

Top Officials at Massachusetts Veterans' Home Face Significant Prison Time Based on COVID-19 Outbreak that Occurred on their Watch

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Superintendent Bennett Walsh and former medical director David Clinton of Holyoke Soldiers' Home in Massachusetts were indicted Sept. 24, 2020, for criminal charges concerning a coronavirus outbreak at the Home that led to the death of at least 76 veteran residents. The specific charges under Massachusetts law criminalize “wantonly or recklessly” permitting (1) bodily injury to an elderly or disabled person or (2) abuse, neglect, or mistreatment to an elderly or disabled person. *See* Mass. Gen. Laws Ann. ch. 265, § 13K. Walsh and Clinton are charged with five counts of each offense. If convicted and sentenced consecutively on each charge, each man could be imprisoned for up to 65 years.

The Massachusetts Attorney General's Office has been investigating the Holyoke Soldiers' Home—a state-run facility established in 1952—since the spring, when it discovered “serious issues with COVID-19 infection control procedures.” In late March, Walsh and Clinton chose to combine two dementia wards of 42 veterans, each of which had both infected and healthy residents, into a single unit that accommodated 25. The Attorney General's Office alleges that the decision to combine the wards fueled an outbreak among residents and staff members, leading to at least 76 veteran deaths and 84 additional infections.

Massachusetts Gov. Charlie Baker also commissioned an independent investigation of the outbreak at the facility. That investigation—led by Mark Pearlstein, former federal prosecutor—found that Walsh and his team made “utterly baffling” decisions that facilitated the transmission of the virus at the Home. After the release of the Governor's investigation report, Clinton resigned and the Governor attempted to fire Walsh, who has contested his termination. A Hampden Superior Court judge ruled that the Governor's administration does not have the power to fire Walsh; the trustee board for the Home does. The board is meeting concerning Walsh's employment status on Sept. 30.

When asked whether charges would be brought against other individuals at the Home, the Massachusetts Attorney General stated that additional evidence would be considered, but that charges were brought against Walsh and Clinton because they were “the ultimate decision-makers” at the Home.

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Walsh's attorneys argue the Attorney General is "scapegoating" Walsh, who "relied on the medical professionals to do what was best for the veterans" during this unprecedented global pandemic. "[Walsh], like other nursing home administrators throughout the commonwealth and nation, could not prevent the virus from coming to the Home or stop its spread once it arrived there," a statement from Walsh's attorneys said. "At all times, Mr. Walsh relied on the medical professionals to do what was best for the veterans given the tragic circumstances of a virus in a home with veterans in close quarters, severe staffing shortages, and the lack of outside help from state officials," the statement added.

Walsh and Clinton's arraignment date has not yet been set. Each also has been named as a defendant in a civil class action lawsuit concerning this matter.

According to the Massachusetts Attorney General, this is the first criminal prosecution in the country of nursing home administrators for actions concerning a coronavirus outbreak among nursing home residents. The precedent this prosecution sets could cause caretakers of the elderly and disabled and administrators of such facilities across the country to fear similar prosecutions.

While no criminal charges have been filed to date in North Carolina against caretakers of individuals who have become infected with COVID-19, laws exist here to criminalize neglectful actions of caretakers. For example, North Carolina Gen. Stat. § 14-32.3(b) makes it a Class F felony for a caretaker to "wantonly, recklessly, or with gross carelessness" fail to provide medical care or confine a disabled or elder adult in a place or under a condition "that is unsafe," if those actions lead the disabled or elder adult to suffer injury.

Although North Carolina law specifically excludes "health care" and "residential" facilities, including "adult care" homes like Holyoke, from this statute, *see* N.C. Gen. Stat. § 14-32.3(d), nursing home administrators whose actions cause their residents to fall sick could still be prosecuted for criminal (or culpable) negligence, which is defined as "recklessness or carelessness, proximately resulting in injury or death" or the "thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *State v. Jones*, 353 N.C. 159, 165 (2000). Intentional, willful, or wanton violation of a statute designed for the protection of human life—such as failure to follow federal or state regulations on COVID-19 precautions— also could establish criminal negligence. *Id.* When a safety statute is unintentionally violated, criminal negligence exists where the violation is "accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable [foreseeability], amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others." *Id.* (quotation omitted).

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Nursing home and residential facility administrators already had much to contend with as they try to keep their residents safe during this global pandemic and monitor constantly changing federal and state guidance on COVID-19. Now, it appears, they must also contend with the risk of criminal prosecution if they fail.

If you have any questions, please contact the authors of this article.

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