

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Littlefield Hospitality
(CCN: 67-6149),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-536

ALJ Ruling No. 2017-12

Date: February 24, 2017

DISMISSAL

Littlefield Hospitality (Littlefield or Petitioner) has not filed its prehearing exchange or responded to my order to show cause why I should not dismiss its request for hearing due to abandonment. Therefore, I dismiss Littlefield's hearing request.

I. Background

Littlefield is a skilled nursing facility (SNF) that participates in the Medicare program. The Centers for Medicare & Medicaid Services (CMS) concluded that Littlefield was not in substantial compliance with several SNF standards and imposed enforcement remedies, including civil monetary penalties, on Littlefield. CMS did this in a series of initial determinations dated December 23, 2015 (for surveys ending on November 10, 2015, and December 3, 2015), January 15, 2016 (for a survey ending on December 18, 2015), March 7, 2016 (for a survey ending on February 16, 2016), and April 28, 2016 (for a survey ending on April 21, 2016). *See* 42 C.F.R. pt. 483, subpt. B, pt. 488, subpts. E, F.

On May 6, 2016, Littlefield, through attorney Glen D. Sanborn, requested a hearing to dispute these initial determinations. Littlefield also sought review of a December 15, 2015 Life Safety Code survey. On May 12, 2016, I issued a prehearing order that included dates by which the parties had to submit their prehearing exchanges.

On June 21, 2016, CMS moved for partial dismissal of the hearing request because it was untimely as to the initial determinations that CMS issued on December 23, 2015, and January 15, 2016. CMS also sought dismissal of the hearing request related to the Life Safety Code survey because CMS did not impose any enforcement remedies on Petitioner based on the findings of that survey. I stayed the schedule for filing prehearing exchanges pending resolution of CMS's motion. Littlefield responded that it did not oppose CMS's motion, but argued that it still should have the right to prove that it returned to substantial compliance with the requirements for SNFs at some point before CMS's surveyors conducted the survey that ended on February 16, 2016.

In my July 26, 2016 Order of Partial Dismissal and New Prehearing Exchange Schedule, I granted CMS's partial motion to dismiss Petitioner's request for hearing, as it related to the initial determinations dated December 23, 2015, and January 15, 2016, due to untimeliness. 42 C.F.R. § 498.70(c). I also dismissed Petitioner's request for hearing as it related to the Life Safety Code survey because Petitioner does not have a right to a hearing unless CMS issued an initial determination imposing enforcement remedies. 42 C.F.R. §§ 498.3(b)(13), (14), (16), 498.70(b). However, I agreed that Petitioner could submit argument and evidence as to whether it returned to substantial compliance prior to the survey that ended on February 16, 2016. I also stated that Petitioner may present argument and evidence related to the deficiencies found in the initial determinations dated March 7, 2016, and April 28, 2016. Finally, I lifted the stay on the prehearing exchange schedule and ordered CMS to file its prehearing exchange by October 10, 2016, and Petitioner to file its prehearing exchange by November 21, 2016.

Subsequently, CMS requested that I invert the prehearing exchange schedule and require Petitioner to submit its prehearing exchange first. I denied CMS's motion, but permitted CMS to file a response to that issue within 20 days following submission of Petitioner's exchange. *See* 42 C.F.R. § 498.17(b)(1).

CMS filed its prehearing exchange. Petitioner did not. Instead of filing Petitioner's exchange, on November 22, 2016, Mr. Sanborn filed a Motion to Withdraw as Counsel. Mr. Sanborn stated in the motion that he was the attorney of record for Petitioner in this case, and provided the following as good cause for withdrawal: "Petitioner has continually failed to assist Movant with the defense of this lawsuit, including failing to provide documentation as requested or contact Movant as requested" and "Petitioner has continually refused to pay Movant in agreement with the terms of Movant's employment." Mr. Sanborn further stated that his withdrawal was not sought for

purposes of delay and that Petitioner has not yet retained a new attorney in this matter. Finally, Mr. Sanborn certified that he sent his motion to Petitioner, but did not include the specific name of an individual to whom he directed the copy of the motion.

On November 28, 2016, I issued an order instructing Mr. Sanborn that, to withdraw, he needed to fully comply with Rule 1.15(b) of the Texas Disciplinary Rules of Professional Conduct and report to me within 14 days his compliance with that rule or his efforts to comply with that rule. My order was sent to the physical and email addresses that Mr. Sanborn included on the certificate of service for Petitioner, which had accompanied his motion to withdraw.

On November 29, 2016, Mr. Sanborn requested a stay and an extension of time for all filing deadlines in the case until I ruled on his motion to withdraw. He also stated the following:

[Mr. Sanborn] repeatedly requested information from Kristi Porter, Petitioner's representative, in order to prepare and file the required pre-hearing exchange. Ms. Porter repeatedly promised, but consistently failed to provide, the requested information. Petitioner's counsel filed his Motion to Withdraw as Petitioner's Counsel in large part, because he is unable to effectively represent Petitioner without the information.

Mr. Sanborn indicated in his motion that CMS counsel thought that it was not appropriate for me to extend the prehearing exchange date for Petitioner since Petitioner already missed that date.

On November 30, 2016, I extended Mr. Sanborn's due date to January 10, 2017, to respond to my November 28, 2016 order. However, I did not stay or extend the filing of Petitioner's prehearing exchange because no good cause for failing to file the exchange had been provided. To the contrary, the information Mr. Sanborn provided appeared to show a lack of good cause.

On January 10, 2017, Mr. Sanborn filed his response to my November 28, 2016 order, which included three exhibits.¹ After reviewing that submission, I was satisfied that Mr. Sanborn complied with Rule 1.15(b) of the Texas Disciplinary Rules of Professional Conduct and I granted his motion to withdraw as counsel for Petitioner.

¹ Mr. Sanborn indicated that he had recently represented Petitioner in another case before the Departmental Appeals Board. See *Littlefield Hospitality*, DAB No. 2756 (2016).

In Mr. Sanborn's January 10 filing, he mentioned that Kristi Porter is Petitioner's representative/co-owner, and that she is the person with whom he has had contact. Based on his contact with Ms. Porter, Mr. Sanborn represented that Petitioner did not yet have a new attorney. Further, Mr. Sanborn was "advised that Ms. Porter has relayed to the Texas Department of Aging and Disability Services that, if no agreement to sell the facility has been reached by January 31, 2017, Ms. Porter will begin steps to close the facility and cease operations." Mr. Sanborn also provided the same mailing address for Petitioner as appeared on the certificate of service for his motion to withdraw. However, he provided a different email address for Ms. Porter. He also submitted a corporate mailing address for Petitioner.

Because Petitioner still had not filed a prehearing exchange, on January 18, 2017, I ordered Petitioner to show cause why I should not dismiss its hearing request for abandonment. I also ordered Petitioner to submit its prehearing exchange with the response to the order to show cause. I gave Petitioner three weeks to file the response and the prehearing exchange. I also informed Petitioner that if it retained new counsel, counsel needed to file a notice of appearance. Finally, I ordered Petitioner to file a notice withdrawing its hearing request if it no longer wanted to pursue this case.

Although the order to show cause mailed to Petitioner's address was returned by the United States Postal Service as undeliverable (perhaps evidencing that Petitioner has closed its facility), the order sent to Petitioner's corporate address was not returned. Further, there is no evidence that Ms. Porter did not receive the copy of the order sent to her email addresses.

II. Discussion

The regulations permit an administrative law judge to dismiss a hearing request for abandonment if a party fails to appear for a prehearing conference or a hearing and fails to respond within 10 days after the administrative law judge sends a notice to show cause. 42 C.F.R. § 498.69. This regulation also applies to parties that fail to submit prehearing documents. *Osceola Nursing & Rehab. Ctr.*, DAB No. 1708 (1999); *see also B&K Nursing Ctr.*, DAB No. 1901 (2003). Further, in cases where an SNF disputes the imposition of a civil monetary penalty, such as the present one, an administrative law judge has the authority to impose sanctions, including dismissal of an action, on a party that fails to comply with an order or fails "to defend an action." 42 U.S.C. §§ 1320a-7a(c)(4), 1395i-3(h)(2)(B)(ii).

Petitioner has not submitted a timely prehearing exchange as required in my May 12, 2016 prehearing order and my July 26, 2016 Order of Partial Dismissal and New Prehearing Exchange Schedule. Petitioner also failed to respond to my order to show

cause and failed to avail itself of one last opportunity to file its prehearing exchange. Petitioner's counsel attempted to prepare a prehearing exchange, but Petitioner refused to assist him, leading to his withdrawal from this case.

In paragraph 14 of my May 12, 2016, prehearing order, I advised the parties that a failure to comply with my order could result in sanctions. In my January 18, 2017 order to show cause, I clearly stated that Petitioner needed to respond to the order and submit its prehearing exchange to avoid dismissal of the hearing request. I conclude that Petitioner has absented itself from these proceedings, failed to comply with my orders, and, as a result, abandoned its hearing request.

III. Conclusion

I dismiss Petitioner's hearing request in this matter as a sanction for failing to comply with my orders to submit a prehearing exchange and because Petitioner's failure to submit a prehearing exchange evidences abandonment of its hearing request.

It is so ordered.

_____/s/_____
Scott Anderson
Administrative Law Judge