Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
CarePlex of Silver Spring,	)	Date: January 31, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-324
	)	Decision No. CR457
Health Care Financing Administration.	)	
	)	

DECISION

I enter summary disposition in favor of the Health Care Financing Administration (HCFA) and against Petitioner, CarePlex of Silver Spring. I sustain HCFA's determination to impose a civil money penalty against Petitioner of $750 a day, beginning on September 28, 1995 and ending on December 15, 1995, for a total amount of $59,250.

I. Background

On March 14, 1996, HCFA notified Petitioner that HCFA concurred with a recommendation from the Maryland Department of Health and Mental Hygiene (Maryland State survey agency) to impose a civil money penalty against Petitioner in the amount of $750 a day for the period beginning September 28, 1995, and ending on December 15, 1995, for a total civil money penalty of $59,250. HCFA Ex. 11 at 1; see HCFA Ex. 4.[1] HCFA advised Petitioner that the penalty was based on findings made by the Maryland State survey agency at a survey of Petitioner conducted on September 12 - 15, 18 - 22, and 25 - 28, 1995 (September 1995 survey). Id. HCFA noted that, in that survey, the Maryland State survey agency had found that Petitioner was not complying with federal requirements governing its participation in Medicare and Medicaid programs. Id.

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[1] HCFA submitted 11 exhibits in support of its motion for summary disposition (HCFA Exs. 1 - 11). Petitioner, in opposing the motion, submitted nine exhibits (P. Exs. 1 - 9). The parties have not objected to my receiving into evidence any of these exhibits. Therefore, I receive into evidence HCFA Exs. 1 - 11 and P. Exs. 1 - 9.

Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision. On August 29, 1996, I held a prehearing conference. At the conference, the parties agreed that this case involved only a legal issue, that being whether, as a matter of law, Petitioner could be held to be responsible for the deficiencies that had been identified by the Maryland State survey agency at the survey it conducted of Petitioner in September 1995. Petitioner stated that, if it were found to be responsible for the deficiencies, it would not contest either the existence of the deficiencies that were identified by the Maryland State survey agency or the amount of the civil money penalty that HCFA had determined to impose. Prehearing Order, September 11, 1996, Paragraph 2.

I established a schedule for simultaneous submissions by HCFA and Petitioner of motions for disposition. I permitted the parties to submit response briefs as well. The parties submitted their briefs and proposed exhibits in compliance with my prehearing order. I base my decision in this case on the undisputed material facts, the law, and the parties' arguments.

II. Issue, findings of fact and conclusions of law

The issue in this case is whether, as a matter of law, Petitioner may be held responsible for the deficiencies which the Maryland State survey agency identified in its September 1995 survey of Petitioner. More specifically, the issue is whether Petitioner is responsible for a civil money penalty that HCFA determined to impose based on the deficiencies identified by the Maryland State survey agency at its September 1995 survey, in light of the fact that Petitioner acquired the facility which was the subject of the Maryland State survey agency's survey on September 11, 1995, one day before the inception of the September 1995 survey.

In its brief, Petitioner asserts that there is an additional issue. Petitioner asserts that it has not waived its right to contest the amount of the civil money penalty that HCFA determined to impose against Petitioner. Petitioner's Brief at 8, n.5. Therefore, according to Petitioner, it remains entitled to a hearing as to the amount of the penalty, should I decide that it is responsible for the penalty. As I discuss below, at Part III.C. of this decision, Petitioner has waived its right to contest the amount of the civil money penalty that HCFA determined to impose.

I make the following findings of fact and conclusions of law (Findings) in support of my decision that Petitioner is responsible for the deficiencies that were identified by the Maryland State survey agency in its September 1995 survey of

Petitioner. I discuss each of my Findings below, at Part III. of this decision.

1. On September 11, 1995, Petitioner acquired ownership of the long-term care facility that is the subject of this case (the facility).

2. The Maryland State survey agency surveyed the facility on September 12 - 15, 18 - 22, and 25 - 28, 1995, and, based on that survey, found the facility to be deficient in complying with federal requirements governing participation of nursing facilities in the Medicare and Medicaid programs.

3. On December 15, 1995, Petitioner attained substantial compliance with federal participation requirements.

4. Petitioner did not cause or create the deficiencies that the Maryland State survey agency identified at its September 1995 survey.

5. Petitioner did not correct the deficiencies that the Maryland State survey agency identified at its September 1995 survey prior to December 15, 1995.

6. The privilege which a Medicare provider agreement confers on a provider to claim reimbursement from Medicare for items or services provided to beneficiaries is conditioned on the provider's compliance with applicable laws and participation requirements.

7. Medicare participation requirements provide that, where there is a change of ownership of a facility which participates in Medicare, that facility's provider agreement will automatically be assigned to the facility's new owner.

8. Under regulations which govern participation in Medicare, a lease of a provider facility constitutes a change of ownership of that facility.

9. An assigned provider agreement is subject to all of the requirements which applied prior to assignment of the agreement, including the requirement that the holder of the agreement comply with all applicable Medicare and Medicaid participation requirements.

10. Where a provider takes assignment of a provider agreement, that provider becomes responsible for assuring that the facility covered by the agreement complies with applicable Medicare participation requirements and becomes responsible for any remedies that HCFA may impose for failure to comply with applicable Medicare and Medicaid participation requirements.

11. The responsibilities that a provider assumes when it takes assignment of a provider agreement include the responsibility to correct any deficiency that may predate the assignment, and to comply with any remedy imposed by HCFA based on that deficiency.

12. Although Petitioner did not cause the deficiencies that the Maryland State survey agency identified at its September 1995 survey, Petitioner is responsible for correcting the deficiencies, and for complying with any remedy that might be imposed by HCFA as a consequence of the deficiencies.

13. Petitioner is responsible for any civil money penalty that is imposed against it, based on its noncompliance with federal participation requirements between September 28, 1995 and December 15, 1995.

14. Petitioner is responsible for a civil money penalty of $750 per day, beginning on September 28, 1995 and ending on December 15, 1995, for a total civil money penalty of $59,250.

15. Petitioner waived its right to contest the amount of the civil money penalty imposed against it by HCFA.

III. Discussion

A. The undisputed material facts (Findings 1 - 5)

Effective November 10, 1989, Sylvan Manor Health Care Center was certified by HCFA to participate in Medicare as a skilled nursing facility. HCFA Ex. 1 at 1. The facility operated at 2700 Barker Street, Silver Spring, Maryland, and did business as Sylvan Manor Nursing Home. See HCFA Ex. 2 at 1 - 2. Effective September 11, 1995, the facility underwent a change of ownership. HCFA Ex. 2 at 3. On that date, the facility was leased from its previous operator by Continuum Care Corporation of Maryland, Inc., d/b/a Sylvan Manor Health Care Center (Continuum Care Corporation). On December 4, 1995, Continuum Care Corporation changed its name to Continuum Care Corporation of Maryland, Inc., d/b/a CarePlex of Silver Spring. P. Ex. 1 at 1; HCFA Ex. 3. Continuum Care Corporation of Maryland, Inc. is the Petitioner in this case.

The Maryland State survey agency conducted its September 1995 survey of Petitioner's facility on September 12 - 15, 18 - 22, and 25 - 28, 1995. HCFA Ex. 4 at 1. The September 1995 survey thus began on the day after Petitioner acquired the facility. On October 20, 1995, the Maryland State survey agency advised Petitioner that it had identified deficiencies in Petitioner's compliance with federal participation requirements. Id.[2] These asserted deficiencies were specifically identified in a survey

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[2] The October 27, 1995 notice was addressed to "Sylvan Manor Health Care Center." HCFA Ex. 4 at 1. However, by that date Petitioner had acquired the facility. HCFA Ex. 2 at 3.

report which the Maryland State survey agency furnished to Petitioner. Id.; HCFA Ex. 5. The Maryland State survey agency advised Petitioner that it would recommend to HCFA that HCFA impose a civil money penalty, beginning September 28, 1995, of $750 per day, which would accrue until the facility corrected its outstanding deficiencies and was found to be in substantial compliance with the terms of its provider agreement. HCFA Ex. 4 at 1 - 2.

In a letter to HCFA dated October 23, 1995, the Maryland State survey agency informed HCFA that it was recommending that the facility be classified as a "poor performer" and that a civil money penalty of $750 per day be imposed against it. HCFA Ex. 6. The Maryland State survey agency advised HCFA that its determination that the facility was a "poor performer" was based on the facility's compliance history. Id. at 1. The Maryland State survey agency observed that, on September 11, 1995, the facility had changed ownership. Id. It noted that the new owner objected strongly to it being made subject to remedies based on the poor performance of its predecessor. Id. at 1 - 2. Notwithstanding, the Maryland State survey agency told HCFA that it believed that it had made the correct determination. Id. at 2.

On November 3, 1995, Petitioner submitted a plan of correction to the Maryland State survey agency. See HCFA Ex. 8 at 1. In that plan of correction, Petitioner advised the Maryland State survey agency that some of the deficiencies that had been identified at the September 1995 survey would not be corrected until after December 28, 1995. See Id.

On December 18 - 20, 1995, the Maryland State survey agency conducted a resurvey of Petitioner's facility. HCFA Ex. 9. The Maryland State survey agency concluded from the resurvey that Petitioner was in substantial compliance with federal participation requirements. Id. On February 21, 1996, the Maryland State survey agency advised Petitioner that it was recommending to HCFA that a civil money penalty be imposed against Petitioner in the amount of $750 per day, beginning September 28, 1995 and ending on December 15, 1995. HCFA Ex. 10 at 1.

On March 14, 1996, HCFA advised Petitioner that it concurred with the recommendation for imposition of a civil money penalty that had been made by the Maryland State survey agency. HCFA Ex. 11. HCFA announced that, based on the recommendation, it had determined to impose against Petitioner a civil money penalty in the amount of $750 per day, beginning September 28, 1995 and ending on December 15, 1995, for a total penalty of $59,250. Id. at 1.

There is no evidence to show that Petitioner created or caused any of the deficiencies that were identified by the Maryland State survey agency at its September 1995 survey. Indeed, from the evidence which the parties offered in support of their

respective positions, it is fair to infer that Petitioner did not cause or create these deficiencies. The Maryland State survey agency began its September 1995 survey on September 12, 1995, the day after Petitioner acquired the facility that was the subject of the survey. Petitioner could not have asserted the control or lack of control that would have caused the deficiencies that were identified at the September 1995 survey.

It is fair also to conclude that the deficiencies that were identified at the September 1995 survey persisted until they were corrected by Petitioner. The date of correction was determined by the Maryland State survey agency and by HCFA to be December 15, 1995. Petitioner has not offered any evidence in conjunction with the motion for summary disposition to show that the deficiencies that were identified at the September 1995 survey were corrected prior to December 15, 1995. Indeed, in its plan of correction, Petitioner averred that some of the deficiencies that were identified at the September 1995 survey would not be corrected before December 28, 1995. HCFA Ex. 8 at 1.

The Maryland State survey agency reluctantly made its February 1996 recommendation to HCFA that HCFA impose civil money penalties against Petitioner. The unrebutted testimony of Carol Benner, Director of Licensing and Certification Administration of the Maryland State survey agency, is that the Maryland State survey agency made its civil money penalty recommendation to HCFA after receiving direction from HCFA to do so. P. Ex. 2. Furthermore, her unrebutted testimony is that it was not the Maryland State survey agency's intention that a significant civil money penalty be imposed against Petitioner, because Petitioner had actually corrected deficiencies which were attributable to the previous owner of the facility at issue. Id. at 3.

B. Governing law (Findings 6 - 11)

A facility may not participate in Medicare unless it enters into a provider agreement with HCFA. Social Security Act (Act), section 1866(a)(1); see 42 C.F.R. §§ 489.3, 489.11(b). A provider agreement gives a facility a privilege to claim reimbursement from Medicare for items or services that it provides to beneficiaries. That privilege is conditioned on the provider complying with Medicare participation requirements. The Secretary, or her delegate, HCFA, may terminate a facility's provider agreement where the facility is not complying substantially with Medicare participation requirements. Act, section 1866(b)(2)(A). Where a facility is a long-term care facility, HCFA may impose additional remedies against that facility if it fails to comply substantially with Medicare participation requirements. These remedies may include imposition of a civil money penalty. Act, section 1819; 42 C.F.R. §§ 488.400 et seq.

Under applicable regulations which govern a provider's participation in Medicare, a facility's provider agreement automatically is transferred to a new owner of the facility at

the time that ownership of the facility is transferred. 42 C.F.R. § 489.18(c). Acquisition of a facility by leasing that facility constitutes a transfer of ownership of the facility. 42 C.F.R. § 489.18(a)(4). Where an individual or entity leases a facility that participates in Medicare, that individual or entity automatically acquires the facility's provider agreement.

Transfer of a provider agreement is a transfer of both the privilege of participating in Medicare and of the obligation to comply with all participation requirements. An assigned agreement is subject to all applicable statutes and regulations and to the terms and conditions under which it was issued. 42 C.F.R. § 489.18(d). Where an individual or entity obtains a provider agreement through transfer of that agreement, that individual or entity assumes all of the obligations and responsibilities that were incurred by the original holder of that agreement. Responsibilities that are assumed include responsibilities that may predate the date of transfer of the provider agreement. United States v. Vernon Home Health, Inc., 21 F.3d 693 (5th Cir. 1994), cert. denied, 115 S. Ct. 575 (1994) [hereinafter Vernon Home Health, Inc.].

The responsibilities that are assumed by an entity which acquires a facility, and therefore, that facility's provider agreement, may include the duty to correct any deficiencies in the entity's compliance with Medicare participation requirements, even if those deficiencies were caused by the facility's previous owner and predate the date of transfer of ownership. See Vernon Home Health, Inc., 21 F.3d at 696. Those responsibilities include also the responsibility to comply with any remedy imposed by HCFA for failure to correct the deficiencies.

Petitioner argues that Vernon Home Health, Inc. does not support a conclusion that a provider which acquires a facility assumes responsibility for remedies that might be imposed due to deficiencies that predate the date of the acquisition. Petitioner notes that the preexisting liability in Vernon Home Health, Inc. was a Medicare overpayment. Petitioner asserts that an overpayment is distinguishable from other liabilities, such as a failure to comply with Medicare participation requirements. Petitioner's Reply Brief at 7. I am not persuaded that the Vernon Home Health, Inc. decision should be read so narrowly as Petitioner asserts. The decision stands for a broader principle that any preexisting obligation to Medicare by a facility becomes the responsibility of the provider that acquires the facility.

More importantly, as I shall discuss in detail below, this case does not, strictly speaking, involve Petitioner's responsibility for a preexisting deficiency. It is true that the deficiencies which are the basis for the civil money penalty in this case originated prior to Petitioner's acquisition of the facility. But, the penalty is based on those deficiencies that continued after Petitioner acquired the facility and which Petitioner did not correct until December 15, 1995. My decision here is not based on a direct application of the Vernon Home Health, Inc.

decision to the facts, but on Petitioner's obligation to correct deficiencies that existed after it acquired the facility.

C. Application of the law to the undisputed material facts (Findings 12 - 14)

Application of the law to the undisputed material facts establishes Petitioner to be responsible for the civil money penalty that HCFA determined to impose. When Petitioner acquired the facility, it assumed responsibility for any deficiencies that predated Petitioner's assumption of ownership, which continued after the date of acquisition and for any remedies that might result from those deficiencies. Thus, Petitioner became responsible for the deficiencies that were identified at the September 1995 survey and for any remedies that HCFA imposed, based on the continuation of the deficiencies until they were corrected. Petitioner was responsible for any penalties that accrued, until the date that the facility attained substantial compliance with Medicare participation requirements. That date was December 15, 1995. Therefore, Petitioner is responsible for a civil money penalty which began to accrue on September 28, 1995 through December 15, 1995. The daily amount of the penalty is $750, and the total amount is $59,250.

Petitioner asserts that, for several reasons, it would be unlawful or unreasonable to make Petitioner liable for a civil money penalty. I have considered each of the arguments made by Petitioner to support its assertion that it is not responsible for a civil money penalty. I disagree with each of them.

1. Petitioner's assertion that there is no authority for HCFA's determination to impose a civil money penalty (Petitioner's Brief at 11 - 12)

Petitioner asserts that there is not either in the Act or in implementing regulations a specific provision which gives HCFA authority to impose a civil money penalty against Petitioner as a "successor to a wrongdoer." To be sure, neither section 1819 of the Act nor implementing regulations governing long-term care facilities states expressly that an entity which acquires a long-term care facility is responsible for a civil money penalty that may be based on deficiencies that predate the acquisition but which the acquiring entity does not correct until a date subsequent to the date of the acquisition. However, given these circumstances, I conclude that the intent of both the Act and the regulations is to impose such a responsibility on the acquiring entity. I find that this intent is made clear by 42 C.F.R. § 489.18(d), which provides in effect that a provider who acquires a facility is responsible for any deficiencies caused by its predecessor.

Petitioner argues that the only regulation which addresses the liability of a provider for deficiencies caused by its predecessor is 42 C.F.R. § 488.414(d)(3). This section provides that a facility may not avoid a remedy based on findings of

substandard care at repeated surveys of that facility, on the ground that the facility has undergone a change of ownership. Petitioner asserts that this section was not used by HCFA as a basis for imposing a remedy here. From this, Petitioner asserts that HCFA failed to rely on the one section in the regulations which gives it explicit authority to impose a remedy on a provider for deficiencies attributable to that provider's predecessor. Petitioner's Brief at 11. I do not agree with this argument. The fact that HCFA may not have relied on 42 C.F.R. § 488.414 to impose a remedy against Petitioner does not derogate from its authority to impose a remedy in this case.[3]

The provisions of 42 C.F.R § 488.414(d)(3) reinforce my conclusion that the Act and regulations impose responsibility on an acquiring provider to correct the deficiencies caused by its predecessor. The regulation makes it explicit that such requirement exists in the case of a facility that has been found previously to have provided substandard care. However, it does not suggest that the responsibility to correct deficiencies that predate acquisition of a facility applies only to a provider that acquires an entity that has been found previously to be providing substandard care.

2. Petitioner's argument that the penalty is punitive (Petitioner's Brief at 13 - 17)

Petitioner argues that it would be inconsistent with the Act's remedial purpose, and unlawfully punitive, to impose a civil money penalty against it. Petitioner's Brief at 13 - 18. Petitioner asserts that the remedial purpose of the provisions of the Act which relate to long-term care facilities, including those provisions which authorize the Secretary and HCFA to impose civil money penalties against those facilities that are not complying substantially with federal participation requirements, is to improve quality of care and to bring substandard facilities into compliance with federal requirements. Petitioner's Brief at 13. According to Petitioner, it is inconsistent with that remedial purpose for HCFA to impose a civil money penalty against it -- and, therefore, punitive -- because Petitioner is blameless for the deficiencies which are the basis of the penalty.

I agree with Petitioner that the Act's purpose is remedial, and not punitive. A remedy that is imposed may be unlawfully punitive if it does not comport with the Act's remedial purpose and with the regulations that implement the Act. However, I conclude that the civil money penalty that HCFA determined to

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[3] It is not entirely clear that the past performance of the facility had no bearing on HCFA's determination of the remedy. The Maryland State survey agency told HCFA on October 23, 1995, that it was basing its recommendation of a civil money penalty in part on the facility's history as a substandard performer. HCFA Ex. 6.

impose in this case is consistent with the Act's remedial purpose.

The remedial purpose of a civil money penalty is to spur a deficient provider to take corrective action. The deficient provider is put on notice that, if it does not correct a substantial deficiency, it will be penalized in an amount that reflects the seriousness of the deficiency and other relevant factors. 42 C.F.R. § 488.408. The spur to correction is enhanced by the fact that the penalty will continue to accrue for each day that the deficiency is not corrected.

The fundamental premise on which Petitioner rests its argument that the civil money penalty which HCFA determined to impose is punitive is Petitioner's assertion that the civil money penalty which HCFA determined to impose is for deficiencies that predated Petitioner's acquisition of the facility. That premise is not accurate. The civil money penalty that HCFA determined to impose is premised on Petitioner's failure to correct continuing deficiencies, and is not a punishment based solely on deficiencies that predated Petitioner's acquisition of the facility. The deficiencies at issue originated previous to Petitioner's acquisition of the facility. But they continued to exist, by Petitioner's own admission, after Petitioner acquired the facility and until December 15, 1995.

I do not mean to make light of Petitioner's efforts to correct these deficiencies, but it is nevertheless an undisputed fact that the deficiencies continued for a time after Petitioner acquired the facility. The civil money penalty that HCFA determined to impose against Petitioner does not penalize Petitioner for any dates prior to the date that Petitioner acquired the facility. It begins on September 28, 1995, more than two weeks after the date that Petitioner acquired the facility.

Petitioner asserts that HCFA determined to impose the civil money penalty against it only after Petitioner corrected the deficiencies that were identified at the September 1995 survey. Petitioner argues that a civil money penalty would serve no remedial purpose in this case because, inasmuch as the penalty was imposed after the deficiencies were corrected, it could not operate as a spur to induce Petitioner to correct the deficiencies.

HCFA's determination to impose a civil money penalty is a ratification of a recommendation that was made to HCFA before the date that the deficiencies were corrected, and of which Petitioner had notice. The likelihood that a penalty might be imposed against Petitioner constituted a remedial inducement for Petitioner to correct deficiencies. It is true that HCFA made its final determination to impose a civil money penalty only after Petitioner had corrected the deficiencies that were identified at the September 1995 survey. But, in fact, Petitioner was notified by the Maryland State survey agency on

October 20, 1995, weeks prior to the date that Petitioner corrected the deficiencies, that the Maryland State survey agency would recommend to HCFA that HCFA impose a civil money penalty of $750 a day until the deficiencies were corrected. HCFA Ex. 4. Thus, Petitioner did have advance notice that a penalty might be imposed against it for failure to correct deficiencies, and that the penalty might accrue for each day that the deficiencies were not corrected.

3. Petitioner's argument that HCFA failed to comply with statutory requirements in determining to impose a civil money penalty (Petitioner's Brief at 17 - 21)

Petitioner argues that, in several respects, HCFA did not comply with the requirements of the Act in determining to impose a civil money penalty against Petitioner. First, Petitioner asserts that the regulations which govern HCFA's determination of the amount of a civil money penalty may, in at least one respect, contravene the requirements of the Act, and therefore may be ultra vires. Second, Petitioner contends that the Act contains a notice requirement which HCFA failed to comply with in giving Petitioner notice of its determination to impose a civil money penalty.

Sections 1819 and 1919 of the Act, which authorize the Secretary to impose a civil money penalty against a long-term care facility that fails to comply substantially with federal participation requirements under Medicare (section 1819) and State health care programs (section 1919), require that any civil money penalty be imposed in the same manner as would apply to a civil money penalty imposed pursuant to section 1128A of the Act. Section 1128A requires that, in imposing a civil money penalty, the Secretary take into account factors which include the nature of the deficiencies present at a facility, the provider's degree of culpability, history of prior offenses, and financial condition, and such other matters as justice may require.

Petitioner argues that HCFA's actions are deficient when measured against these statutory requirements. First, according to HCFA, the regulations which implement the civil money penalty provisions may be ultra vires. Petitioner observes that 42 C.F.R. § 488.438(f), which describes the factors which are to be considered by HCFA in determining the amount of a civil money penalty, provides, at 42 C.F.R. § 488.438(f)(4), that a facility's degree of culpability is to be considered as follows:

> *Culpability* for purposes of this paragraph includes, but is not limited to, neglect, indifference, or disregard for resident care, comfort or safety. The absence of culpability is not a mitigating circumstance in reducing the amount of the penalty. (Emphasis added).

Petitioner asserts that the emphasized language may limit unreasonably, and in a way that Congress did not contemplate in enacting the civil money penalty provisions of the Act, HCFA's

authority to consider a facility's culpability in determining a civil money penalty.

I do not have authority to decide whether a regulation is ultra vires. I am an agent of the Secretary for purposes of hearing and deciding cases involving HCFA, and the Secretary's implementing regulations are as binding on me as they are on HCFA. Therefore, I make no decision as to whether 42 C.F.R. § 488.438(f)(4) is ultra vires.

However, the provisions of 42 C.F.R. § 488.438(f)(4) may be consistent with the Act's requirement that culpability be considered as a factor in determining the amount of a civil money penalty. Section 1128A(d)(2) of the Act requires the Secretary to take into account a person's "degree of culpability" in determining the amount of a civil money penalty. It does not prescribe how the Secretary is to evaluate culpability.

Petitioner asserts that the law implicitly requires HCFA to advise an entity against whom it has determined to impose a civil money penalty precisely how it has weighed the factors which are the basis for the penalty. Petitioner argues that the notice that HCFA sent to Petitioner advising Petitioner of HCFA's determination to impose a civil money penalty is defective. According to Petitioner, the notice merely states as conclusions that HCFA considered factors mandated by law, without stating precisely how HCFA evaluated these factors, and the weight that HCFA assigned to them. Petitioner asserts that, for example, it is not possible to tell from HCFA's notice whether HCFA actually considered Petitioner's culpability in determining to impose a civil money penalty against Petitioner.

The notice requirements that HCFA must adhere to in advising a provider of its intent to impose a civil money penalty are contained in 42 C.F.R. § 488.434. That regulation provides that, in its notice, HCFA must advise the provider, among other things, of: the nature of the provider's noncompliance; the statutory basis for the civil money penalty; the amount of penalty per day of noncompliance by the provider; and any factors that are specified in 42 C.F.R. § 488.438(f) that were considered by HCFA in determining the amount of the penalty. The factors enumerated in 42 C.F.R. § 488.438(f) include: the facility's compliance history; the facility's financial condition; other factors specified in 42 C.F.R. § 488.404; and the facility's degree of culpability.

Petitioner seems to suggest that, either under the regulations or under section 1128A of the Act, there exists a requirement for HCFA to state in its notice of a civil money penalty the precise rationale used by HCFA for determining to impose a penalty, including the rationale used to calculate the amount of the penalty. I do not find that such a requirement exists in the regulations or in the Act. The regulations and the Act plainly require HCFA to state, generally, what penalty it has determined to impose and the basis for the penalty. They do not require a

bill of particulars from HCFA. Nor is that requirement contained in the Act.

The notice which HCFA sent to Petitioner in this case states precisely the beginning and end dates of the penalty that HCFA determined to impose and the amount of the penalty. HCFA Ex. 11 at 1. Additionally, the notice advises Petitioner that:

> In addition to taking into account the scope and severity of the recent deficiencies, [HCFA] considered your facility's past history including repeat deficiencies, its degree of culpability and its financial condition in determining the amount of the civil money penalty that [HCFA is] imposing for each day of noncompliance.

Id. The notice thus tells Petitioner that the penalty is premised on the facility's compliance history, on the level of Petitioner's culpability for the deficiencies, and on Petitioner's financial ability to repay the penalty. That it does not state how HCFA weighted these factors is obvious. Nor is it clear from the notice what HCFA means by the term "degree of culpability."

HCFA's notice letter complies, barely, with what is required by the Act and the regulations. The notice is adequate to advise Petitioner what factors HCFA relied on in determining the amount of the civil money penalty. It is sufficient, therefore, to put Petitioner on notice as to what would be addressed at a hearing concerning the penalty. That is consistent with the notice requirements of 42 C.F.R. § 488.434.

I am not suggesting by this conclusion that HCFA could rely on a notice of this character as prima facie proof that its determination to impose a civil money penalty is reasonable, at a hearing concerning the amount of the penalty. At such a hearing, HCFA might be required to prove exactly how it determined to impose the penalty.[4] All I conclude here is that the notice that HCFA sent to Petitioner is minimally sufficient to tell Petitioner what would be at issue if Petitioner challenged the determination to impose a civil money penalty.

Petitioner asserts also that section 1128A of the Act requires that HCFA consider other factors that justice may require in determining to impose a civil money penalty. Petitioner asserts that it is not clear from the notice that HCFA did so in this case. The notice regulation, 42 C.F.R. § 488.434, and the two

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[4] However, the provider would have the ultimate burden of proving that HCFA's conclusion as to the level of the provider's noncompliance is clearly erroneous. 42 C.F.R. § 498.61(b). That burden does not derogate from HCFA's initial burden of establishing how it came up with its determination to impose a penalty.

regulations that are incorporated therein, 42 C.F.R. §§ 488.404 and 488.438, do not specifically state that HCFA must consider other factors that justice may require as a part of its determination to impose a civil money penalty. Arguably, the factors described in these regulations subsume such other factors. In any event, HCFA's notice comported with the specific requirements of 42 C.F.R. § 488.434. In order to find that HCFA's notice is defective because it did not recite that HCFA considered other factors that justice may require, I would have to decide that the notice regulation is ultra vires. As I explain above, I have no authority to make such a finding.

4. Petitioner's argument that imposition of a civil money penalty against it is unfair (Petitioner's Brief at 21 - 29)

Petitioner argues that imposition of a civil money penalty against it would be unfair. Petitioner asserts that it is being penalized by HCFA for the deficiencies caused by its predecessor which predated Petitioner's acquisition of the facility and not for anything that Petitioner did or did not do.

My authority in a civil money penalty case is to decide whether HCFA's action comports with the requirements of the regulations which implement the relevant provisions of the Act. I do not have authority to decide questions of equity. Thus, the short answer to Petitioner's argument is that HCFA's action must be sustained if it complies with the provisions of the Act and regulations, even if it could be viewed as being "unfair" to Petitioner. However, I am not persuaded from Petitioner's argument that HCFA's determination in this case actually manifests unfairness.

Petitioner's argument that HCFA is acting unfairly rests on its characterization of HCFA's determination as being predicated solely on deficiencies that predate Petitioner's acquisition of the facility, and for which Petitioner bears no responsibility. However, as I have discussed above, that is not an accurate characterization of what HCFA determined in this case. HCFA's remedy is predicated on the fact that deficiencies were identified at the September 1995 survey whose origin must have predated Petitioner's acquisition of the facility. But in fact, the entire amount of the civil money penalty is based on the failure by Petitioner to correct those deficiencies until December 15, 1995. The penalty did not begin to accrue until September 28, 1995, more than two weeks after the acquisition date. Had Petitioner corrected the deficiencies before September 28, then, presumably, there would be no penalty.

5. Petitioner's argument that imposition of a civil money penalty against it is poor public policy and is inconsistent with the purposes of the Act (Petitioner's Brief at 29 - 31)

Petitioner argues that to impose a civil money penalty against it would frustrate the Act's purpose to encourage facilities to comply with federal participation requirements. In particular, Petitioner asserts that the remedy in this case serves as a disincentive to providers to acquire facilities that might be deficient, and to correct those deficiencies. Moreover, Petitioner observes that the Maryland State survey agency only reluctantly recommended that a penalty be imposed against Petitioner.

I have no authority to consider the public policy implications of HCFA's determination. My authority is limited to deciding whether HCFA's determination comports with the requirements of the Act and regulations. In this case, I find that it does.

D. Petitioner's waiver of its right to contest the amount of the civil money penalty (Finding 15)

I find that Petitioner waived its right to contest the amount of the civil money penalty. At the August 29, 1996 prehearing conference, Petitioner advised me explicitly that it wished to argue only the issue of its legal responsibility for the civil money penalty. My September 11, 1996 prehearing order made it plain that the motion and briefing schedule that I was establishing was based on Petitioner's decision not to contest the amount of the penalty.

I am not suggesting that there would never be a case where I would permit a party to change its position as to the issues it wished to assert. However, where, as happened in this case, a party explicitly announces that it is abandoning an issue, that party ought to at least make a showing of good cause as grounds to reinstate that issue. Petitioner has not made any such showing of good cause here.

IV. Conclusion

I conclude that, as a matter of law, HCFA is authorized to impose a civil money penalty against Petitioner. I sustain a civil money penalty which accrues from September 28, 1995 until December 15, 1995, in the amount of $750 per day, for a total amount of $59,250.

/s/

Steven T. Kessel
Administrative Law Judge