§ 31.16 Suspension, revocation, or limitation of an operating certificate and imposition of fines by the commissioner of mental health.

(a) The commissioner of mental health may revoke, suspend, or limit an operating certificate or impose the penalties described in subparagraph (i), (ii) or (iii) of paragraph one of subdivision (b) or in subdivision (g) of this section upon a determination that the holder of the certificate has failed to comply with the terms of its operating certificate or with the provisions of any applicable statute, rule or regulation. The holder of the certificate shall be given notice and an opportunity to be heard prior to any such determination except that no such notice and opportunity to be heard shall be necessary prior to an emergency suspension or limitation of the facility's operating certificate imposed pursuant to paragraph one of subdivision (b) of this section.

(b) 1. A certificate may be temporarily suspended or limited without a hearing for a period not in excess of sixty days upon written notice to the facility following a finding by the office of mental health that a patient's health or safety is in imminent danger or there exists any condition or practice or a continuing pattern of conditions or practices which poses imminent danger to the health or safety of any patient. Upon such finding and notice, the power of the commissioner temporarily to suspend or limit an operating certificate shall include, but shall not be limited to, the power to:

(i) Prohibit or limit the placement of new patients in the facility;

(ii) Remove or cause to be removed some or all of the patients in the facility; or

(iii) Suspend or limit or cause to be suspended or limited the payment of any governmental funds to the facility provided that such action shall not in any way jeopardize the health, safety and welfare of any person with a mental illness in such program or facility.

2. At any time subsequent to the suspension or limitation of any operating certificate pursuant to paragraph one of this subdivision where said suspension or limitation is the result of correctable physical plant, staffing or program deficiencies, the facility may request the office to reinspect the facility to redetermine whether a

specific condition or practice continues to exist. After the receipt of such a request, the office shall reinspect the facility within ten days and in the event that the previously found condition or practice has been eliminated, the suspension or limitation shall be withdrawn. If the condition or practice has not been eliminated, the commissioner shall not thereafter be required to reinspect the facility during the emergency period of suspension or limitation.

3. During the sixty day suspension or limitation period provided for in paragraph one of this subdivision the commissioner shall determine whether to reinstate or remove the limitations on the facility's operating certificate or to revoke, suspend or limit the operating certificate pursuant to subdivision (a) of this section. Should the commissioner choose to revoke, suspend or limit the operating certificate, then the emergency suspension or limitation provided for in this subdivision shall remain in effect pending the outcome of an administrative hearing on the revocation, suspension or limitation.

4. The facility operator, within ten days of the date when the emergency suspension or limitation pursuant to paragraph one of this subdivision is first imposed or within ten days of the date of receipt of notice from the commissioner to revoke, suspend or limit the facility's operating certificate, may request an evidentiary hearing to contest the validity of the emergency suspension or limitation. Such an evidentiary hearing shall commence within ten days of the facility operator's request and no request for an adjournment shall be granted without the concurrence of the facility operator, office of mental health and the hearing officer. The evidentiary hearing shall be limited to a determination of whether a patient's health or safety is in imminent danger or there exists any condition or practice or a continuing pattern of conditions or practices which poses imminent danger to the health or safety of any patient. The emergency suspension or limitation shall be upheld upon a determination that the office of mental health had reasonable cause to believe that a patient's health or safety was in imminent danger. A record of such hearing shall be made available to the facility operator upon request. Should the commissioner determine to revoke, suspend or limit the facility's operating

certificate pursuant to subdivision (a) of this section, no administrative hearing on that action shall commence prior to the conclusion of the evidentiary hearing, the rendering of the hearing officer's report and the commissioner's final review and determination concerning the emergency suspension or limitation. The commissioner shall issue a ruling within ten days after the receipt of the hearing officer's report.

(c) When the holder of an operating certificate shall request an opportunity to be heard, the commissioner shall fix a date, time and place for the hearing. A copy of the charges stating the substance of the alleged violations of the terms of the operating certificate or the alleged violation of any applicable statute, rule or regulation, together with the notice of the date, time and place of the hearing, shall be served in person or mailed by registered or certified mail to the facility at least ten days before the date fixed for the hearing. The facility shall file with the office, not less than three days prior to the hearing, a written answer to the charges.

(d) 1. When a hearing must be afforded pursuant to this section or other provisions of this article, the commissioner, acting as hearing officer, or any person designated by him as hearing officer, shall have power to:

(i) administer oaths and affirmations;

(ii) issue subpoenas, which shall be regulated by the civil practice law and rules;

(iii) take testimony; or

(iv) control the conduct of the hearings.

2. The rules of evidence observed by courts need not be observed except that the rules of privilege recognized by law shall be respected. Irrelevant or unduly repetitious evidence may be excluded.

3. All parties shall have the right of counsel and be afforded an opportunity to require the production of witnesses and evidence in manner and form as prescribed by the civil practice law and rules, to cross-examine witnesses, to examine evidence produced against them, and to have subpoenas issued on their behalf.

4. If evidence at the hearing relates to the identity, condition, or clinical record of a patient, the hearing officer may exclude all persons from the room except parties to the proceeding, their counsel and the witness. The record of such proceeding shall not be available to anyone outside the office, other than a party to the proceeding or his counsel, except by order of a court of record.

5. The commissioner may establish regulations to govern the hearing procedure and the process of determination of the proceeding.

6. The commissioner shall issue a ruling within ten days after the termination of the hearing or, if a hearing officer has been designated, within ten days from the hearing officer's report. The ruling shall be based upon a preponderance of the evidence and shall contain conclusions concerning the alleged violations of the terms of the operating certificate or the alleged violation of any applicable statute, rule or regulation.

(e) All orders or determinations hereunder shall be subject to review as provided in article seventy-eight of the civil practice law and rules.

(f) 1. Except as provided in paragraph two of this subdivision, anything contained in this section to the contrary notwithstanding, an operating certificate of a facility shall be revoked upon a finding by the office that any individual, member of a partnership or shareholder of a corporation to whom or to which an operating certificate has been issued, has been convicted of a class A, B or C felony or a felony related in any way to any activity or program subject to the regulations, supervision, or administration of the office or of the office of temporary and disability assistance, the department of health, or another office of the department of mental hygiene, or in violation of the public officers law in a court of competent jurisdiction of the state, or in a court in another jurisdiction for an act which would have been a class A, B or C felony in this state or a felony in any way related to any activity or program which would be subject to the regulations, supervision, or administration of the office or of the office of temporary and disability assistance, the department of health, or another office of the department of mental hygiene, or for an act

which would be in violation of the public officers law. The commissioner shall not revoke or limit the operating certificate of any facility, solely because of the conviction, whether in the courts of this state or in the courts of another jurisdiction, more than ten years prior to the effective date of such revocation or limitation, of any person of a felony, or what would amount to a felony if committed within the state, unless the commissioner makes a determination that such conviction was related to an activity or program subject to the regulations, supervision, and administration of the office or of the office of temporary and disability assistance, the department of health, or another office of the department of mental hygiene, or in violation of the public officers law.

2. In the event one or more members of a partnership or shareholders of a corporation shall have been convicted of a felony as described in paragraph one of this subdivision, the commissioner shall, in addition to his other powers, limit the existing operating certificate of such partnership or corporation so that it shall apply only to the remaining partner or shareholders, as the case may be, provided that every such convicted person immediately and completely ceases and withdraws from participation in the management and operation of the facility and further provided that a change of ownership or transfer of stock is completed without delay, and provided that such partnerhip or corporation shall immediately reapply for a certificate of operation pursuant to this article.

(g) The commissioner may impose a civil penalty upon a finding that the holder of the certificate has failed to comply with the terms of the operating certificate or with the provisions of any applicable statute, rule or regulation. The maximum amount of such civil penalty imposed thereunder shall not exceed two thousand dollars per day or twenty-five thousand dollars, per violation. Penalties may be considered at the individual bed level for beds closed without authorization at inpatient settings.

Such civil penalty may be recovered by an action brought by the commissioner in any court of competent jurisdiction.

Such civil penalty may be released or compromised by the commissioner before the matter has been referred to the attorney general. Any such civil penalty may be released or compromised and any action commenced to recover the same may be settled or discontinued by the attorney general with the consent of the commissioner.

1. Such civil penalty under this subdivision shall account for factors which shall include: (i) any officially declared national, state, or municipal emergency; (ii) any unforeseen disaster or other catastrophic event that directly impacts access to health care services; (iii) the frequency, duration, scope, and nature of non-compliance; and (iv) any other factors as established by the commissioner.

2. In determining whether an operating certificate holder has violated its obligation to comply with the terms of the operating certificate, it shall not be a defense that the operator was unable to secure proper staff or other necessary resources if the lack of staff or other resources was foreseeable and could be prudently planned for or involved routine staffing needs that arose due to typical staffing patterns, typical levels of absenteeism, and time off typically approved by the operator for vacation, holidays, sick leave, and personal leave.

(h) It shall be the duty of the attorney general upon the request of the commissioner to bring an action for an injunction against any person who violates, disobeys or disregards any term or provision of this chapter or of any lawful notice, order or regulation pursuant thereto; provided, however, that the commissioner shall furnish the attorney general with such material, evidentiary matter or proof as may be requested by the attorney general for the prosecution of such an action.

(i) Where a proceeding has been brought pursuant to section 31.28 of this article, and a receiver is appointed pursuant thereto, the commissioner may assume operation of the facility subject to such receivership, upon termination of such receivership, and upon showing to the court having jurisdiction over such receivership that no voluntary association, not-for-profit corporation or other appropriate provider is willing to assume operation of the facility subject to receivership and is capable of meeting the requirements of this article; provided that the commissioner notifies the chairman of the assembly ways and means

committee, the chariman of the senate finance committee and the director of the budget of his intention to assume operation of such facility at least six months prior to such assumption.