BEFORE THE
DEPARTMENT OF DEVELOPMENTAL SERVICES
STATE OF CALIFORNIA

In the Matter of: ST. SHARBEL'S, RESIDENTIAL CARE FACILITY, INC. Appellant, vs. SAN GABRIEL/POMONA REGIONAL CENTER, Regional Center.	OAH No. 2009020471

PROPOSED DECISION

This is an appeal from a January 15, 2009, decision by the director of the San Gabriel/Pomona Regional Center.[1] Pursuant to California Code of Regulations, title 17, sections 56064 and 56065,[2] Robert Walker, Administrative Law Judge, Office of Administrative Hearings, State of California, reviewed this appeal.

Judith A. Enright, Attorney at Law,[3] representing San Gabriel/Pomona Regional Center, filed a letter brief dated March 4, 2009.

James R. Conolly, Attorney at Law,[4] representing the appellant, St. Sharbel's Residential Care Facility, Inc., filed an appeal and letter brief dated January 30, 2009.

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[1] R. Keith Penman is the regional center director for the San Gabriel/Pomona Regional Center. Mr. Penman's title is Executive Director.

[2] California Code of Regulations, title 17 will be referred to as "Code."

[3] Judith A. Enright, Attorney at Law, 9100 Wilshire Boulevard, Suite 7715 – East Tower, Beverly Hills, California 90212-3401.

[4] James R. Conolly, Attorney at Law, 555 West Fifth Street, 48th Floor, Los Angeles, California 90013-1065.

ISSUES

The regional center director held that removing consumers from appellant's facilities had been appropriate because a situation that constituted an immediate danger did exist. Appellant contends the decision "does not comport with" Code section 56053.

Was there an immediate danger?

Did the regional center, as is required by Code section 56053, conduct an investigation?

Did the regional center, as is required by Code section 56053, subdivision (d)(1), meet with the administrator to describe the situation that constituted an immediate danger?

Did the regional center, as is required by Code section 56053, subdivision (d)(2), notify the Department of Social Services' Community Care Licensing Division of the condition that constituted an immediate danger?

Did the regional center, as is required by Code section 56053, subdivision (e), determine whether the immediate danger could be corrected within 24 hours of verification?

FACTUAL FINDINGS

ST. SHARBEL'S

1. At one time, St. Sharbel's Residential Care Facility, Inc. (St. Sharbel's) operated a large, residential facility for persons with developmental disabilities.

2. Between 2000 and 2003 there were a number of occasions when St. Sharbel's failed to operate according to regional center requirements, and the regional center developed corrective action plans that St. Sharbel's was required implement.

3. The regional center, pursuant to a policy of promoting the availability of small group homes, gave St. Sharbel's down-sizing funds, and St. Sharbel's closed the large facility and opened three smaller facilities. The facilities were known as Garvey, Marbury, and Verness.

4. The regional center also gave St. Sharbel's $55,000 to develop a fourth facility. St. Sharbel's began developing the fourth facility but lost it in foreclosure before opening it.

5. The total funds the regional center gave St. Sharbel's for down-sizing and start-up exceeded $480,000.

CONCERNS REGARDING ST. SHARBEL'S ABILITY TO FINANCE THE OPERATION OF ITS FACILITIES

6. In February of 2008, representatives of St. Sharbel's asked to meet with the regional center. Lucina Galarza is the Quality Assurance Manager for the regional center. On February 20, 2008, Ms. Galarza and other regional center representatives met with Roy Montera, St. Sharbel's financial officer, and other representatives of St. Sharbel's, who reported that they were having a monthly shortfall of approximately $10,000. They also said they had a tax bill coming due in November, and it "would destroy them." The Garvey facility had a bedroom for a staff person. That enabled St. Sharbel's to employ a live-in staff person at that facility, which resulted in lower operating costs. At the February 20, 2008, meeting, there was a discussion of the possibility of the regional center's helping to finance construction of staff bedrooms at the Marbury and Verness facilities so that St. Sharbel's could hire live-in staff for those facilities and reduce its costs. The regional center representatives asked St. Sharbel's to submit a business plan. At the time of the February meeting, St. Sharbel's was delinquent on the mortgage payments on the fourth facility, the one being developed. They, however, did not disclose that to the regional center representatives.

7. In February and March of 2008, the regional center conducted an audit of St. Sharbel's facilities. The audit disclosed that more than $9,000 in consumers' funds was unaccounted for. St. Sharbel's deposited the missing funds into accounts for the consumers.

8. In April of 2008, Mr. Montera left a voice mail message for Ms. Galarza telling her that the fourth facility, the one being developed, was in foreclosure. In spite of the fact that St. Sharbel's had used regional center start-up funds in developing that facility, St. Sharbel's had not advised the regional center of the foreclosure. Mr. Montera left the voice mail message just two days before the public foreclosure auction.

9. When Ms. Galarza learned of the foreclosure, she lost confidence in St. Sharbel's ability to manage the finances of the three existing facilities. After consulting with other regional center staff, she advised St. Sharbel's that the regional center would not be providing funds to add staff bedrooms to the Marbury and Verness facilities.

10. Shortly after Ms. Galarza advised St. Sharbel's that the regional center would not be providing funds to add staff bedrooms, representatives of St. Sharbel's again asked to meet with the regional center. At a meeting on May 28, 2008, Mr. Montera presented a written agenda, with a subject of "Sunset of St. Sharbel's . . . ." Representatives of St. Sharbel's talked about financial issues. The following is a paraphrased summary of what they said: St. Sharbel's had lost $150,000 since 2007. They were losing $10.000 a month. A tax liability would have to be paid in November of 2008. They would not be able to operate past the end of June of 2008. Ms. Galarza said the regional center would make a decision as to what it needed to do. She asked whom she should call when she was ready to report back to St. Sharbel's. The St. Sharbel representatives said to call Mr. Montera.

11. On June 3, 2008, Ms. Galarza and a number of other regional center staff met and concluded that, within the terms of Code section 56053, a situation of immediate danger existed at all three of the St. Sharbel facilities. Ms. Galarza said they came to that conclusion because:

> [W]e all felt that we needed to move the clients right away because their health and safety was at risk because . . . [St. Sharbel's] could no longer provide. They no longer had the money to operate. To us, that meant they didn't have the money to provide staffing, food, shelter, et cetera.[5]

12. The regional center did not conduct the investigation required by Code section 56053, subdivision (a), because Ms. Galarza and other regional center staff concluded it would be superfluous. St. Sharbel's had provided the financial information concerning its dire circumstances. The regional center staff made a judgment based on that information. Because St. Sharbel's had self-reported the financial information and because the staff was confident about the conclusions they drew from it, the staff felt they did not need to investigate.[6]

13. On June 3, 2008, Ms. Galarza communicated with Tina Vasquez-Garcia of the Department of Social Services' Community Care Licensing Division and told her that the regional center had concluded that there was an immediate danger at the St. Sharbel facilities. Ms. Galarza said the regional center had decided to remove all of the consumers from the facilities.

14. On June 3, 2008, Ms. Galarza also called Mr. Montera and told him the regional center had decided to remove all of the consumers from the St. Sharbel facilities. In subsequent telephone conversations, Mr. Montera requested that consumers not be removed from the Garvey facility, and Ms. Galarza agreed to that request.

15. On June 4, 2008, Josephine Culata, St. Sharbel's administrator, called Ms. Galarza and told her one of St. Sharbel's trustees could get a loan to keep things going. Ms. Galarza consulted with other regional center staff, returned Ms. Culata's call, and said that a loan would just create more problems and not resolve the issues.

16. The regional center did not, as is required by Code section 56053, subdivision (d)(1), meet with Ms Culata to describe the situation that constituted the immediate danger.

17. Code section 56053, subdivision (e), required the regional center to determine whether the immediate danger could be corrected within 24 hours. There is no evidence that anyone at the regional center considered or addressed that issue.

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[5] Ms. Galarza's testimony in the November 24, 2008, hearing before the regional center director.

[6] *Ibid.*

18. On June 5, 2008, the regional center staff removed all of the consumers from the Verness facility, and on June 6, 2008, they removed all of the consumers from the Marbury facility.

19. Ms. Enright, regional center's counsel, sent Mr. Conolly, St. Sharbel's counsel, a letter dated June 6, 2008, in which Ms. Enright listed the reasons the regional center had concluded that a situation of immediate danger existed at the Verness and Marbury facilities. The list included the following: St. Sharbel's had serious financial problems. At a May 28, 2008, meeting, representatives of St. Sharbel's reported that St. Sharbel's had lost $150,000 since the first of the year. *Representatives of St. Sharbel's* "*repeatedly stated that they only had enough funds to operate their homes for two more weeks.*" St. Sharbel's had promised to give the regional center a business plan but failed to do so. The regional center had given St. Sharbel's nearly $500,000. An audit revealed that more than $9,000 in consumers' funds was unaccounted for. A fourth facility, which had been slated to open, had been lost in foreclosure. In spite of the fact that St. Sharbel's used regional center start-up funds in developing that fourth facility, St. Sharbel's did not advise the regional center of the foreclosure until two days before the public auction. Representatives of St. Sharbel's indicated that they would be unable to provide food, electricity, and staffing support for the consumers.

20. It is found that, at the May 28, 2008, meeting, no representative of St. Sharbel's said that they could operate for only two more weeks. Also, no representative of St. Sharbel's indicated that they would be unable to provide food, electricity, or staffing support during the month of June of 2008. Ms. Enright was not at the May 28, 2008, meeting. In her letter, she is reporting what someone told her. Scott Kelley, Quality Assurance Specialist for the regional center, was at the meeting, and he wrote a memorandum dated May 28, 2008, regarding what transpired. He does not say that representatives of St. Sharbel's said that they had enough funds to operate for only two more weeks. He wrote, "Lastly, the representatives stated that they would not be able to operate the three facilities past the end of June 2008." In a June 3, 2008, memorandum, Ms. Galarza wrote about the "concerns voiced by St. Sharbel's representatives – which included the facilities not being able to fiscally operate past June 2008 . . . ." In the November 24, 2008, hearing before the regional center director, Ms. Galarza testified about the May 28, 2008, meeting. She testified that, "The company reported to us that they would not be able to function or operate past June 2008." She also testified that she "*got the impression that*" they were saying that they could not survive past a couple of weeks. It is found that Ms. Enright's statement that *representatives of St. Sharbel's* "*repeatedly stated that they only had enough funds to operate their homes for two more weeks*" is mistaken. Not only did they not say that *repeatedly*, they did not say that at all.

21. Code section 56053, subdivision (a), concerns situations that appear to constitute immediate danger. That subdivision requires a regional center to investigate such situations immediately. If the regional center verifies that there is an immediate danger, section 56053 makes it mandatory that the regional center do certain things. One thing it must do is meet with the facility administrator to describe the situation that constitutes the

immediate danger. Another thing it must do is determine whether the immediate danger can be corrected within 24 hours. Code section 56053, subdivision (d)(1), provides:

> Immediately after verifying that a situation exists which constitutes an immediate danger, the regional center *shall* take the following actions: (1) Meet with the administrator to describe the situation(s) which constitutes the immediate danger . . . . (Italics added.)

22. Code section 56053, subdivision (e), provides: "The regional center *shall* determine whether the immediate danger can be corrected within 24 hours of verification." (Italics added.)

23. On June 12, 2008, which was nine days after the regional center had determined there was an immediate danger, Ms. Enright and Mr. Conolly had a telephone conversation, which Ms. Enright confirmed in a letter of June 13, 2008. The conversation concerned Ms. Enright's June 6, 2008, letter to Mr. Conolly. Ms. Enright had faxed the letter to Mr. Conolly on June 6, 2008, but she now wanted to send copies of it to Mr. Conolly's clients. In the June 12, 2008, conversation, Mr. Conolly said he was authorized to accept correspondence on behalf of his clients.

24. In Ms. Enright's June 13, 2008, letter, she, in effect, characterized this as Mr. Conolly's having waived his clients' right to the meeting required by Code section 56053, subdivision (d)(1). [7] And in the November 24, 2008, hearing before the regional center director, Ms. Enright read her June 13, 2008, letter into the record and insisted that, on June 12, 2008, Mr. Conolly had agreed that Ms. Enright's June 6, 2008, letter satisfied the Code 56053, subdivision (d)(1), requirement that the regional center meet with the administrator to describe the situation that constituted the immediate danger. At the hearing, Mr. Conolly disputed that that was what he had agreed to.

25. It is found that Ms. Enright was mistaken in her characterization of Mr. Conolly's agreement. First, Ms. Enright's June 13, 2008, letter does not refer to the meeting requirement. Rather, it refers to "immediate danger documentation." Second, in Ms. Enright's June 13, 2008, letter there is no reference to Mr. Conolly's having said he would not make his clients available for a Code section 56053, subdivision (d)(1), meeting or that he would stand in his clients' place for a Code section 56053, subdivision (d)(1), meeting. Indeed, it was already one week too late for such a meeting to occur. What Mr. Conolly said, in effect, was: *You faxed the letter to me on June 6, 2008, so there is no need for you to send*

[7] The regional center director, based on Ms. Enright's June 13, 2008, letter, found that Mr. Conolly had waived his client's right to a Code section 56053, subdivision (d)(1), meeting.

In Ms. Enright's June 13, 2008, letter, she refers to Code section 56063, but that appears to be a typographical error because that section refers to a decision after an appeal. It is Code section 56053, subdivision (d)(1), that requires the regional center to meet with the administrator to describe the situation that constitutes an immediate danger.

copies to my clients. He agreed simply that he had accepted the June 6, 2008, letter on behalf of his clients – not that the letter was a substitute for satisfying the requirement that the regional center meet with the administrator.

26. In the regional center director's decision on the appeal, he excuses the regional center for having failed to comply with Code section 56053, subdivision (d)(1). At page 8, he says "No meeting could take place with individuals who could not be contacted, except through counsel." But the regional center director's conclusion that the regional center was unable to comply with Code section 56053, subdivision (d)(1), because of something Mr. Conolly said in a June 12, 2008, telephone conversation is contrary to the chronology of events. Code section 56053, subdivision (d)(1), required the regional center to meet with the administrator sometime between June 3 and June 5, 2008, that is, sometime between determining that there was an immediate danger and the time the consumers were removed. What Mr. Conolly said on June 12, 2008, could not have prevented the regional center from doing what it was required to do on June 3, 4, or 5, 2008.

27. In the November 24, 2008, hearing before the regional center director, Ms. Galarza testified that she believed she had satisfied the Code section 56053, subdivision (d)(1), requirement to meet with the administrator to describe the situation that constituted the immediate danger. She testified that, at the end of the May 28, 2008, meeting, when she asked whom she should call when she was ready to report back to St. Sharbel's, she was told to call Mr. Montera. So she thought it was appropriate to call him rather than meet with the administrator. It is found, however, that there was no reason for the St. Sharbel representatives to anticipate that Ms. Galarza's question about whom she should call had to do with a determination of immediate danger. There is no evidence that, at the May 28, 2008, meeting, anyone mentioned the possibility of a determination that there was an immediate danger. The St. Sharbel representatives had spoken of an inability to continue beyond the end of June. It is found that their direction to call Mr. Montera was not a waiver of the requirement of Code section 56053, subdivision (d)(1), which required the regional center to meet with the administrator after a determination of immediate danger.

PROCEDURAL HISTORY AND RECORD ON APPEAL

1. By a letter dated July 3, 2008, Mr. Conolly filed an appeal with the regional center director. The appeal was from the regional center staff's finding of immediate danger and was pursuant to California Code of Regulations, title 17, section 56061, subdivision (a)(2). Ms. Enright sent Mr. Conolly a letter dated July 22, 2008, in which she said his appeal failed to satisfy a requirement of Code section 56061, subdivision (a)(6), that an appeal be signed by the facility administrator.[8] Mr. Conolly filed an August 6, 2008, copy of the appeal signed by the facility administrator.

[8] There is no Code section 56061, subdivision (a)(6). The requirement is found in Code section 56062, subdivision (a)(6).

2. The regional center director held a hearing on November 24, 2008, and issued a decision dated January 15, 2009, in which he determined that a situation of immediate danger had existed.

3. As noted above, Mr. Conolly filed an appeal and letter brief dated January 30, 2009. This appeal is to the Director of the State Department of Developmental Services (Department Director) and was filed pursuant to Code section 56064.

4. On February 13, 2009, the Office of Administrative Hearings (OAH), as the designee of the Department Director, received that appeal. On February 18, 2009, OAH served the parties with an Acknowledgement of Appeal and Request for Documentation and Appeal File.

5. Under cover of Ms. Enright's letter brief dated March 4, 2009, the regional center submitted the administrative record, which consists of the following:

> 1. The August 6, 2008, appeal to the regional center director. This is the appeal that originally was dated July 3, 2008. Mr. Conolly filed it again with the signature of the facility administrator. The version that bears the facility administrator's signature is dated August 6, 2008.
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> 2. A letter of November 4, 2008, notifying Mr. Conolly that a hearing on the appeal to the regional center director would be held on November 24, 2008.
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> 3. The transcript of the November 24, 2008, hearing with the regional center's exhibits A through II (double I) and St. Sharbel's exhibits 1 and 2.
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> 4. The regional center director's January 15, 2009, decision.
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> 5. The January 30, 2009 appeal to the Department Director. This is the letter from Mr. Conolly that also contains his letter brief.

6. These items have been marked as Item 1 through Item 5, inclusive, and Ms. Enright's letter brief has been marked as Item 6.

LEGAL CONCLUSIONS

IMMEDIATE DANGER

1. Code section 56053, in relevant part, provides:

> (a) Situations which come to the attention of, or are reported to, the regional center and which appear to constitute an immediate danger shall be investigated immediately following the notification. Situations which shall be investigated include but are not limited to:

> (1) Life threatening conditions;
>
> (2) Suspicion or allegations of abuse of a consumer;
>
> (3) A consumer(s) in the facility with no direct supervision unless there is an IPP objective and waiver or exception, approved pursuant to Title 22, California Code of Regulations, Section 80024;
>
> (4) Failure to provide a consumer(s) with a medically prescribed special diet(s); or
>
> (5) The presence of an individual exhibiting aggressive or assaultive behavior which is life threatening to self or others.
>
> [¶] . . . [¶]
>
> (d) Immediately after verifying that a situation exists which constitutes an immediate danger, the regional center shall take the following actions:
>
> (1) Meet with the administrator to describe the situation(s) which constitutes the immediate danger; and
>
> (2) Notify the Department of Social Services' Community Care Licensing Division district office of the conditions which constitute the immediate danger.
>
> (e) The regional center shall determine whether the immediate danger can be corrected within 24 hours of verification.
>
> (1) When the immediate danger cannot be corrected within 24 hours of verification, the regional center shall initiate the emergency relocation of the consumer(s) subject to the immediate danger.
>
> (2) When the immediate danger can be corrected within 24 hours of verification, and the safety of the consumer(s) can be assured, the regional center shall verify that the correction of the immediate danger has occurred.
>
> (A) The regional center shall verify the correction of the immediate danger within 24 hours of notification by the facility that the immediate danger has been corrected.

2. Thus, Code section 56053 provides authority for a regional center to move expeditiously to initiate emergency relocation of consumers who are subject to an immediate danger. The procedural protections afforded a vendor are extremely minimal. The examples of immediate danger provided in Code section 56053, subdivisions (a)(1) through (a)(5),

support a conclusion that this section is to be used only in circumstances in which it is not practical to provide the vendor with more extensive procedural safeguards. The examples – life threatening structural conditions, abuse, absence of supervision, failure to provide a medically prescribed diet, and life threatening behaviors – share the characteristic of presenting an emergency. It is not that a regional center must find that there is an emergency before concluding that there is an immediate danger, but it is useful to note that the examples share that characteristic. The prospect of having to close a facility after an additional month of operation is a matter of such a different quality as to fall outside the parameter of section 56053.

3. Code section 56054 concerns *substantial inadequacies* as opposed to *immediate dangers*, and the prospect of not being able to operate for more than a month is a substantial inadequacy. It is not that substantial inadequacies are trivial or less important than immediate dangers. It is not that substantial inadequacies do not require prompt attention. The examples of substantial inadequacies include many extremely serious matters – matters that need to be dealt with without delay. But they are matters that do not require the sort of summary treatment required by an immediate danger. With regard to substantial inadequacies, the regulations provide somewhat more measured procedural safeguards for vendors.

4. It is determined that, as of June 3, 2008, the prospect of St. Sharbel's not being able to operate past the end of June was a substantial inadequacy. It was not a situation that constituted an immediate danger.

MINIMAL PROCEDURAL SAFEGUARDS

5. Not only did the regional center mistakenly conclude that St. Sharbel's financial situation constituted an immediate danger, the regional center failed to accord St. Sharbel's the minimal procedural safeguards that a determination of immediate danger requires.

6. The regional center did not investigate to determine for how long St. Sharbel's could provide appropriate care. On May 28, 2008, St. Sharbel's representatives said they could not continue beyond the end of June. Ms. Galarza "got the impression that" they would not be able to survive past a couple of weeks. But Code section 56053, subdivision (a), does not permit a regional center to base a verification of immediate danger on an impression. It must be based on an investigation.

7. After concluding that an immediate danger existed, the regional center did not meet with the administrator to describe the situation that constituted the immediate danger. If the regional center had done that, Ms. Culata, St. Sharbel's administrator, would have had an opportunity to point out that there was no immediate danger. She would have had an opportunity to explain to Ms. Galarza that they could operate to the end of June and were not at risk of closing in two weeks. She would have had an opportunity to provide details regarding the additional loan that one of St. Sharbel's trustees proposed. She may have had other useful information to share with Ms. Galarza.

8. The regional center did satisfy the requirement of notifying the Department of Social Services' Community Care Licensing Division.

9. As noted above, Code section 56053, subdivision (e), requires a regional center to determine whether a situation that constitutes an immediate danger can be corrected within 24 hours. Because the regional center incorrectly concluded that St. Sharbel's financial situation created an immediate danger, there was no determination that could appropriately be tested with regard to the 24 hour provision. The fact that it made little sense to apply the 24-hour test tends to emphasize the fact that the situation did not have the characteristic of presenting an emergency and did not constitute an immediate danger.

ORDER

St. Sharbel's appeal from the regional center director's decision is granted, and the regional center director's decision is reversed.

DATED: March 26, 2009

Robert Walker

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings