Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	Date: June 15, 2007
Sunset Manor, (CCN: 17-5363), Petitioner,	Docket No. C-05-392
v.	Decision No. CR1606
Centers for Medicare & Medicaid Services.	

DECISION

Petitioner, Sunset Manor, violated 42 C.F.R. § 483.70(a),[1] on April 4, 2005. A per instance civil money penalty (PICMP) of $2000 is reasonable.

I. Background

Petitioner is a long-term care facility located in Frontenac, Kansas. Petitioner is authorized to participate in the federal Medicare program as a skilled nursing facility (SNF) and the Kansas Medicaid program as a nursing facility (NF). On April 4, 2005, Petitioner was subject to a Life Safety Code survey by the Kansas Fire Marshal's Office acting on behalf of the Kansas Department on Aging (the state agency). The surveyor concluded that Petitioner was in violation of the Life Safety Code and that the violation posed immediate jeopardy to resident health and safety. Joint Stipulation dated October 21, 2005 (Jt. Stip.).

[1] All references are to the revision of the Code of Federal Regulations (C.F.R.) in effect at the time of the surveys, unless otherwise indicated.

The Centers for Medicare & Medicaid Services (CMS) notified Petitioner by letter dated April 26, 2005, that it concurred with the survey finding that Petitioner violated the Life Safety Code, Tag K51[2], and that the violation posed immediate jeopardy for one day, April 4, 2005. CMS further advised Petitioner that, based upon the violation of Tag K51, it was imposing: a PICMP of $5,000; and a denial of payment for new admissions effective May 5, 2005 and continuing until Petitioner returned to substantial compliance with program participation requirements or termination of Petitioner's provider agreement. Petitioner's Exhibit (P. Ex.) 1, at 4-6. CMS notified Petitioner by letter dated June 24, 2005, that the PICMP was reduced to $2000. P. Ex. 2. The DPNA was never effectuated. Transcript (Tr.) at 63.

Petitioner requested a hearing by an administrative law judge (ALJ) by letter dated June 8, 2005. P. Ex. 1. The case was assigned to me for hearing and decision on July 6, 2005. A one-day hearing was conducted on December 14, 2005, in Topeka, Kansas. CMS exhibits 1 through 13 were offered and admitted. CMS exhibit 14 was offered but not admitted at hearing subject to my review of the parties post-hearing briefs. Based on the arguments of counsel, I find that CMS exhibit 14 is authentic and relevant and it is admitted.[3] Petitioner's exhibits 1 through 6 were offered and admitted. Brian Love, Fire Prevention Inspector with the Kansas Fire Marshal's Office, testified for CMS. Kevin Knaup, Administrator of Sunset Manor, testified for Petitioner. The parties submitted post-hearing briefs and reply briefs.

---

[2] This "Tag" designation is the "ID Prefix" from the survey form, CMS-2786R, used by the surveyor. CMS Exhibit (CMS Ex.) 1, at 15. Tag K51 is also used in the Statement of Deficiency, CMS-2567, dated April 4, 2005 (SOD). CMS Ex. 2, at 9. Other alleged violations cited by the survey were not cited by CMS as the basis for imposing a remedy and those violations are not on appeal before me.

[3] The document is an extract from the 1999 edition of the National Fire Protection Association (NFPA) document number 72, National Fire Alarm Code® (National Fire Alarm Code) and the 1999 National Fire Alarm Code Handbook (which sets forth provisions of the code). Further discussion related to the admissibility of this document is found in the Analysis section of this decision. CMS requested that I take administrative notice of the remaining provisions of the 1999 edition of the National Fire Alarm Code. CMS Post-hearing Brief (CMS Brief) at 6, fn. 2. However, no copy of the complete code was provided and one is not readily available for my use. Furthermore, CMS has not provided any rationale for why administrative notice of the remaining provisions of the code is warranted.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the exhibits admitted and the transcript of the proceedings. Citations to transcript pages and exhibit numbers related to each finding of fact may be found in the analysis section of this decision if not indicated here.

1. The state agency completed a Life Safety Code survey of Petitioner on April 4, 2005. CMS Ex. 1.

2. CMS notified Petitioner that the conditions found during the Life Safety Code survey constituted immediate jeopardy to resident health and safety for one day, April 4, 2005. P. Ex. 2.

3. CMS notified Petitioner that it was imposing a PICMP of $5000, which was later reduced to $2000. P. Exs. 1, at 4-6; 2.

4. Petitioner filed a request for hearing on July 6, 2005. P. Ex. 1, at 1-3.

5. On April 4, 2005, during a Life Safety Code survey the state agency cited Petitioner because:

    a. end-of-line resisters were installed on two terminals (31 and 32) on the fire alarm control panel (CMS Ex. 2, at 9-10);

    b. the facility performed silent drills during the months of June, September, and December of 2004 and March 2005, but failed to sound the fire alarm in 4 out of the 12 previous months (CMS Ex. 2, at 8); and

    c. during a fire drill witnessed by the surveyor it was noted that the fire alarm monitoring company was unable to reach the fire department dispatch center for five minutes and 20 seconds as a result of telephone busy signals (CMS Ex. 2, at 10-12).

6. There were end-of-line resistors installed on two terminals in Petitioner's fire alarm control panel.

7. Petitioner did not sound its audible fire alarm in June, September, and December 2004 and March 2005.

8. The evidence does not show that the presence of end-of-line resistors in Petitioner's alarm control panel interfered with the operation of the alarm system.

9. During a fire drill conducted on April 4, 2005, the fire alarm was delivered to Petitioner's alarm monitoring company without unreasonable delay but the alarm monitoring company was unable to deliver the alarm to the fire department for five minutes and 20 seconds.

10. Petitioner had no alternative or back-up plan to ensure that a fire alarm was delivered to the fire department without unreasonable delay in the event its fire alarm system failed to timely deliver the alarm.

B. Conclusions of Law

1. Petitioner's request for hearing was timely and I have jurisdiction.

2. The 2000 edition of the Life Safety Code is incorporated by reference in 42 C.F.R. § 483.70(a), and it has the force and effect of a regulation.

3. The NFPA 72, the National Fire Alarm Code (1999 ed.) is not incorporated by reference in 42 C.F.R. § 483.70(a), and the provisions of the National Fire Alarm Code do not have the force and effect of a regulation.

4. The National Fire Alarm Code is evidence of industry standard in the area of fire alarms.

5. CMS must identify the statute, regulation or other legal criteria to which it seeks to hold the provider.

6. CMS has failed to show that Petitioner had actual knowledge of the provisions of the National Fire Alarm Code (1999 ed.).

7. CMS has failed to identify any legal criteria or credible evidence of an industry standard that prohibits the use of end-of-line resistors in an alarm control panel.

8. CMS has failed to make a prima facie showing the end of the line resistors found on two terminals in Petitioner's fire alarm control panel violated 42 C.F.R. § 483.70.

9. CMS has failed to identify any legal criteria or credible evidence of an industry standard that requires a long-term care facility to sound its audible fire alarm signal every month.

10. CMS has failed to make a prima facie showing that Petitioner's failure to sound its audible fire alarm signal in four months during a 12-month period violated 42 C.F.R. § 483.70.

11. CMS has made a prima facie showing that on April 4, 2005, Petitioner was in violation of 42 C.F.R. § 483.70, because the fire alarm caused by the drill the surveyor triggered was not delivered to the fire department without unreasonable delay.

12. Petitioner has failed to show that it was in substantial compliance with 42 C.F.R. § 483.70 on April 4, 2005, prior to taking corrective action on that date.

13. Petitioner has failed to show that it had any affirmative defense to its violation of 42 C.F.R. § 483.70 on April 4, 2005.

14. There is a basis for the imposition of an enforcement remedy in this case.

15. A PICMP of $2000 is reasonable.

C. Issues

The issues in this case are:

> Whether there is a basis for the imposition of an enforcement remedy; and,
>
> Whether the remedy imposed is reasonable.

D. Applicable Law

Petitioner is a long-term care facility participating in the federal Medicare program as a SNF and in the state Medicaid program as a NF. The statutory and regulatory requirements for participation by a long-term care facility are found at sections 1819 and 1919 of the Social Security Act (Act) and at 42 C.F.R. Part 483. Sections 1819 and 1919 of the Act vest the Secretary of Health and Human Services (the Secretary) with authority to impose civil money penalties against a long-term care facility for failure to comply substantially with federal participation requirements.

Pursuant to the Act, the Secretary has delegated to CMS and the states the authority to impose remedies against a long-term care facility that is not complying substantially with federal participation requirements. Facilities that participate in Medicare may be surveyed on behalf of CMS by state survey agencies in order to determine whether the

facilities are complying with federal participation requirements. 42 C.F.R. §§ 488.10-488.28, 488.300-488.335. Pursuant to 42 C.F.R. Part 488, CMS may impose a per instance or per day CMP against a long-term care facility when a state survey agency concludes that the facility is not complying substantially with federal participation requirements. 42 C.F.R. §§ 488.406; 488.408; 488.430. The regulations in 42 C.F.R. Part 488 also give CMS a number of other remedies that can be imposed if a facility is not in compliance with Medicare requirements. *Id.* Pursuant to 42 C.F.R. § 488.301, "*[i]mmediate jeopardy* means a situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." (emphasis in original). Further, "*[s]ubstantial compliance* means a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." *Id.* (emphasis in original).

The regulations specify that a CMP that is imposed against a facility on a per day basis will fall into one of two ranges of penalties. 42 C.F.R. §§ 488.408, 488.438. The upper range of CMP, of from $3050 per day to $10,000 per day, is reserved for deficiencies that constitute immediate jeopardy to a facility's residents, and in some circumstances, for repeated deficiencies. 42 C.F.R. §§ 488.438(a)(1)(i), (d)(2). The lower range of CMP, from $50 per day to $3000 per day, is reserved for deficiencies that do not constitute immediate jeopardy but either cause actual harm to residents, or cause no actual harm, but have the potential for causing more than minimal harm. 42 C.F.R. § 488.438(a)(1)(ii). There is only a single range of $1000 to $10,000 for a per instance CMP, which applies whether or not immediate jeopardy is present. 42 C.F.R. §§ 488.408(d)(1)(iv); 488.438(a)(2).

The Act and regulations make a hearing before an ALJ available to a long-term care facility against which CMS has determined to impose a CMP. Act, § 1128A(c)(2); 42 C.F.R. §§ 488.408(g); 498.3(b)(13). The hearing before an ALJ is a *de novo* proceeding. *Anesthesiologists Affiliated, et al*, DAB CR65 (1990), *aff'd*, 941 F.2d 678 (8th Cir. 1991); *Emerald Oaks*, DAB No. 1800, at 11 (2001); *Beechwood Sanitarium*, DAB No. 1906 (2004); *Cal Turner Extended Care*, DAB No. 2030 (2006); *The Residence at Salem Woods*, DAB No. 2052, (2006). A facility has a right to appeal a "certification of noncompliance leading to an enforcement remedy." 42 C.F.R. § 488.408(g)(1); *see also* 42 C.F.R. §§ 488.330(e) and 498.3. However, the choice of remedies by CMS or the factors CMS considered when choosing remedies are not subject to review. 42 C.F.R. § 488.408(g)(2). A facility may only challenge the scope and severity level of noncompliance found by CMS if a successful challenge would affect the amount of the CMP that could be collected by CMS or impact upon the facility's nurse aide training program. 42 C.F.R. §§ 498.3(b)(14) and (d)(10)(i). CMS's determination as to the level of noncompliance "must be upheld unless it is clearly erroneous." 42 C.F.R. § 498.60(c)(2). This includes CMS's finding of immediate jeopardy. *Woodstock Care*

Center, DAB No. 1726, at 9, 38 (2000), *aff'd, Woodstock Care Center v. Thompson*, 363 F.3d 583 (6th Cir. 2003). The Departmental Appeals Board (the Board) has long held that the net effect of the regulations is that a provider has no right to challenge the scope and severity level assigned to a noncompliance finding, except in the situation where that finding was the basis for an immediate jeopardy determination. *See, e.g., Ridge Terrace*, DAB No. 1834 (2002); *Koester Pavilion*, DAB No. 1750 (2000). Review of a CMP by an ALJ is governed by 42 C.F.R. § 488.438(e).

When a penalty is proposed and appealed, CMS must make a prima facie case that the facility has failed to comply substantially with federal participation requirements. "Prima facie" means that the evidence is "(s)ufficient to establish a fact or raise a presumption unless disproved or rebutted. *Black's Law Dictionary* 1228 (8th ed. 2004); *see also, Hillman Rehabilitation Center*, DAB No. 1611, at 8 (1997), *aff'd Hillman Rehabilitation Center v. U.S. Dept. of Health and Human Services*, No. 98-3789 (GEB), slip op. at 25 (D.N.J. May 13, 1999). To prevail, a long-term care facility must overcome CMS's showing by a preponderance of the evidence. *Batavia Nursing and Convalescent Center*, DAB No. 1904 (2004); *Batavia Nursing and Convalescent Inn*, DAB No. 1911 (2004); *Emerald Oaks*, DAB No. 1800 (2001); *Cross Creek Health Care Center*, DAB No. 1665 (1998); *Hillman Rehabilitation Center*, DAB No. 1611.

E. Analysis

There is little dispute about the pertinent facts in this case. On April 4, 2005, Brian Love of the Kansas Fire Marshal's office visited Petitioner's facility to conduct a Life Safety Code inspection. Inspector Love saw what he believed were end-of-line resistors on terminals 31 and 32 in Petitioner's fire alarm control panel. Inspector Love alleged in the SOD that the resistors should not be where he found them and that they were not approved components, devices or equipment installed in accordance with the National Fire Alarm Code. CMS Ex. 2, at 10. Petitioner questions whether what Inspector Love observed were end-of-line resistors and, if they where, what prohibits them from being where Inspector Love observed them, particularly in light of the fact that the alarm functioned properly when tested on April 4, 2005. Petitioner's Prehearing Brief at 9-10; Petitioner's Reply to CMS's Post-Hearing Brief (P. Reply) at 3-5. Inspector Love also reviewed Petitioner's documentation of fire drills and concluded that Petitioner had failed to "sound a fire alarm test" in June, September, and December 2004 and March 2005 in violation of what he believed to be a requirement to "manually" test fire alarm systems monthly. CMS Ex. 2, at 10. Petitioner argues that Inspector Love and CMS have never identified any provision of the Life Safety Code that requires a monthly, audible test of a fire alarm. P. Reply at 2-3. Finally, Inspector Love observed a fire drill on April 4, 2005. He learned that it took Petitioner's fire alarm monitoring company over five minutes to reach the local fire department dispatch center and he alleged that Petitioner's residents were "subjected to unnecessary risk." CMS Ex. 2, at 10-11. Inspector Love testified at

hearing that the problem he detected regarding the alarm monitoring company contacting the local fire department caused him to conclude that Petitioner's residents were subject to immediate jeopardy on April 4, 2005, however immediate jeopardy was abated on that day by corrective action of Petitioner. Tr. 58, 127-28, 154; *see also* CMS Ex. 2, at 11-12. Petitioner's position is that its alarm worked and that it should not be held accountable for the fact that all the telephone lines at the fire department dispatch center were busy when Petitioner's alarm monitoring company attempted calling on April 4, 2005. Petitioner's Prehearing Brief at 10-13; Petitioner's Post-Hearing Brief (P. Brief) at 14-19.

Based on the foregoing facts, CMS presents three examples to support its position that Petitioner was in violation of 42 C.F.R. § 483.70(a) on April 4, 2005. However, before addressing the individual examples of violations, it is necessary to address a legal issue raised by Petitioner.

1. The legal standard by which Petitioner's compliance with 42 C.F.R. § 483.70(a) is judged.

I advised the parties in the Prehearing Order[4] that I intended to apply the Board's prior rationale in *Hillman* when allocating the burden of persuasion in this case. I similarly advised the parties at the beginning of the hearing. Tr. 7-8. The evidence is not in equipoise in this case and there is no issue raised regarding the proper allocation of the burden of persuasion. The Board's definition of the requirements for a prima facie case from *Hillman* is, nevertheless, helpful in resolving this case:

> HCFA [now known as CMS] must identify the legal criteria to which it seeks to hold a provider. Moreover, to the extent that a provider challenges HCFA's findings, HCFA must come forward with evidence of the basis for its determination, including the factual findings on which HCFA is relying and, if HCFA has determined that a condition of participation was not met, HCFA's evaluation that the deficiencies found meet the regulatory standard for a condition-level deficiency.

DAB No. 1611, at 8. This passage from *Hillman* is important because it shows that for a considerable time the Board has recognized that CMS has an initial burden to make a prima facie showing of a violation of some legal criteria to which it seeks to hold a provider such as Petitioner. In order make a prima facie case, CMS must: (1) identify the statute, regulation or other legal criteria to which it seeks to hold a Petitioner; (2) come

---

[4] Notice of Case Assignment and Prehearing Case Development Order (Prehearing Order), dated July 6, 2005, para. C.4.

forward with evidence upon which it relies for its factual conclusions that are disputed by the Petitioner; and (3) show how the violation or deficiency it found amounts to noncompliance that warrants an enforcement remedy.

Petitioner in this case objects that CMS seeks to hold it responsible for a violation of the National Fire Alarm Code. Petitioner argues that the National Fire Alarm Code does not have the force and effect of the Act or the Secretary's regulations, and violation of the Code is not a proper basis for imposition of an enforcement remedy.

The Secretary requires by regulation that a long-term care "facility must be designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the pubic." 42 C.F.R. § 483.70. Subsection (a) of the regulation, entitled "Life safety from fire" requires that a facility meet the applicable provisions of the 2000 edition of the Life Safety Code published by NFPA (Life Safety Code), which has been incorporated in the regulation by reference in accordance with 5 U.S.C. § 552(a).[5] Specific exceptions to the application of the 2000 edition of the Life Safety Code are listed in the regulation. 42 C.F.R. § 483.70(a)(1)(ii). CMS is also granted authority to waive provisions of the Life Safety Code that would result in unreasonable hardship to the facility so long as the waiver would not adversely affect the health and safety of the patients. 42 C.F.R. § 483.70(a)(2). Petitioner does not dispute that the regulation properly incorporates the 2000 edition of the Life Safety Code or that the incorporated edition of the Life Safety Code has the effect of a regulation. Petitioner is correct, however, that the regulation does not incorporate by reference the National Fire Alarm Code, though it is referred to in 42 C.F.R. § 483.70(a)(7)(iii)(A).

The surveyor worksheet used by Inspector Love in this case requires, under Tag K51 for existing structures, that the surveyor determine whether the facility has:

> A fire alarm system with approved component, devices or equipment installed according to NFPA 72, National Fire Alarm Code to provide effective warning of fire in any part of the building. Activation of the complete fire alarm system shall be by manual fire alarm initiation, automatic detection or extinguishing system operation. Pull stations in patient sleeping areas, may be omitted provided that manual pull stations are within 200 ft of nurse's stations. Pull stations are located in the path of egress. Electronic or written records of

---

[5] Section 1819(d)(2)(B) of the Act provides that a SNF must meet the provisions of the edition of the Life Safety Code specified by the Secretary in regulation. Section 1919(d)(2)(B) imposes the same requirement for nursing facilities.

> tests shall be available. A reliable second source of power must be provided. Fire alarm systems shall be maintained periodically and records of maintenance kept readily available. There shall be annunciation of the fire alarm system to an approved central station. 19.3.4, 9.6

CMS Ex. 1, at 15. The SOD (CMS Ex. 2, at 9) includes similar language and also refers to subsection 19.3.4 and section 9.6 of the Life Safety Code. Extracts of those provisions are at CMS Ex. 11, at 3-8. Life Safety Code § 19.3.4, titled "Detection, Alarm, and Communications Systems," requires that health care facilities with occupants have a fire alarm system in accordance with section 9.6. Life Safety Code § 9.6 is titled "Fire Detection, Alarm and Communications Systems." Life Safety Code § 9.6.1.4 requires that a fire alarm system be "installed, tested, and maintained in accordance with the applicable requirements of NFPA 70, *National Electrical Code*, and NFPA 72, *National Fire Alarm Code*," with exceptions. Life Safety Code § 9.6.1.7 requires that a fire alarm system have an approved maintenance and testing program complying with NFPA 70, National Electrical Code and NFPA 72, National Fire Alarm Code. The National Fire Alarm Code is referred to in multiple additional subsections of Life Safety Code § 9.6.

The surveyor worksheet and the SOD language suggests that CMS treat the National Fire Alarm Code as imposing requirements upon long-term care facilities related to their fire alarm systems beyond what is specified by the regulations. Petitioner's argument turns on the notion that it cannot be bound by the provisions of the National Fire Alarm Code or penalized for their violation unless that Code has been properly incorporated by reference in the Secretary's regulations. CMS argues that the 1999 edition of the National Fire Alarm Code was incorporated by reference by § 2.1.1 of the 2000 edition of the Life Safety Code, furthering the impression that CMS seeks to give the provisions of the National Fire Alarm Code the force and effect of a regulation. Tr. 19-21.

I concur with Petitioner that the National Fire Alarm Code has never been incorporated by reference by the Secretary's regulations. Accordingly, the provisions of the National Fire Alarm Code do not have the same force and effect as the provisions of the Secretary's regulations. The requirements of the Act and the Administrative Procedure Act (APA) are controlling law in this case. The APA provides that each agency of the federal government must make available to the public by publication in the Federal Register all "substantive rules of general applicability" (5 U.S.C. § 552(a)(1)(D)) and that "except to the extent that a person has actual and timely notice of the terms thereof, a person may not . . . be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1). The APA provides that

incorporation by reference is sufficient. 5 U.S.C. § 552(a)(1).[6] In this case the problem for CMS is that only the 2000 edition of the Life Safety Code is incorporated by reference in 42 C.F.R. § 483.70(a), there is no mention of incorporation of the 1999 edition of the National Fire Alarm Code.[7]

The requirement of the APA that a regulation must be properly published in the Federal Register in order to be enforceable was considered in *Appalachian Power Company v. Train*, 566 F.2d 451 (4th Cir. 1977). The Fourth Circuit Court of Appeals considered the requirements for publication of regulations and incorporation by reference in the context of an Environmental Protection Agency (EPA) regulation challenged by multiple power companies. The regulation in question required the affected companies to comply with a document referred to as the "Development Document." There was no disagreement in the case that the lengthy document was not set forth in the regulations and that, while the EPA intended to incorporate the document by reference in the regulations, the EPA failed to follow the procedures for incorporation by reference specified at 1 C.F.R. Part 51. The court found that the provisions of the "Development Document" were unenforceable against the companies. The court reasoned that 5 U.S.C. § 552(a)(1) of the APA is clear that a person or entity may not be required to "resort to, or be adversely affected" by something that is required to be published in the Federal Register but is not. *Id.* at 455. Section 552(a)(1)(D) requires agencies to publish in the Federal Register "substantive rules of general applicability." The court found the document in question is a substantive rule of general applicability based on the fact that it imposed mandatory obligations upon members of the public. Thus, the court found that for the terms of the document to be enforceable it either had to be published in the Federal Register in its entirety or it had to be incorporated by reference following the procedures specified by, and with approval of, the Director of the Federal Register. *Id.* The court agreed with the EPA that if the EPA could show that the companies in that case had actual and timely notice of the terms of

---

[6] These provisions were added to the APA by the act popularly known as "The Freedom of Information Act." Pub. L. 104-231 § 2(a).

[7] Effective March 11, 2003, the Secretary adopted the 2000 edition of the Life Safety Code to be applicable to all regulated facilities on a phased-in schedule. The 2000 edition of the Life Safety Code is incorporated in 42 C.F.R. § 483.70(a) by reference. *See* 68 FR 1374. In discussing the promulgation of the final rule, the proponent describes the history leading to the final rule, including the proposed rule of August 1, 1990 (55 FR 31196) which was withdrawn October 26, 2001 (66 FR 54179). The proponent also specifically discusses the applicability of 5 U.S.C. § 552, and the requirement for the Secretary to adopt a particular edition of the Life Safety Code and the requirement for incorporation by reference of the edition of the code in the regulation with a copy of that edition being on file at the Office of the Federal Register.

the document, then the actual knowledge exception of 5 U.S.C. § 552(a)(1) applied. However, the court found that the EPA did not prove that the companies had such actual notice of the contents of the Development Document. The court rejected the EPA argument that it was sufficient that the document was reasonably available on grounds that the APA requires a showing of actual notice and not simply availability. *See also*, *Morton v. Ruiz*, 415 U.S. 199, 232-33 (1974); *Timber Access Industries, Co., Inc. v. United States*, 553 F.2d 1250, 1255 (1977).

In the case before me, CMS argues that the provisions of the 1999 edition of the National Fire Alarm Code should be applied like a regulation. CMS Post-hearing Brief (CMS Brief) at 2; CMS Post-hearing Reply (CMS Reply) at 3. However, that code has not been published in the Federal Register or incorporated by reference. CMS seeks to apply the National Fire Alarm Code as a substantive rule of general applicability to the extent that its application would impose specific obligations upon Petitioner subject to enforcement remedies for failure to comply. Accordingly, pursuant to 5 U.S.C. § 552(a) and based on the analysis of that statute in *Appalachian Power*, if CMS wants to enforce the code as a regulation, CMS either needed to set out that edition in the regulation in its entirety or must have met the requirements for incorporation by reference. CMS did neither. CMS argues that section 2.1.1 of the Life Safety Code makes the National Fire Alarm Code a mandatory reference and actually incorporates that code by double reference into the regulation. I am not persuaded that the reference in section 2.1.1 amounts to incorporation by reference into the regulation as required by 5 U.S.C. § 552(a).

There is also an issue of whether or not Petitioner had actual knowledge of the requirements of the 1999 edition of NFPA 72, the National Fire Alarm Code, so that it is enforceable against Petitioner within the exception created by 5 U.S.C. § 552(a). I agree with the court in *Appalachian Power* that the statute clearly specifies there must be a showing of actual knowledge and that availability alone is not enough. After careful review of all the evidence and pleadings in this case, I find no evidence that Petitioner had actual knowledge of the provisions of the National Fire Alarm Code or its application and, in fact, Petitioner denies availability of the code and, by implication, actual knowledge of its provisions. P. Brief at 16-17. Accordingly, I conclude that CMS has failed to show that Petitioner had actual knowledge of the provisions of the 1999 edition of the National Fire Alarm Code and its provisions may not be enforced as a regulation.

Although the provisions of the 1999 edition of the National Fire Alarm Code, are not enforceable against Petitioner as a regulation in this case, the Code is nevertheless credible evidence of the industry standards related to fire alarms, their components, installation and maintenance. *See e.g.*, Fed. R. Evid. 803(18); John W. Strong, *McCormick on Evidence* § 321 (5th ed. 1999). Thus, I find it appropriate to admit and

consider CMS Ex. 14, which contains extracts from the 1999 edition of the National Fire Alarm Code as relevant evidence of the industry standard reflected by those extracted provisions.[8] There is no question that the NFPA, which publishes the Life Safety Code and the National Alarm Code among other documents, is a primary source for industry standards related to fire safety. Tr. 18.

2. Petitioner violated 42 C.F.R. § 483.70 on April 4, 2005.

The surveyor made three findings and conclusions that are cited as violations of 42 C.F.R. § 483.70(a): (a) end-of- line resistors were found on two terminals in the fire alarm control panel; (b) the facility failed to sound the fire alarm in four out of the 12 previous months; and (c) during a fire drill during the survey, the fire alarm monitoring company could not reach the fire department for more than five minutes. CMS Ex. 1, at 15; CMS Ex. 2, at 10. I consider each of the allegations.

a. The evidence does not show that end-of-line resistors are prohibited by law or regulation or that their use is inconsistent with industry standard.

The surveyor alleges in the Fire Safety Survey Report under Tag K51 (CMS Ex. 1, at 15) and the SOD under Tag K051 (CMS Ex. 2, at 10), that end-of-line resistors were observed at terminals 31 and 32 in the fire alarm control panel. CMS and the surveyor allege that use of end-of-line resistors in the alarm control panel was not in accordance with the requirements of the Life Safety Code because they are not approved components, devices or equipment installed according to the National Fire Alarm Code.

CMS offered the testimony of the surveyor, Brian Love. While I accept that Inspector Love is qualified as a Life Safety Code surveyor, the evidence does not show that Life Safety Code surveyors are trained or qualified so that they might credibly opine as to the proper electrical components for use in alarm panels. Further, it has not been shown that Inspector Love had experience or qualifications as an electrical engineer or as a fire alarm technician or installer, qualifications or experience that would give credibility to his opinion regarding the appropriate use of end-of-line resistors in an alarm control panel. Tr. 23. Inspector Love's testimony that he was a professional firefighter and did company inspections; that he was trained to do Life Safety Code inspections by CMS; and that he worked for a "private fire protection engineer" doing inspections (Tr. 23)

---

[8] There is no question as to the authenticity of the extract. I do recognize the hearsay nature of the document, however the document may certainly be viewed as within the exception to the hearsay rule as applied in the federal courts under Fed. R. Evid. 803(18).

does not show that he has the knowledge or experience to credibly testify as to the appropriate use of end-of-line resistors in fire alarm panels, even if I accept his assertions that he recognizes a resistor on sighting it.

The documentary evidence CMS offered also does not support the allegations regarding the use of the resistors. The extract from the 1999 edition of the National Fire Alarm Code (CMS Ex. 14), which I accept as reflecting the industry standard for fire alarms, does not indicate that the use of end-of-line resistors in the manner described by Inspector Love (Tr. 28, 31-34) is impermissible. None of the other documents CMS submitted related to the Life Safety Code address the use of end-of-line resistors. There is also no evidence that the end-of-line resistors Inspector Love saw had any adverse effect on the correct operation of the facility alarm system or any other evidence from which one might infer that the resistors were incorrectly used. Tr. 72.

The Act and Secretary's regulations do not address the use of end-of-line resistors.

I find no legal prohibition, statutory or regulatory (Life Safety Code included), of the use of end-of-line resistors in the manner Inspector Love described. I find no evidence that the use of end-of line resistors configured in an alarm control panel as Inspector Love observed is inconsistent with industry standards as reflected by the National Alarm Code. I do not find that Inspector Love has the expertise to opine as to the proper use of specific electrical components in an alarm control panel. I also do not find any evidence that the configuration described by Inspector Love prevented the proper operation of Petitioner's fire alarm system. I conclude that this example does not constitute a violation of 42 C.F.R. § 483.70(a).

b. Petitioner's failure to sound an audible fire alarm four out of 12 months is not a violation of 42 C.F.R. § 483.70(a).

There is no dispute that the facility did silent drills during night shifts in June 2004, September 2004, December 2004 and March 2005, and did not sound the audible fire alarm in those four months. CMS alleges that failure to test by sounding the audible fire alarm constitutes a violation of the regulation. However, CMS has failed to identify a provision of the Act or other statute, a regulation, or other legal requirement that Petitioner must sound its fire alarm every month. Inspector Love did not refer to a specific regulatory requirement for an audible test of the fire alarm, and, upon my specific inquiry, could point to no specific regulatory requirement. Tr. 36-38. On my questioning, he opined that such a requirement might be in the Life Safety Code, but stated he believed there was an exception for audible testing during evening shifts. He testified after being given a copy of the Life Safety Code as follows:

Q BY MR. BRUCE (Counsel for CMS): The 2000 edition, which is the edition at issue in this case. Can you refer to -- what was that section you referred to again?

A (Inspector Love) 19.7.1.2.

Q Can you take and find that provision there and review that provision and tell us if that is the provision you're referring to?

A It is.

Q And what does that provision provide?

A Fire drills in health care occupancy shall include the transmission of a fire alarm signal and the simulation of an emergency fire condition. Drills shall be conducted quarterly on each shift to familiarize facility personnel with the signals and emergency action required under varied conditions. When drills are conducted between 9:00 p.m. and 6:00 a.m., a coded announcement shall be permitted to be used instead of audible alarms.

Tr. 135-36.

Inspector Love opined that monthly testing of the audible fire alarm is an industry standard, but he provided no basis for that opinion. Tr. 37. CMS is obliged to establish the legal criteria to which it seeks to hold Petitioner. The Act and the Secretary's regulations do not establish standards for sounding an audible fire alarm. The plain language of Life Safety Code § 19.7.1.2 (2000 ed.), which has the force and effect of a regulation, does not specify that audible alarms must be sounded monthly and specifically excepts sounding the audible alarm when a drill is conduct between 9:00 p.m. and 6:00 a.m. (commonly know as the night shift). CMS Ex. 12, at 21. Inspector Love's opinion that there is some industry standard to sound the audible alarm every month, even if correct, does not amount to a legal requirement for Petitioner to do so.

I conclude CMS has identified no legal requirement that Petitioner sound its audible fire alarm every month. Accordingly, CMS has failed to make a prima facie showing of a violation arising from this example.

c. Petitioner's failure to notify the local fire department of a fire alarm without unreasonable delay during a fire drill on April 4, 2005, is a violation of 42 C.F.R. § 483.70.

The parties stipulated that on April 4, 2005, Inspector Love witnessed a fire drill initiated at his request. Petitioner's fire alarm monitoring company timely received a fire alarm signal from Petitioner's fire alarm system. The monitoring company began placing telephone calls to the Frontenac, Kansas fire department, the fire department that serves the area where Petitioner is located, within four seconds of receiving the alarm signal from Petitioner's system. The alleged deficiency is based upon the fact that the monitoring company was unable to establish a telephone connection with the fire department for five minutes, 20 seconds because each time the alarm company attempted calling the fire department dispatch center it received a telephone busy signal. Petitioner was unaware of any technical or logistical difficulties at the fire department dispatch center that would prevent or interfere with its timely receipt of notification from Petitioner's fire alarm monitoring company. Joint Stipulation (Jt. Stip.).

Life Safety Code § 19.3.4.3.2 requires that fire department notification be accomplished in accordance with Life Safety Code § 9.6.4. CMS Ex. 11, at 7; CMS Ex. 12, at 17-18. Life Safety Code § 9.6.4 requires that a fire alarm system accomplish notification of the fire department of fire or other emergency and allows four methods of transmission: auxiliary alarm system, central station connection, proprietary system, or remote station connection. CMS Ex. 11, at 4-5; CMS Ex. 12, at 13-14. These provisions of the Life Safety Code, which are cited on the Fire Safety Survey Report (CMS Ex. 1, at 15) and the SOD (CMS Ex. 2, at 9), do not specify how quickly notification of the fire department must be accomplished.

National Fire Alarm Code § 5-2.6.1.1(1) specifies that a fire alarm monitoring company must immediately retransmit the alarm to the fire department communications center. Immediately is defined as "without unreasonable delay." It is also stated that routine handling should take a maximum of 90 seconds from receipt of the alarm signal by the monitoring station until "initiation of retransmission" to the fire department communications center. CMS Ex. 14, at 3-4. A note that appears in the National Fire Alarm Code Handbook advises that alarm monitoring companies must give highest priority to handling and retransmission of fire alarm signals because in the worst case it may take 15 minutes for the signal from the protected premises to reach the monitoring station. I have already discussed that I do not view the National Fire Alarm Code as having the force and effect of a regulation, but that I do find it to be good evidence of industry standard. However, the standard for how quickly a fire alarm needs to be transmitted by a fire alarm system from a protected long-term care facility through a fire

alarm monitoring company to the fire department so that the fire department may respond, is not answered by any of the evidence presented to me in this case. The Act and the Secretary's regulations also do not address this specific issue which seems to be the focus of the parties.

However, 42 C.F.R. § 483.70 does impose upon all long-term care facilities that choose to participate in the Medicare or Medicaid programs the obligation to ensure that:

> The facility . . . be designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the public.

The requirement established by 42 C.F.R. § 483.70(a) that each long-term care facility meet the provisions of the 2000 edition of the Life Safety Code, is one of the ways that the Secretary has specified that a long-term care facility will satisfy its overarching obligation to protect the health and safety of its residents, its personnel, and the public. The surveyor and the parties in this case have focused extensively upon the timing involved in the transmission and/or retransmission of the alarm signal and who should bear fault for failure of the Frontenac Fire Department to receive the alarm from the alarm monitoring company. The Act, the regulations, and the Life Safety Code do not specify how much time is permissible. The National Alarm Code suggest times from 90 seconds to 15 minutes, but it does not establish a clear industry standard. However, this is not the critical issue. The important issue is whether or not Petitioner met its regulatory obligation to protect the health and safety of its residents, its personnel, and the public.

The real problem in this case is that Petitioner's system for notifying the fire department did not function as it should have, *i.e.*, the alarm monitoring company received the signal but could not communicate the alarm to the fire department because all the phones were busy. In fact, Petitioner's system for notifying the fire department did not work for more than five minutes due to the fact the fire department could not be notified. I find this sufficient to establish a prima facie showing of a violation of 42 C.F.R. § 483.70, because Petitioner's facility was not equipped and maintained to protect the health and safety of its residents, its personnel, and the public during periods when its system was not functioning.

Petitioner is afforded the opportunity to disprove or rebut the prima facie showing or to establish some affirmative defense. The fact that the fire department could not be notified for more than five minutes due to busy signals is not disputed. Petitioner has presented no evidence to show that it had some back-up notification process such as calling 911, and, it admits it has no such plan. P. Brief at 7. In fact, Petitioner takes the position that so long as it has an alarm system it is not obliged to call 911. P. Brief at 7; P. Reply at 2. Reading the Life Safety Code in a very technical manner, I agree with Petitioner that it

does not require a facility to have a plan to call 911 if there is a functioning alarm system.[9] However, I am not persuaded that the incorporation by reference of the Life Safety Code should be a bar to requiring long-term care facilities to exercise common sense and judgment when protecting its residents and personnel. Calling 911 or another emergency service number, in a fire drill or actual emergency, would seem to be a reasonable step for any long-term care facility to take as a back-up measure to ensure that the alarm is delivered or to ensure emergency services understand the alarm is only a drill. Petitioner has not presented evidence that it had a reliable back-up plan and its system failed in the presence of the surveyor. Petitioner has not rebutted the prima facie case. I also find unpersuasive Petitioner's argument that Inspector Love's incorrect marking on the Fire Safety Survey Report, should be grounds for excusing its regulatory violation. Petitioner's Prehearing Brief at 3-4; P. Brief at 4-5; Tr. 110-13; 121-22.

I conclude that Petitioner was in violation of 42 C.F.R. § 483.70 on April 4, 2007.

2. A PICMP of $2000 is reasonable.

In determining the amount of the CMP, the following factors specified at 42 C.F.R. § 488.438(f) must be considered: (1) the facility's history of noncompliance, including repeated deficiencies; (2) the facility's financial condition; (3) the seriousness of the deficiencies as set forth at 42 C.F.R. § 488.404; and (4) the facility's degree of culpability.

The regulation authorizes the imposition of a PICMP ranging from $1000 to $10,000, for a regulatory violation. Pursuant to the guidance in *Emerald Oaks*, DAB No. 1800, I must assess *de novo* the reasonableness of the CMP proposed by CMS based on the factors set forth at 42 C.F.R. § 488.438(f). The PICMP of $2000 proposed by CMS is at the lower end of the range for a PICMP. CMS provided me with no evidence related to Petitioner's past history of noncompliance other than to allege past noncompliance in May 2004, without any detail as to the nature of that noncompliance. I also have received no evidence regarding Petitioner's ability to pay, nor has Petitioner denied the means to pay.

A facility may only challenge the scope and severity level of noncompliance found by CMS if a successful challenge would affect the amount of the CMP that could be collected by CMS or impact upon the facility's nurse aide training program. 42 C.F.R. §§ 498.3(b)(14) and (d)(10)(i). Petitioner's authority to conduct a nurse aide training program was withdrawn but later restored. Tr. 63-65. Further, whether or not a

---

[9] In a technical sense, Petitioner's alarm system was not functioning as the system, including the equipment at Petitioner's facility and monitoring company, could not deliver the alarm to the fire department as it was intended to.

deficiency poses immediate jeopardy is irrelevant to the amount of the PICMP that may be imposed as there is only a single range for a PICMP. However, to the extent that a declaration of immediate jeopardy reflects upon the seriousness of the deficiency, it is reasonable to consider whether or not immediate jeopardy existed as an evidentiary matter.

Inspector Love testified at hearing that the problem he detected regarding the alarm monitoring company contacting the local fire department caused him to conclude that Petitioner's residents were subject to immediate jeopardy on April 4, 2005. CMS agreed with the state agency determination that immediate jeopardy was abated on April 4, 2005 by corrective action of Petitioner. Tr. 58, 127-28, 154; *see also* CMS Ex. 2, at 11-12. Petitioner argues that CMS has presented no competent evidence that the noncompliance would likely or probably cause serious injury, harm, impairment, or death.

Immediate jeopardy is appropriately found when a deficiency has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident. 42 C.F.R. § 488.301. The Board recently explained that on appeal, there is a presumption CMS's determination of immediate jeopardy is correct. The long-term care facility must rebut the presumption in favor of the CMS declaration of immediate jeopardy by showing it is clearly erroneous. *Daughters of Miriam Center*, DAB No. 2067 at 7 (2007). Petitioner argues that its facility is only one-story with a fully automatic sprinkler system. The audible fire alarm and sprinklers are tested regularly and have never failed. In 25 years of existence, the facility had only one fire 20 years ago that was suppressed by the sprinkler system. Petitioner argues its staff is well-trained and during the fire drill triggered by Inspector Love it only took staff 1.5 minutes to evacuate all residents at risk. Petitioner concludes that the fire department's delayed receipt of the fire alarm on April 4, 2005 did not cause and was not likely to cause serious injury, harm, impairment or death to any resident. P. Brief at 19-24. I am not persuaded by Petitioner's argument or the evidence that it points to as showing that the CMS immediate jeopardy determination was clearly erroneous. Petitioner's argument suggests that the fire department response to a fire alarm is really unnecessary for protection of Petitioner's residents and staff given Petitioner's sprinkler system and trained staff. However, inherent in the regulations and the Life Safety Code, and as a matter of common-sense, timely response of the fire department to a real fire is critical to avoid serious injury or death to facility residents. The adverse conditions associated with a real fire such as smoke, heat, explosions, and structural collapse are not present and do not hinder prompt evacuation in the case of a fire drill. Whether or not Petitioner's sprinkler system could completely control every fire has not been demonstrated. Similarly, Petitioner's staff's performance under real fire conditions has not been demonstrated, at least not within the last 20 years. The unrebutted testimony of Inspector Love is that fire can spread rapidly, thus rapid response to a fire alarm is critical. Tr. 154. After review of all the facts and with due consideration of Petitioner's

arguments, I cannot conclude that the declaration of immediate jeopardy was clearly erroneous in this case and I do find that this was a serious violation. While I do not find that Petitioner was significantly culpable in this violation based on the administrator's testimony, I do not find that the $2000 proposed PICMP should be reduced.

Accordingly, I conclude that a $2000 PICMP is reasonable.

III. Conclusion

For the foregoing reasons, I find that Petitioner violated 42 C.F.R. § 483.70(a) on April 4, 2005, and that a PICMP of $2000 is reasonable.

/s/

Keith W. Sickendick
Administrative Law Judge