Department of Health and Human Services

# DEPARTMENTAL APPEALS BOARD

## Civil Remedies Division

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| In the Case of: | ) | |
| | ) | |
| Rosewood Manor Incorporated, | ) | Date: July 29, 1998 |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| - v. - | ) | Docket No. C-98-176 |
| | ) | Decision No. CR544 |
| Health Care Financing Administration. | ) | |
| | ) | |

## DECISION

In this Decision, I grant the motion to dismiss filed by the Health Care Financing Administration (HCFA) and order the above-captioned action dismissed pursuant to 42 C.F.R. § 498.70(b) and (c). In doing so, I issue the following formal findings of fact and conclusions of law, which are explained in the text of my Decision:

1. "Receipt," as used in 42 C.F.R. §§ 498.40(a) and 498.22(b)(3), means only that HCFA's notice of initial determination is taken into the possession, custody, or control of the "affected party" to whom the notice is addressed.

2. The "affected party" in this case is Rosewood Manor Incorporated (Rosewood Manor).

3. HCFA's letter dated November 7, 1997 is a notice of initial determination subject to challenge by Rosewood Manor, or its legal representative or other authorized official, in accordance with the manner and timing specified by 42 C.F.R. § 498.40.

4. On November 7, 1997, HCFA sent its November 7, 1997 notice of initial determination (also referred to as "notice letter") to Rosewood Manor for receipt by and at Rosewood Manor via both telefax and certified mail.

5. For the period from November 6, 1997 through November 23, 1997, Rosewood Manor's Administrator and owner, Hendrik Melton, was on a hunting trip out of state and could not be reached by telephone. No one at Rosewood Manor had responsibility for reading HCFA's November 7, 1997 notice letter or for taking action in response to it during Mr. Melton's absence.

6. While Mr. Melton was away on his hunting trip, Rosewood Manor received (i.e., obtained possession, control, or custody of) HCFA's November 7, 1997 notice letter.

7. For purposes of 42 C.F.R. §§ 498.40(a) and 498.22(c)(3), HCFA's use of Mr. Melton's name and title (Administrator) in the address portion of its November 7, 1997 notice letter has no legal effect on the receipt of said notice letter by Rosewood Manor through its other employees or agents.

8. For purposes of 42 C.F.R. §§ 498.40(a) and 498.22(c)(3), the absence of anyone with responsibility to read the notice letter or to request an appeal of it during Mr. Melton's absence has no legal effect on Rosewood Manor's receipt of HCFA's November 7, 1997 notice letter before his return.

9. Rosewood Manor has not shown that November 23, 1997, the date of Mr. Melton's return from his hunting trip, was the date on which Rosewood Manor received HCFA's November 7, 1997 notice letter.

10. On the facts of this case and pursuant to 42 C.F.R. § 498.22(c)(3), Rosewood Manor must be presumed to have received the mailed copy of HCFA's November 7, 1997 notice letter no later than November 12, 1997.

11. Even though a request for hearing may be filed by an "affected party," its "legal representative," or its "other authorized official" pursuant to 42 C.F.R. § 498.40(a),

each of these three individuals or entities is not entitled to a new 60-day filing period whenever HCFA's notice of initial determination is transferred from one individual or entity to the other.

12. Nothing purporting to be a request for hearing was filed timely by or for Rosewood Manor within the period specified by 42 C.F.R. § 498.40(a).

13. On January 16, 1998, Mr. Melton filed a letter in which he asked for a hearing on behalf of Rosewood Manor. Mr. Melton's January 16, 1998 request letter referenced only his receipt of a letter from HCFA dated January 13, 1998.

14. HCFA's letter to Rosewood Manor dated January 13, 1998 contains no initial determination subject to administrative review or hearing.

15. Even if Rosewood Manor's arguments before me were considered as its request for me to extend its filing period to January 16, 1998 retroactively pursuant to 42 C.F.R. § 498.40(c), I find no good cause to grant such an extension.

16. The above-captioned action must be dismissed pursuant to 42 C.F.R. § 498.70(b) and (c).

## I. Background and summary of dispute

The record before me establishes without dispute that HCFA issued its notice of initial determination dated November 7, 1997, imposing against Rosewood Manor the enforcement remedies of a denial of payment for new Medicare and Medicaid admissions (DPNA) effective on November 24, 1997, and a civil money penalty (CMP) of $1,000 for one day of noncompliance, September 7, 1997. Thereafter, Rosewood Manor's President and Administrator, Hendrik Melton, submitted a letter dated January 16, 1998, which refers to the receipt of another letter from HCFA dated January 13, 1998, complains that Petitioner was being noticed of its hearing rights belatedly in HCFA's January 13, 1998 letter, and states, "I am requesting a hearing regarding the above case . . . ."

HCFA contends that no request for hearing has been filed timely to challenge its November 7, 1997 notice of initial determination. In support of its motion to dismiss, HCFA relies

primarily upon the provisions of the regulations which state that a request for hearing must be filed within 60 days from receipt of the notice of initial determination and that the receipt date is presumed to be five days after the date of the notice, unless an actual receipt date is shown. 42 C.F.R. § 498.40(a)(2); 42 C.F.R. § 498.22(b)(3)(as incorporated by 42 C.F.R. § 498.40(a)(2)). HCFA submitted evidence to demonstrate that its notice of initial determination dated November 7, 1997 was sent to Rosewood Manor by telefax that same day, as well as by certified mail sent concurrently. HCFA Reply, 1 at n.2; HCFA Attachment (Att.) 1.[1] On the basis of the foregoing evidence and regulations, HCFA contends that Rosewood Manor should have filed a request for hearing by no later than January 11, 1998, even if the presumed receipt date were applied to the mailed version of the notice letter to calculate the filing period. Instead, a document purporting to be Rosewood Manor's request for hearing was filed on January 16, 1998, five days beyond the period allotted by 42 C.F.R. § 498.40(a).[2]

Rosewood Manor opposes the motion to dismiss by relying on those provisions of the regulations which state that a hearing request may be filed within 60 days of receipt by "other authorized official" (42 C.F.R. § 498.40(a)), and emphasizing that a later receipt date may be shown to rebut the presumption that HCFA's notice was received five days after the date of the letter (42 C.F.R. § 498.22(b)(3)). Accordingly, Rosewood submitted the affidavit of its Administrator and owner, Hendrik Melton, to show that:

> -- he was away on a hunting trip out of the state from November 6, 1997 through November 23, 1997;

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[1] I have not excluded from the record any of the documents attached to the briefs submitted by the parties.

[2] By regulation, the request for hearing must be "filed" with the appropriate tribunal. 42 C.F.R. § 498.40(a). Nothing of record shows that Rosewood Manor's request letter was sent by any means other than regular United States mail from its city of origin, Grand Rapids, Michigan, to HCFA's office in Chicago, Illinois. The copy of the request letter forwarded to our office by HCFA indicates that Rosewood Manor's request letter was not received by HCFA until January 21, 1998. However, HCFA uses the date of Rosewood Manor's request letter, January 16, 1998, as the date of filing. HCFA Motion, 2. Therefore, I will also refer to the date of filing as January 16, 1998.

-- he alone had the authority to make decisions concerning the appeals of certification issues and CMPs;

-- HCFA's notice letter was addressed to him;[3]

-- he did not authorize anyone to open his mail or take actions on his behalf during his hunting trip; and

-- he was not reachable by telephone during his hunting trip.

Using the circumstances described in Mr. Melton's affidavit, Rosewood Manor argues that the 60-day filing period guaranteed by 42 C.F.R. § 498.40(a) did not begin to run until Mr. Melton's return from his hunting trip on November 23, 1997. Rosewood Manor contends, "The key language of the regulation is that the 'authorized official' must actually 'receive' the notice." Petitioner Brief, 2. Similarly, the affidavit of Mr. Melton submitted by Rosewood Manor also alleges that he "did file his appeal of the CMP within sixty (60) days after his returning to the facility and receiving the Notice of Imposition of Remedies." Melton Affidavit, paragraph 7.

For the reasons which follow, I reject Rosewood Manor's argument that HCFA's November 7, 1997 notice letter was not received for purposes of 42 C.F.R. § 498.40(a) until Mr. Melton, as Rosewood Manor's "authorized official" for filing a request for hearing, made himself available to read HCFA's notice letter on November 23, 1997.

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[3] Mr. Melton refers to a HCFA letter dated November 12, 1997. Melton Affidavit, paragraph 5. There is no November 12, 1997 letter from HCFA in the record.

However, as I noted above, there are the letters from HCFA dated November 7, 1997 and January 13, 1998. Both of those letters were addressed as follows:

Hendrik Melton, Administrator
Rosewood Manor
1001 Lafayette S.E.
Grand Rapids, MI 49507

## II. Rejection of Rosewood Manor's showing that HCFA's notice letter was not received until November 23, 1997, and adoption of the presumed receipt date specified by 42 C.F.R. § 498.22(b)(3)

The relevant regulations do not define the elements of "receipt." The regulations create only a rebuttable presumption concerning the affixing of a date to the undefined event of "receipt." 42 C.F.R. § 498.22(b)(3). Therefore, I will first define "receipt" for purposes of triggering the 60-day filing period specified by 42 C.F.R. § 498.40(a) by evaluating the set of regulations which underlie the hearing and appeal process relevant to this case.

Before any initial determination made by HCFA can become subject to challenge, HCFA has a duty to send out a notice letter containing certain required information. 42 C.F.R. §§ 498.20(a), 488.434(a), 498.3(b). The regulation at 42 C.F.R. § 498.20(a) requires HCFA to mail the notice of an initial determination to "the affected party." Similarly, when HCFA decides to impose the CMP remedy, HCFA must also send a "written notice of the penalty to the facility . . . ." 42 C.F.R. § 488.434(a),

Even though Mr. Melton owns and works for Rosewood Manor as its Administrator, he is neither "the facility" nor the "affected party" within the meaning of the above-cited regulations. The "affected party" or "the facility" in this case is Rosewood Manor, because it is a skilled nursing facility providing services under the Medicare program with its own Medicare provider number. 42 C.F.R. § 498.2 (see definitions therein of "provider" and "affected party"); HCFA Notice Letter dated November 7, 1997. For these reasons, HCFA was legally obligated to send its notice letter dated November 7, 1997 to Rosewood Manor. 42 C.F.R. §§ 498.20(a), 488.434(a). Conversely, Rosewood Manor was the only entity which was legally entitled to receive HCFA's November 7, 1997 notice letter. Id.

Since the relevant regulations do not impose a duty on the "affected party" to read or act upon HCFA's notice of initial determination, it is proper to determine Rosewood Manor's receipt of HCFA's November 7, 1997 notice letter with use of an objective test, in accordance with the usual legal definition of the term "receipt": i.e., as denoting the taking of possession, custody, or control of the designated item by its intended recipient. See BLACK'S LAW DICTIONARY 1268 (6th ed. 1990).

There is no dispute in this case that HCFA's November 7, 1997 letter was a notice of initial determination which was sent in accordance with the requirements of 42 C.F.R. § 498.3(b) and 42 C.F.R. § 488.434(a). The notice letter stated, inter alia, that a CMP remedy was being imposed against Rosewood Manor and that Rosewood Manor may contest HCFA's determination. HCFA

established also that it had sent its November 7, 1997 notice letter by telefax and by certified mail to Rosewood Manor's address. Rosewood Manor does not dispute HCFA's contention that HCFA's November 7, 1997 notice letter had in fact reached Rosewood Manor's address. Obviously, some employee of Rosewood Manor had taken possession or control of HCFA's November 7, 1997 notice letter prior to Mr. Melton's return from his hunting trip. Otherwise, Rosewood Manor would not have had a need to submit Mr. Melton's affidavit to show that no one was authorized to read the mail addressed to him during his absence and that he did not become available to read or act on the contents of HCFA's notice letter until his return on November 23, 1997. If Rosewood Manor had failed or refused to take possession or control of said notice letter during Mr. Melton's absence, it could have simply shown, for example, that its employees had refused to accept delivery of the certified notice letter or had turned off the telefax machine during Mr. Melton's absence.

Rosewood Manor's arguments suggest, however, that no possession, custody, or control of HCFA's notice letter was assumed by Rosewood Manor while Mr. Melton was away between November 6, 1997 and November 23, 1997 because HCFA had placed Mr. Melton's name on the notice letter, and because Mr. Melton had sole responsibility for reading and acting on the contents of HCFA's notice letter. I reject Rosewood Manor's arguments. They are not in accord with the facts of record and miscast the relevant legal relationships.

It is significant that Rosewood Manor does not contend that no individual was authorized to take custody, possession, or control of HCFA's November 7, 1997 notice letter on Rosewood Manor's behalf while Mr. Melton was on his hunting trip. There is no allegation by Rosewood Manor that Mr. Melton's absence from November 6, 1997 through November 23, 1997 had somehow caused the other employees to cease taking custody, possession, or control of incoming mail for Rosewood Manor during that period. Nor is there any indication that all clerical and administrative work at Rosewood Manor was halted while Mr. Melton was away.[4] In fact,

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[4] I note, for example, that HCFA has submitted with its reply brief a copy of the rules promulgated by Michigan to regulate the operation of nursing homes licensed by that state. HCFA Att. 2. The rules state in relevant part:

> An administrator shall designate, in writing, a competent person who is not less than 18 years of age to carry out the responsibilities and duties of the administrator in the administrator's

Mr. Melton's affidavit indicates only that no one else had been given the authority to read mail such as HCFA's notice letter, which contained his name, or to make appeal decisions for Rosewood Manor.

As I have noted already, the regulations do not require any "affected party" to read the notice letters sent by HCFA or to exercise any appeal rights. Nor do the regulations obligate HCFA to ensure that its notice letter is delivered to the individual in whom an "affected party" has vested the responsibility for reading the notice letter and making the decision to appeal. HCFA cannot insist upon, or object to, the delegations Rosewood Manor makes or fails to make. Nor is there any information in this case to suggest that HCFA had purposely sent its notice letter on November 7, 1997 because HCFA knew of Mr. Melton's absence and knew that he would not give anyone else the authority to read the notice of imposition of enforcement remedies sent by HCFA.[5]

For these reasons, I find immaterial to the receipt issue before me whether anyone other than Mr. Melton had been delegated the responsibility to read HCFA's notice letter or make appeal decisions during Mr. Melton's absence. As a matter of law, Rosewood Manor's failure to delegate those responsibilities to someone other than Mr. Melton does not negate those facts of record which establish that Rosewood Manor, by other(s) of its employees with responsibility for taking possession, control, or custody of incoming mail, had received HCFA's notice letter before Mr. Melton's return from his trip. Accordingly, the date on which Mr. Melton returned from his hunting trip and made himself available to read HCFA's notice letter cannot be construed as the date on which Rosewood Manor received HCFA's notice letter dated November 7, 1997.

The fact that Mr. Melton's name appeared on HCFA's notice letter as Rosewood Manor's "Administrator" does not make the notice letter personal to him or make his physical presence at Rosewood Manor on the date of the notice letter's delivery the sine qua non of receipt by Rosewood Manor. HCFA's designation of Mr. Melton by his official title makes clear that the notice letter

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absence.

HCFA Att. 2 at 2.

Rosewood Manor has not requested an opportunity to file a surreply to address HCFA's use of the rule.

[5] See footnote 4.

concerned official business between HCFA and Rosewood Manor.[6] As a skilled nursing facility participating in the Medicare program, Rosewood Manor knew that it must provide services in substantial compliance with Medicare program requirements, or be subjected to sanctions which HCFA is authorized to impose. See generally, 42 C.F.R. Part 488, subpart F. Rosewood Manor also knew or should have known that HCFA would send it a letter concerning the imposition of any federal remedies. See 42 C.F.R. §§ 488.434(a), 498.20(a). Under the foregoing circumstances, even if Mr. Melton had ceased to be Rosewood Manor's "Administrator" when HCFA's notice letter was being delivered, Rosewood Manor could not and would not have had any legal justification to refuse the receipt of said notice letter because it contained Mr. Melton's name.

The legal effect of HCFA's having addressed its notice letter to Mr. Melton as the Administrator of Rosewood Manor is not significantly different than that which was created by Mr. Melton's having sent a letter to request a hearing on behalf of Rosewood Manor dated January 16, 1998 addressed as follows:

> Robert Gross or Gwendolyn Michel
> Branch Manager
> Michigan Operations Branch
> Division of Medicaid and State Operations
> 105 West Adams Street
> 15th Floor
> Chicago, ILL.
> 60603-6201

Even if Mr. Gross or Ms. Michel were no longer employed by HCFA when Rosewood Manor's request letter was delivered, the request would still be deemed to have been received by HCFA when HCFA took custody, possession, or control of it. Rosewood Manor would no doubt object if HCFA were to contend that the request letter

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[6] There is no fact of record which could lead to the conclusion that HCFA's notice letter was of a personal nature. The notice letter itself identifies Mr. Melton as the Administrator of Rosewood Manor. Rosewood Manor has not placed into evidence a copy of the envelope which was delivered by mail or alleged that the envelope prepared by HCFA was addressed differently than what appears on the notice letter. Moreover, according to the cover sheet which should have accompanied the copy of the November 7, 1997 notice letter sent by telefax, HCFA did not mention Mr. Melton's name or title. HCFA Att. 1. The cover sheet identified only Rosewood Manor as the addressee. Id.

was received late for filing for the same reasons relied upon by Rosewood Manor: e.g., that the request letter contained the names of Mr. Gross or Ms. Michel, both those individuals were on vacation on the day the request letter was delivered to HCFA, no one else had the authority to read the mail addressed to those individuals during their absence, and, therefore, the request letter could not be considered received for filing until those two individuals returned from their vacation to their workplace.

Even though 42 C.F.R. § 498.22(b)(3) permits a showing of a later receipt date to rebut the presumption that HCFA's notice letter was received five days after the date on the notice letter, Rosewood Manor is seeking to apply that regulatory provision improperly to the facts of this case. The facts of this case establish that HCFA's November 7, 1997 notice letter reached Mr. Melton after Rosewood Manor had first acquired possession, custody, and control of it during Mr. Melton's absence. Therefore, November 23, 1997 merely represents the date on which Mr. Melton returned from his hunting trip and thereby became available to read HCFA's notice letter. If Rosewood Manor wishes to rebut the regulatory presumption that HCFA's November 7, 1997 notice letter was received by November 12, 1997, Rosewood Manor must show on which day during Mr. Melton's absence its employee(s) actually took possession, control, or custody of said notice letter and thereby had the notice letter available for Mr. Melton's review upon his return. No such evidence has been presented by Rosewood Manor.

Even though a request for hearing may be filed by "[t]he affected party or its legal representative or other authorized official" (42 C.F.R. § 498.40(a)(emphasis added)), the regulations do not provide each of these named entities with their own 60-day period in which to file a request for hearing. There can be no doubt that the "legal representative" and "other authorized official" are merely the agents of the "affected party." As agents, the "legal representative" or "other authorized official" have no independent right of action against HCFA. These agents must also act within the same constraints as their principal.

Here, there is unrefuted evidence that some agent for Rosewood Manor had taken custody, possession, or control of HCFA's properly addressed notice letter dated November 7, 1997 while Mr. Melton was away on his trip. However, there is no evidence showing the precise date during Mr. Melton's absence on which the aforementioned event took place. Therefore, I must presume that Rosewood Manor had received HCFA's November 7, 1997 notice letter by no later than November 12, 1997.[7] See, 42 C.F.R. §§

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[7] HCFA has submitted evidence to show that on November 7, 1997, its notice letter was sent to Rosewood Manor by telefax, as well as by certified mail. HCFA

498.22(b)(3), 498.40(a). Under the deadline specified by 42 C.F.R. § 498.40(a), Rosewood Manor and its agents had until January 11, 1998 to file its request for hearing.

Contrary to Rosewood Manor's arguments, its agent, Mr. Melton, did not acquire (and could not have acquired) the right to have until January 22, 1998 to file a request for hearing on its behalf. See Petitioner Brief, 3. The result urged by Rosewood Manor would give an agent greater rights than its principal. The result urged by Rosewood Manor would also give undue significance to one agent's absence or unavailability in order to negate the legally significant actions taken by other agents for the principal. If Rosewood Manor's interpretation of "receipt" were accepted as legally valid for purposes of 42 C.F.R. § 498.40(a), the receipt date referenced by the regulation could be placed in flux by the transfers of HCFA's notice letters between the "affected party," its "legal representative(s)," and its "other authorized official(s)." By these unilateral actions between themselves, the "affected party" and its agents could then keep the right to challenge HCFA's initial determinations alive for an indefinite length of time. Such results would be clearly aberrant and contrary to law.

Whether or not Mr. Melton had adequate time to decide and prepare a request for hearing following his return from his hunting trip is an issue which may be raised and considered under 42 C.F.R. § 498.40(c), which permits me to extend the 60-day filing period pursuant to motion and for good cause shown. I will analyze the evidence of record pursuant to 42 C.F.R. § 498.40(c) in the section which follows. However, the need for additional time to file a hearing request is not material to the question of whether the request was filed timely within the 60-day period guaranteed by 42 C.F.R. § 498.40(a). I reach the extension of time issue

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Att. 1. However, HCFA did not mention the telefax transmittal or submit its supporting evidence until it filed its reply brief. Additionally, HCFA's motion to dismiss argues only that the hearing request should have been filed by January 11, 1998 (65 days after the November 7, 1997 date appearing on the notice letter). See HCFA Motion, 2.

Under these circumstances, I consider it more fair to use the presumed receipt date of November 12, 1997 (5 days after the date of HCFA's notice letter), notwithstanding HCFA's evidence showing that the notice letter was sent by telefax as well as by certified mail to Rosewood Manor on November 7, 1997, and even though Rosewood Manor has not requested leave to file a surreply to deny that the notice letter was successfully transmitted by telefax.

under 42 C.F.R. § 498.40(c) only because I have concluded, for the reasons set forth above, that Rosewood Manor's January 16, 1998 letter was filed more than 60 days after it became entitled to do so under 42 C.F.R. § 498.40(a).

## III. The absence of good cause for extending the filing period for Rosewood Manor

The 60-day filing period specified in 42 C.F.R. § 498.40(a) may be extended under the following conditions:

> (1) The affected party or its legal representative or other authorized official may file with the ALJ [administrative law judge] a written request for extension of time stating the reasons why the request was not filed timely.
>
> (2) For good cause shown, the ALJ may extend the time for filing the request for hearing.

42 C.F.R. § 498.40(c).

Rosewood Manor has not filed a formal request for an extension of time. However, as I indicated above, its arguments concerning Mr. Melton's unavailability until November 23, 1997 suggest the issue of good cause. In its reply brief, HCFA appears to have construed such arguments as a request for an extension of time based on an allegation of good cause. HCFA Reply, 2 - 3. HCFA set forth its reasons for opposing Rosewood Manor's attempts to show good cause. Id. Rosewood Manor has not requested leave to file anything additional. Therefore, I perceive no opposition by Rosewood Manor to having me also construe its arguments as a request for an extension of time and I therefore review the question of good cause.

HCFA notes that Rosewood Manor has failed to show that the time between November 23, 1997 (Mr. Melton's return from his hunting trip) and January 11, 1998 (the deadline specified by 42 C.F.R. § 498.40(a)) was not adequate for filing a request for hearing. HCFA Reply, 2. I agree. Moreover, Rosewood Manor's own actions have now rendered academic any question which might have existed concerning the amount of time Mr. Melton needed after November 23, 1997 to prepare a hearing request to challenge the initial determinations contained in HCFA's November 7, 1997 notice letter.

The most significant problem for Rosewood Manor under the good cause issue is the lack of correlation between its proof concerning Mr. Melton's unavailability to read HCFA's November 7, 1997 notice letter while he was away on his hunting trip, and the contents of its January 16, 1998 letter requesting a hearing.

The request letter of January 16, 1998 was prepared and signed by Mr. Melton and refers only to his receipt of a letter from HCFA dated January 13, 1998. Nothing mentioned in that letter refers to HCFA's notice letter dated November 7, 1997. Instead, his January 16, 1998 request letter complained of the fact that HCFA's January 13, 1998 letter contained the statement that Rosewood Manor's "time period for requesting a hearing has expired, January 13, 1998." He indicated that he was submitting a request for hearing notwithstanding the alleged expiration of such a right because "the letter is date stamped at the top cover page 'Jan 13 1998' [and] you must admit that this notice of rights is late in coming." Rosewood Manor's January 16, 1998 Request Letter.

Mr. Melton's January 16, 1998 request letter does not even suggest that Rosewood Manor was writing in response to HCFA's notice of initial determination dated November 7, 1997. There is no indication that, by January 16, 1998, Mr. Melton had read HCFA's November 7, 1997 notice letter or that he was aware of its existence, even though HCFA's January 13, 1998 letter began with the sentence, "On November 7, 1997, we informed you that we were imposing selected remedies . . . [,]" and then made repeated references to the contents of the November 7, 1997 notice letter. Even though HCFA's November 7, 1997 notice letter contained very explicit explanations and instructions concerning Rosewood Manor's hearing rights, Mr. Melton's request letter still indicated that he did not know of such hearing rights until he received HCFA's January 13, 1998 letter informing him that those rights had expired on January 13, 1998. Therefore, he was complaining that HCFA should have notified Rosewood Manor of its hearing rights before January 13. 1998.

The foregoing facts alone make it impossible for me to accept Mr. Melton's January 16, 1998 request letter by extending until January 16, 1998 the time period Rosewood Manor had to file its challenges to the initial determinations in HCFA's November 7, 1997 notice letter. The contents of his January 16, 1998 request letter have nothing to do with his absence from November 6, 1997 through November 23, 1997. The January 16, 1998 request letter makes immaterial the question of whether Rosewood Manor might have needed until January 16, 1998 (i.e., more than the 60-days after receipt period guaranteed by 42 C.F.R. § 498.40(a)) to file a request for hearing because Mr. Melton was not even available to read HCFA's November 7, 1997 notice letter until his return from his hunting trip on November 23, 1997.

Even if I were to consider the effects of Mr. Melton's absence from November 6, 1997 through November 23, 1997 in isolation of the fact that his absence had no bearing on the information he chose to place into his January 16, 1998 request letter, I would also find against Rosewood Manor on the good cause issue. As HCFA correctly pointed out, none of the effects allegedly caused

by Mr. Melton's absence amounted to circumstances beyond his or Rosewood Manor's control. HCFA Reply, 2. Rosewood Manor and Mr. Melton had the authority to make appropriate delegations or sub-delegations, respectively, to ensure that none of the functions usually performed by him would cease during the period he chose to be on vacation out of state and unreachable by telephone. Shortly before Mr. Melton left on his trip, the state surveying agency had conducted a survey of Rosewood Manor and notified Rosewood Manor that federal enforcement remedies might be imposed by HCFA, due to the noncompliance found during the survey.[8] HCFA also pointed out that the State of Michigan requires a nursing home administrator to delegate his responsibilities when he is to be absent. The fact that no such delegation was made under the foregoing circumstances indicates that the omission was voluntary and intentional. Therefore, the consequences of the omission do not constitute good cause for extending the time period for filing a request for hearing.

Finally, I find no good cause for extending the filing period, given that the matters raised in Rosewood Manor's request letter are not subject to adjudication.

In response to the dearth of information in Rosewood Manor's request letter, HCFA argues that the request letter does not comport with the requirements of 42 C.F.R. § 498.40(b), and, therefore, as a matter of law, it cannot be considered a request for hearing within the meaning of the regulation.[9] HCFA Motion,

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[8] According to HCFA's notice letter dated November 7, 1997, a survey was conducted on October 10, 1997, and the state survey agency provided notification to Rosewood Manor of its finding of actual harm to residents. Also according to HCFA's November 7, 1997 notice letter, the state survey agency notified Rosewood Manor on October 21, 1997 that it was recommending that enforcement remedies be imposed immediately, based on survey findings of substandard quality of care.

[9] Rosewood Manor responds to HCFA's arguments by construing them as an objection to the "lack of specificity." Petitioner Brief, 3. Rosewood Manor contends:

> HCFA cannot seriously argue that it is unaware of Petitioner's legal arguments. This case has been consolidated with Docket No. C-97-355, in which Petitioner's counsel set forth detailed legal arguments regarding the adequacy of HCFA's notice,

2 - 3. The merits of HCFA's arguments are self-evident, and it would be redundant for me to further analyze the content of Rosewood Manor's request letter by comparing it with the mandatory provisions of 42 C.F.R. § 498.40(b). Instead, I discuss Rosewood Manor's failure to have raised any justiciable issue by having referred only to HCFA's January 13, 1998 letter in its request letter.

HCFA's January 13, 1998 letter notified Rosewood Manor that a revisit survey had found it in substantial compliance and that the CMP had become due and payable because no request for hearing had been filed. These matters are not initial determinations by HCFA within the definitions provided by the regulations. See 42 C.F.R. § 498.3(b). Since only initial determinations by HCFA are reviewable in this forum (id.), a request for hearing on non-initial determinations have no legal force or effect, no matter how well the request may have been drafted or when it was filed.

As I discussed previously, Rosewood Manor's request letter refers only to HCFA's January 13, 1998 correspondence and does not even imply that HCFA's November 7, 1997 notice letter had been read. Therefore, there exists no hearing right on the matters contained in Rosewood Manor's request letter. Accordingly, its request letter must also be dismissed pursuant to 42 C.F.R. § 498.70(b).[10]

## IV. Rejection of Rosewood Manor's interpretation of 42 C.F.R. § 498.70

Rosewood Manor contends that dismissal of an untimely filed request for hearing is not mandatory. Rosewood Manor reads 42 C.F.R. § 498.70(c) as stating only that "the ALJ may dismiss a hearing request . . . ." Petitioner Brief, 4. Therefore, Rosewood Manor asks me to exercise my discretion in its favor by retaining adjudicatory authority over its request dated January 16, 1998.

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etc. HCFA has not been taken by surprise.

Petitioner Brief, 3 - 4.

I make clear for the record that this case has not been consolidated with any other case. Moreover, no regulation states that the requirements of 42 C.F.R. § 498.40(b) may be disregarded by a petitioner if it believes that HCFA already knows its position from other cases.

[10] This regulation relates to dismissal for cause when there exists no right to a hearing.

I disagree with Rosewood Manor's reading of 42 C.F.R. § 498.70(c) and find no reason to retain jurisdiction over its untimely filed request letter even if I had the discretion to do so.

The timeliness requirement has been made mandatory by 42 C.F.R. § 498.40(a), through the use of the words "[t]he affected party . . . must file the request in writing within 60 days from receipt of the notice . . . unless that period is extended in accordance with paragraph (c) of this section." 42 C.F.R. § 498.40(a)(emphasis added). These words alone would preclude the interpretation that an administrative law judge may waive an affected party's obligation to file timely under either subsection (a) or (c) of 42 C.F.R. § 498.40. Moreover, Rosewood Manor has quoted a portion of 42 C.F.R. § 498.70 out of context in order to rely on the word "may" contained therein. The regulation is titled "Dismissal for cause," and the portion which contains the word "may" states as follows:

> On his or her own motion, or on the motion of a party to the hearing, the ALJ may dismiss a hearing request either entirely or as to any stated issue, under the following circumstances:
>
> (a) Res judicata. . . .
>
> (b) No right to hearing. . . .
>
> (c) Hearing request not timely filed. . . .

42 C.F.R. § 498.70.

Clearly, the word "may" refers to the administrative law judge's discretion to order dismissal sua sponte or pursuant to a motion filed by a party, and to the possibility that the judge may find it appropriate to dismiss only certain issues (as opposed to the entire case) for the reasons stated in the regulation. If the word "may" refers to untimely filed hearing requests, as Rosewood Manor urges, then administrative law judges could also adjudicate, at their discretion, matters on which no right to hearing exists or which have already been settled between the parties under the res judicata doctrine. See 42 C.F.R. § 498.70. Such an interpretation would negate or make superfluous the regulations at 42 C.F.R. Part 498, which delineate, inter alia, the administrative law judges' subject matter jurisdiction and specify when, how, and to whom hearing rights are afforded.

In sum, it is neither reasonable nor legally valid to interpret 42 C.F.R. § 498.70 as conferring discretion on administrative law judges to disregard the untimely filings of hearing requests, the effects of res judicata, and limitations on their subject matter jurisdiction.

## V. Conclusion

For all of the reasons discussed above, I hereby dismiss this action pursuant to 42 C.F.R. § 498.70(b) and (c).

/s/

Mimi Hwang Leahy

Administrative Law Judge