTY**

I. PROCEDURAL BACKGROUND

On February 14, 2022, the Office of Health Strategy (“OHS”) imposed a civil penalty of \$65,000 on Windham Hospital (Exhibit A) for failure to seek a Certificate of Need (“CON”) for termination of inpatient services under C.G.S. Sec. 19a-638(a)(5). On March 7, 2022, Hartford HealthCare (“HHC”) requested a hearing (Exhibit B) pursuant to Connecticut General Statutes (“C.G.S.”) § 19a-653(c) on behalf of Windham Hospital to contest imposition of the civil penalty.

An administrative hearing was held remotely (via Zoom) on May 25, 2022, before the duly-designated hearing officer Daniel J. Csuka (Exhibit E). Several witnesses testified and numerous documents were entered into evidence and became part of the record. (Exhibit S). At the close of the hearing, counsel was given the opportunity to submit briefs in support of their positions. Both parties have submitted briefs.

II. FACTUAL BACKGROUND

On September 3, 2020 Windham Hospital filed a CON application and supplemental forms to terminate its inpatient obstetric (“OB”) services. This CON application was labeled Docket No. 20-32394-CON.

Around that same time OHS received information that triggered an inquiry regarding Docket No. 20-32394-CON causing OHS to send a letter dated Sept. 18, 2020 to Barbara Durdy, Director of Strategic Planning for Hartford HealthCare who is listed as the contact person on the CON application for Windham Hospital.

The September Inquiry letter stated that OHS was in receipt of information alleging Windham Hospital pre-emptively discontinued obstetrical services without CON authorization and laid out a series of questions. The questions addressed the detailed definition of the term “diversion status;” the reason the decision was made to divert obstetrical services; the timing when such a decision was made; and whether were patients informed of the decision, among other things.

On October 2, 2020, Barbara Durdy responded to the September Inquiry Letter on behalf of Hartford HealthCare in pertinent part that,

“Windham Hospital ... has used the terms ‘diversion’ and ‘temporary interruption’ interchangeably to describe its interruption of obstetric services as a result of the Hospital’s inability to provide sufficient physician and nursing coverage to safely provide the service.... Intermittently during FY2020, it was necessary for the Hospital to temporarily interrupt labor and delivery services due to insufficient clinical resources to safely care for patients. ... Each time the Hospital implemented an interruption of labor and delivery services, the Hospital notified the local EMS dispatch (CMED). The local dispatch was advised to bypass the Hospital and bring patients in need of labor and delivery services to either Backus Hospital or to an alternate facility based on patient preference. ... In addition, ... each time it was necessary for the Hospital to temporarily interrupt labor and delivery services, all active obstetric patients received written notification regarding the service interruption including instructions for transportation.” (Exhibit C).

She continued in the letter to indicate that Windham Hospital temporarily interrupted OB delivery services three times during the period January 1, 2020, through May 2020 as follows:

- February 15 – February 24, 2020
- March 20 – April 1, 2020
- April 10 – April 19, 2020

The Hospital's sole physician providing obstetrical services at the Hospital took paid time off for vacation in June 2020 and the Hospital was not able to provide call coverage for this leave.

Simultaneously the Hospital was losing nursing staff to retirement and resignation, so they implemented another planned disruption in June 2020. At approximately this same time, the Board of Directors of Hartford HealthCare held a meeting where they unanimously voted to approve closure of Windham Hospital's obstetrics department.

After OHS's initial review of the CON application Docket No. No. 20-32394-CON, OHS issued its Completeness Letter #1 ("CL #1"). In this letter, OHS asked for clarification on the Hospital's efforts to recruit staff, the proposed transportation plan, the cessation in 2015 of the only OB-GYN practice providing services, and the explanation of "diversion status" for inpatient obstetrics. In response to CL#1, Windham Hospital provided a "Dear Patient" letter indicating that "birthing services will be provided at Backus Hospital's Birthing Center in Norwich starting July 1, 2020." Therefore, July 1, 2020 was the date when Windham Hospital officially decided it could no longer piece together the coverage needed to run an inpatient OB unit and actually terminated services. The letter continued,

"Backus Hospital obstetricians will provide care for our patients and will be delivering babies at Backus Hospital. The Women's Health Services office at Windham Hospital

and Dr. Eugene Rozenshteyn will continue to provide prenatal care. ... If you would prefer to deliver your baby at a hospital other than Backus, Dr. Rozenshteyn will work with you to help make arrangements for your delivery and transportation if needed.”

The letter gave more information regarding whom to call about delivering babies at alternate hospitals but no information regarding how women could give birth at Windham Hospital. Even though they did not state it directly, it was implicit that inpatient obstetric services at Windham Hospital had been terminated.

The issue of termination of OB services gave rise to a public hearing which was held remotely via Zoom on November 10, 2021 before Hearing Officer Joanne Yandow. After the public hearing a series of late filed documents were submitted, and the record was closed on March 17, 2022.

III. LEGAL DISCUSSION

C.G.S. § 19a-653 states that if a health care facility or institution that is required to file a CON under C.G.S. § 19a-638 wilfully fails to seek CON approval for any of the activities in C.G.S. § 19a-638 [they] “shall be subject to a civil penalty of up to \$1,000/day for each day such ... health care facility or institution conducts any of the described activities without certificate of need approval as required by section 19a-638.”

Therefore, the Office of Health Strategy has the burden of proof pursuant to C.G.S. § 19a-653 to show that Windham Hospital was required to file a CON application before it terminated an inpatient service – specifically Obstetrics services; that Windham Hospital did in fact terminate Obstetric services; that Windham Hospital did not file a CON application before it terminated the OB services; and finally, that Windham Hospital knew it was required to file a CON, or in other words, Windham Hospital wilfully failed to file a CON application before terminating inpatient

services.

A. Windham Hospital was required to file a CON before it terminated an inpatient service – specifically obstetrics services.

Connecticut law states that,

“(a) A certificate of need issued by the unit shall be required for: ...(5) The termination of inpatient or outpatient services offered by a hospital, including, but not limited to, the termination by a short-term acute care general hospital or children's hospital of inpatient and outpatient mental health and substance abuse services....” C.G.S. § 19a-638(a)(5).

Windham Hospital is a hospital as defined under this statutory chapter. As such, Windham Hospital is subject to the statutory criterion that a CON is required for the termination of inpatient services. Obstetric services are inpatient services offered by Windham Hospital.

B. Windham Hospital did, in fact, terminate obstetric services.

It is not disputed that Windham Hospital ceased providing obstetric services on July 1, 2020. However, evidence was submitted that affirmatively indicated the Hospital’s planning and forethought to do so. The Board of Directors of the parent organization of Windham Hospital held a meeting where they affirmatively decided to terminate Windham Hospital’s obstetric services. The minutes from that Board meeting held on June 16, 2020, verify that the vote to close Windham Hospital’s obstetrics department was made unanimously.

Additionally, Windham Hospital drafted and sent a letter to its prenatal patients indicating that as of July 1, 2020, that pregnant women would no longer be able to give birth at Windham Hospital. The letter further advised that they should make alternative plans, by delivering at Backus Hospital in Norwich, or a different hospital of their choice.

C. Windham Hospital did not file a CON application before it terminated the OB services.

Windham Hospital did not file a CON before July 1, 2020, the date Windham Hospital terminated obstetric services. The Hospital filed a CON application on September 3, 2020, more than two months after it terminated obstetric services on July 1, 2020.

D. And finally, Windham Hospital knew it was required to file a CON, or in other words, Windham Hospital wilfully failed to file a CON application before terminating inpatient obstetric services.

The President of Windham Hospital, Ms. Handley, was specifically told by the Department of Public Health in testimony that Windham Hospital would need to file a CON before terminating the inpatient service of obstetrics. Hartford HealthCare/Windham Hospital also circulated a flyer for a “Virtual Public Meeting” to be held on August 10, 2020, that would discuss Windham Hospital’s “proposal to discontinue childbirth services”. The flyer stated that “[t]his proposal is subject to regulatory approval, and the hospital plans to submit a CON application.”

E. Calculation of Civil Penalty.

The Office of Health Strategy also has the burden of proof to explain the details imposition of the civil penalty. The statute reads in pertinent part that the institution,

“shall be subject to a civil penalty of up to \$1,000/day for each day such ... health care facility or institution conducts any of the described activities without certificate of need approval as required by section 19a-638.” C.G.S. § 19a-653.

The penalty should run from the first date Windham Hospital began operating after

terminating OB services without CON approval. That date was July 1, 2020. The CON application was filed on September 3, 2020, and so that is the date when the violation ended. Therefore, the penalty should be assessed for that entire time period of 65 days. One thousand dollars per day times 65 days is equal to \$65,000 – the amount of the civil penalty imposed.

IV. CONCLUSION AND REQUEST FOR IMPOSITION OF A CIVIL PENALTY

By not obtaining a CON before terminating these essential medical OB services, Windham Hospital broke the law. The consequences for breaking this law are being widely felt throughout the Windham community – a community that can no longer rely on the security of having a local hospital ready when they are to deliver a baby. The legal consequence for breaking the law is the imposition of a \$65,000 civil penalty.

OHS had the burden and has proven that Windham Hospital wilfully terminated its inpatient obstetric services without first obtaining a CON. The evidence showed that Windham Hospital knew it needed to file a CON application to terminate these services as of July 1, 2020 and it wilfully did not seek a CON until more than two months later. The evidence further showed that OHS correctly imposed a civil penalty of \$1,000 per day for each day after July 1, 2020, until it filed a CON with the Office of Health Strategy on September 3, 2020 for a total civil penalty is \$65,000.

Windham Hospital wilfully terminated its in-patient obstetric services without first obtaining a CON in violation of C.G.S. § 19a-653. Therefore, the Office of Health Strategy should uphold the imposition of the civil penalty in the amount of \$65,000.

Respectfully submitted,

Office of Health Strategy

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CERTIFICATION

This is to certify that a copy of the foregoing was sent via electronic mail this 12th day of August, 2022 to the following party:

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