Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	
Glen Rose Medical Center Nursing Home,	DATE: October 22, 2002
Petitioner,	Civil Remedies CR918 App. Div. Docket No. A-02-116
	Decision No. 1852
- v. -	
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Glen Rose Medical Center Nursing Home (Glen Rose) appealed the decision of Administrative Law Judge (ALJ) Jose A. Anglada dismissing in part Glen Rose's request for a hearing. Glen Rose Medical Center Nursing Home, DAB CR918 (June 14, 2002) (ALJ Decision). The ALJ held that Glen Rose failed to file a timely request for a hearing as to certain deficiency findings cited in CMS's initial notice of imposition of remedies. In addition, the ALJ found that Glen Rose did not show good cause for its failure to file a timely hearing request.

Based on the following analysis, we conclude that the ALJ erred in dismissing the hearing request as untimely. We therefore reverse the ALJ Decision and remand this case to the ALJ for further proceedings consistent with this decision.

The record here includes the record before the ALJ and the parties' submissions on appeal.[1] Our standard of review on appeal from an ALJ decision of a disputed issue of law is whether the initial decision is erroneous. The standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence in the record as a whole. Guidelines for Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs (at http://www.hhs.gov/dab/guidelines/prov.html); see also South Valley Health Care Center, DAB No. 1691 (1999), aff'd South Valley Health Care Center v. HCFA, 223 F.3d 1221 (10th Cir. 2000); Lake Cook Terrace Center, DAB No. 1745, at 6 (2000) ("it is not our role to substitute our evaluation of the evidence for that of the ALJ, but only to determine whether his factual findings are supported by substantial evidence in the record as a whole"). The standard of appellate review of an ALJ's exercise of discretion to dismiss a hearing request, where such dismissal is authorized by law, is whether the discretion has been abused. Osceola Nursing and Rehabilitation Center, DAB No. 1708, at 2 (1999); cf. Rulings on Request for Removal of Hearing to Board, Rehabilitation & Healthcare Center of Tampa, Appellate Division Docket No. A-99-95 (August 16, 1999) and Four States Care Center, Appellate Division Docket No. A-99-66 (June 7, 1999) (regulation specifying that an ALJ "may" dismiss means ALJ has discretion to

[1] Glen Rose submitted with its request for Board review of the ALJ Decision two attachments, relating to two surveys of Glen Rose, that were not included in the record below. We admitted these documents into the record pursuant to 42 C.F.R. § 498.86(a).

Not included in the record is a supplemental brief filed by CMS on October 7, 2002. Under the Board's procedures, the only authorized submissions following the request for review were CMS's response to the request for review and Glen Rose's reply. Guidelines for Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs. CMS did not request permission from the Board to deviate from these procedures or consult with Glen Rose before submitting its supplemental brief. Moreover, no new issues were raised in Glen Rose's reply brief which CMS should have had an opportunity to address. We therefore grant Glen Rose's motion to strike CMS's supplemental brief from the record.

determine whether dismissal is appropriate based on the circumstances of the case).[2]

Applicable Law

Compliance with the requirements of participation for long-term care facilities is determined through the survey and certification process, set out at 42 C.F.R. Part 488, Subpart E. Surveys are generally conducted by a state survey agency under an agreement with CMS. Subpart F of Part 488 specifies the remedies that may be imposed by CMS based on a determination that a facility is not in substantial compliance with the requirements. When a survey results in findings that the facility is not in substantial compliance and CMS chooses to apply one or more remedies, CMS is required to issue a notice to the facility stating the nature of the noncompliance, which remedy is imposed, the effective date of the remedy and the right to appeal the determination leading to the remedy. 42 C.F.R. § 488.402(f). Where CMS imposes a civil money penalty (CMP), the notice must include the following information:

> (i) The nature of the noncompliance;
> (ii) The statutory basis for the penalty;
> (iii)The amount of penalty per day of noncompliance or the amount of the penalty per instance of noncompliance;
> * * * * *
> (v) The date of the instance of noncompliance or the date on which the penalty begins to accrue;
> (vi) When the penalty stops accruing, if applicable;
> * * * * *
> (viii)Instructions for responding to the notice, including a statement of the facility's right to a hearing, and the implication of waiving a hearing, as provided in § 488.436.

42 C.F.R. § 488.434(a)(2). Section 488.436 provides that a facility may waive the right to a hearing, in writing, within 60 days from the date of the notice imposing the CMP, in which case the CMP will be reduced by 35 percent.

The regulations governing the conduct of hearings provide that a request for hearing must be filed within 60 days of receipt of notice of an appealable determination. 42 C.F.R. § 498.40(a)(2).

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[2] The cited rulings are published as attachments to Lakewood Plaza Nursing Center, DAB No. 1767 (2001).

The ALJ may extend the filing time "for good cause shown." 42 C.F.R. § 498.40(c).

One ground for dismissing a hearing request is that the "affected party did not file a hearing request timely and the time for filing has not been extended." 42 C.F.R. § 498.70(c).

Background

The following background information is drawn from the ALJ Decision and the record before him, as supplemented on appeal.

Glen Rose is a skilled nursing facility located in Glen Rose, Texas. A survey by the Texas Department of Human Services (State survey agency) that concluded on January 12, 2001 found that Glen Rose was not in substantial compliance with numerous requirements of participation, and that several of these deficiencies posed immediate jeopardy to patient health and safety. In a letter dated January 19, 2001, CMS cited eleven requirements of participation (some including subsections with separate requirements) with which Glen Rose was found out of compliance and notified Glen Rose of the imposition of the following remedies based on these findings: termination of its Medicare provider agreement on February 4, 2001; a $6,000 per day CMP, commencing on January 12, 2001; denial of payment for new admissions effective January 21, 2001.

The January 19 letter also advised Glen Rose of its right to request a hearing before an ALJ and stated that such a request "must be filed no later than March 20, 2001 (60 days from the date of receipt of this letter via fax)." CMS Ex. 1, at 2. The letter further stated: "If you waive your right to a hearing (IN WRITING) no later than March 20, 2001, the total amount of the civil money penalty will be reduced by 35%." Id.

A second survey by the State survey agency that concluded on February 9, 2001 found that, although the conditions that represented immediate jeopardy had been removed, Glen Rose was not in substantial compliance with seven requirements of participation. By letter dated February 9, 2001, CMS listed the seven requirements (which were among the eleven requirements listed in CMS's initial notice) and notified Glen Rose that "the enforcement action (remedies mentioned in the January 19, 2001 Health Care Financing Administration [HCFA] letter) continues as before," with the exception of the following changes:

- TERMINATION: The new termination date is June 12, 2001. . . .

> - CMP: a "per-day civil money penalty" (CMP) is being imposed in the amount of $6,000.00 per day (for the period of immediate jeopardy January 12, 2001 through January 18, 2001) and $1,500.00 per day (commencing January 19, 2001) . . . . The CMP will continue to accrue until the deficiencies are corrected and your facility is found to be in substantial compliance, or your provider agreement is terminated. If a hearing is requested, the CMP will not be collected until a final administrative decision upholding the imposition of the remedy has been made. **If you waive your right to a hearing (IN WRITING) no later than April 10, 2001 (sixty days from receipt of this letter via fax), the total amount of the civil money penalty will be reduced by 35%.**
>
> The other remedy(ies) mentioned in the January 19, 2001 HCFA letter, remain unchanged . . . .

The notice also stated:

> If you disagree with **the determination of noncompliance**, you or your legal representative may request a hearing . . . . You may appeal the finding of noncompliance that led to an enforcement action, but not the enforcement action itself.

CMS Ex. 2, at 1-2 (emphasis in original).

Glen Rose filed a request for hearing on April 9, 2001. CMS filed a Motion for Partial Summary Disposition on September 28, 2001. CMS's motion stated in relevant part:

> Petitioner has failed to timely appeal the deficiency findings which lead to the imposition of a $6,000 per day CMP (from January 12 through January 18) and a DPNA remedy (from January 21 through February 8). Petitioner has, however, timely appealed the revised CMP determination of $1,500 per day (from January 19 through February 8).

Respondent's Motion for Partial Summary Disposition at 11.[3]

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[3] By letter dated May 7, 2001, CMS notified Glen Rose (continued...)

Glen Rose opposed the motion, at the same time filing a Motion for Extension of Time to File Request for Hearing.

The ALJ granted CMS's motion, finding that Glen Rose "took no action" regarding CMS's January 19, 2001 notice "within the 60 days provided." ALJ Decision at 6. The ALJ noted that "the request for hearing that was eventually filed" addressed only the February 9, 2001 notice and "did not directly address the deficiencies noted in the January 2001 survey . . . ." Id.; see also ALJ Decision at 4, n.3. According to the ALJ, "there is no ambiguity in the February 9, 2001 notice that should have led Petitioner to reason that a revised deadline, superseding the March 20, 2001 deadline for appealing the January 19, 2001 notice of remedies, was established." Id.

The ALJ further found that Glen Rose had not shown good cause for an extension of the 60-day time period for filing a hearing request. The ALJ observed that section 498.40(c) of 42 C.F.R. does not define what constitutes good cause, but stated that "[t]his term has been defined . . . by the DAB to mean circumstances beyond an entity's ability to control. *Hospicio San Martin*, DAB No. 1554 (1996)." ALJ Decision at 6. The ALJ stated that this standard was not met since "there is no evidence of confusion in either CMS's notice letter of initial determination dated January 19, 2001, or the notice dated February 9, 2001." Id. at 8. Accordingly, the ALJ concluded that "[t]he only remaining issue in this case is Petitioner's challenge to the non-immediate jeopardy finding of noncompliance which was the basis for a $1,500 a day CMP." Id. at 8.[4]

On appeal, Glen Rose excepted to both of the ALJ's numbered findings of fact and conclusions of law (FFCLs): FFCL A, stating that "Petitioner did not file a timely request for hearing;" and FFCL B, stating that "Petitioner has failed to establish good cause justifying an extension of time to file its request for hearing." ALJ Decision at 3-4.

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[3] (...continued)
that it had attained substantial compliance and that the proposed termination was rescinded. CMS Ex. 3, at 1.

[4] Notwithstanding this finding, there is no indication in the record for the ALJ Decision, which was transmitted to the Board by the Civil Remedies Division on August 8, 2002, that any proceedings in this case are pending before the ALJ.

Analysis

Below, we explain why we conclude that the ALJ erred when he found that Glen Rose did not file a timely request for hearing as to certain deficiencies identified in CMS's January 19, 2001 notice. In view of this conclusion, we do not reach the question of whether the ALJ erred in denying Glen Rose's request for an extension of time to file its hearing request.[5]

Glen Rose did not dispute that it did not file a request for hearing within 60 days of receipt of CMS's January 19 notice, which stated that CMS had found deficiencies posing immediate jeopardy and imposed a $6,000 per day CMP and other remedies. Glen Rose took the position, however, that CMS's February 9 notice was a "revised determination" of noncompliance at both the immediate jeopardy and non-immediate jeopardy levels. Accordingly, Glen Rose argued, it had 60 days from the date of the February 9 notice to request a hearing on all of the deficiencies.

In support of its position, Glen Rose relied principally on the language in the February 9 notice advising the facility of its right to appeal "the finding of noncompliance that led to the enforcement action." We agree with Glen Rose that this language can be read as referring to all of the deficiencies found in the January 12 survey and therefore suggests that the February 9 notice is a revised determination. If the February 9 notice were not a revised determination, Glen Rose would be entitled to contest only CMS's finding in that notice as to the duration of the noncompliance, not the underlying findings of noncompliance that led to the enforcement actions in the first instance. Mimiya Hospital, DAB No. 1833 (2002); Ruling on Petition to Reopen DAB No. 1833 (October 3, 2002) (copy of ruling attached).[6]

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[5] We note in any event that in Hospicio San Martin, the Board applied the definition of "good cause" cited by the ALJ here only after stating that neither party disputed the application of this definition below. The Board has not viewed the question of the proper definition as settled. See The Carlton at the Lake, DAB No. 1829, at 2 (2002).

[6] Thus, the ALJ's statement of what remained at issue after his partial dismissal is in error. The ALJ found that Glen Rose was entitled to a hearing on "the non-immediate jeopardy finding of noncompliance which was the basis for a $1,500 a day

(continued...)

Glen Rose's position is also supported by the language in the February 9 notice that a CMP "is being imposed in the amount of $6,000 per day (for the period of immediate jeopardy January 12, 2001 through January 18, 2001) and $1,500.00 per day (commencing January 19, 2002) . . . ." CMS Ex. 2, at 1. The use of the phrase "is being imposed" with reference to the $6,000 CMP is significant. Since the January 19 notice already advised Glen Rose of the $6,000 per day CMP, CMS would presumably have stated in the second notice that a $6,000 per day CMP had already been imposed (or other words to that effect) if it regarded the February 9 notice as merely adding to the January 19 notice based on the results of the second survey. Instead, the verb form used by CMS signals that the $6,000 per day CMP is being imposed as of the date of the February 9 notice retroactive to January 12.

Further support for Glen Rose's position is provided by the statement in the February 9 notice that "[i]f you waive your right to a hearing (IN WRITING) no later than April 10, 2001 (sixty days from receipt of this letter via fax), the total amount of the civil money penalty will be reduced by 35%." CMS Ex. 2, at 1. The applicable regulations provide that such a waiver must be made "within 60 days from the date of the notice imposing the CMP." 42 C.F.R. § 488.436(a). In giving Glen Rose 60 days from receipt of the February 9 notice to waive "the total amount" of the CMP, CMS thus indicated that this notice was imposing both the $6,000 per day CMP and the $1,500 per day CMP.

Glen Rose could reasonably conclude from these statements that the February 9 notice revised the January 19 notice, and that the 60-day period for filing a request for hearing therefore ran from receipt of the second notice rather than the initial notice. The Board has often stated that we "do not conclude lightly that Petitioner has no right to a hearing on [CMS's] imposition of a civil money penalty." See Alden Nursing Center-Morrow, DAB No. 1825, at 10 (2002), and cases cited therein. Thus, to the extent that there is any ambiguity in CMS's second notice, it should be construed in favor of affording Glen Rose a hearing on the deficiencies underlying the CMPs.

The conclusion that the February 9 notice revised the January 19 notice and established a new deadline for a hearing request is

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[6] (...continued)
CMP." If the ALJ were correct that the February 9 notice is not a revised determination, Glen Rose would not be entitled to contest the findings of noncompliance relating to the non-immediate jeopardy deficiencies listed in that notice.

all the more reasonable given the timing of the two notices. The second notice was dated and faxed only three weeks after the initial notice, well before the end of the 60-day period provided in the initial notice for filing a hearing request. Since no action had been taken by Glen Rose on the initial notice, it was logical to view the second notice as restarting the 60-day period.[7]

Moreover, the applicable regulations specifically contemplate the issuance of a revised determination, providing that an affected party has 60 days from receipt of "the initial, reconsidered, or revised determination" to file a request for a hearing with CMS. 42 C.F.R. § 498.40(a) (emphasis added). CMS did not dispute that the second notice in question here was a revised determination within the meaning of this section. CMS nevertheless maintained that, when CMS revises its remedies "based on the changing nature of a facility's noncompliance," a facility has "more than one deadline to appeal specific remedies which are based on new and different levels of noncompliance." CMS Br. at 13. CMS argued that "[a]pplying Petitioner's liberal construction of section 498.40(a) would improperly enlarge the appeal process that was established by statute, which may already be extended for good cause established by petitioner." Id. at 14. We conclude that this is not a valid basis for denying a facility the 60 days provided by that regulation for appealing a revised determination, however. CMS could address its concern about unwarranted extensions of the appeal period by modifying the language of its notices where appropriate.

The ALJ also stated that the request for hearing filed by Glen Rose after receipt of the February 9 notice did not address the deficiencies in CMS's January 19 notice. The ALJ appeared to imply that this showed that Glen Rose itself understood that the February 9 notice simply added to the January 19 notice and was not a revised determination that extended the time for filing a hearing request in the January 19 notice. Contrary to what the ALJ stated, however, Glen Rose's hearing request specifically contests not only the requirements of participation with which the second survey found continuing noncompliance, but also the

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[7] This case is distinguishable on its facts from Mimiya (upholding the ALJ's dismissal of the facility's hearing request as untimely). In that case, CMS's second notice was issued more than three months after the initial notice. Here, in contrast, the second notice could reasonably be read as establishing a new filing deadline since it was issued during the 60-day period provided in the initial notice for filing a hearing request.

requirements with which Glen Rose was found out of compliance only in the first survey. See CMS Ex. 4 (4/9/01 hearing request) at 4-8.[8] Since the hearing request is clear on its face that Glen Rose was disputing all of the deficiency findings, including those identified only in CMS's first notice, it is immaterial that (as CMS pointed out) the hearing request mentions the February 9 survey but not the January 12 survey, and that (as the ALJ pointed out) Glen Rose's then attorney did not have a copy of CMS's initial notice at the time the hearing request was filed. Thus, the contents of Glen Rose's hearing request are consistent with Glen Rose's contention that it understood the second notice as a revised determination that was appealable in its entirety.

Conclusion

For the reasons explained above, we conclude that Glen Rose filed a timely request for hearing with respect to the alleged deficiencies that were the basis for the $1,500 per day CMP, the $6,000 per day CMP, and the denial of payment for new

[8] Glen Rose's hearing request disputed all of the deficiency findings in the January 19 notice, including four deficiency findings that are not included in the February 9 notice, i.e., deficiencies relating to 42 C.F.R. §§ 483.25(c), 483.25(i)(1), 483.65(a)(1)-(3), and 483.75(o)(2)-(3). The surveyors found that Glen Rose's noncompliance with all but one of these four requirements, section 483.25(i)(1), posed immediate jeopardy. Glen Rose Br., Attachment A. (The regulations pertaining to some of the deficiency findings disputed by Glen Rose appear to have been mis-cited in both of CMS's notices; the tag numbers referenced in the hearing request correspond to those in the survey report, however.)

admissions. Accordingly, we reverse the ALJ Decision and remand the case to the ALJ for further proceedings consistent with this decision.

Judith A. Ballard

M. Terry Johnson

Marc R. Hillson
Presiding Board Member

ATTACHMENT TO DAB NO. 1852

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: October 3, 2002
Mimiya Hospital,	
Petitioner,	Civil Remedies CR836 App. Div. Docket No. A-02-22 Petition to reopen Decision No. 1833
- v. -	
Centers for Medicare & Medicaid Services.	

RULING ON PETITION TO REOPEN

The Centers for Medicare and Medicaid Services (CMS) petitioned to reopen the Board's decision in Mimiya Hospital, DAB No. 1833 (2002). In that decision, the Board reviewed the appeal of Mimiya Hospital (Mimiya) of a decision by an Administrative Law Judge (ALJ) denying Mimiya's request for a hearing to contest the determination by CMS to impose a civil money penalty (CMP) on Mimiya. The ALJ had denied Mimiya's request for a hearing on the grounds that Mimiya had failed to file its hearing request within the 60-day period specified by the regulations in 42 C.F.R. Part 498. See Mimiya Hospital, DAB CR836 (2001) (ALJ Decision).

The Board, while finding that Mimiya's appeal of a CMP for a determination of immediate jeopardy at Mimiya was untimely filed, remanded another portion of the CMP imposed on Mimiya to the Administrative Law Judge for a hearing. The Board found that a second CMS letter notifying Mimiya of the time period in which it was not in substantial compliance with Medicare participation requirements was an initial determination only with respect to the duration of the deficiency and that Mimiya had timely requested a hearing to determine the duration and the appropriate CMP for that deficiency.

CMS is requesting that the Board re-open that part of the decision and revise its findings on that particular issue. The Board assigned Board Docket No. A-02-118 to CMS's request to re-open.*

The Board may reopen its decision, within 60 days of the date of notice of the decision, upon its own motion or the petition of either party. 42 C.F.R. § 498.100. The regulations do not specify a standard for granting a petition to reopen. Procedures applicable to other types of disputes provide that the Board may reconsider a decision when a party promptly alleges a clear error of fact or law. 45 C.F.R. § 16.13. This standard is reasonably applied here as well. Reopening a Board decision is not a routine step in the Board's review of an ALJ decision. Rather, it is the means for the parties and the Board to point out and correct any errors that make the decision clearly wrong.

In support of its request to reopen, CMS argued that the second CMS notification was not an initial determination as that letter imposed no new remedies on Mimiya, but merely informed Mimiya that it had achieved substantial compliance as of June 23, 2000, and that the previously imposed CMP of $100 per day was terminated after a 58-day period of noncompliance. CMS contended that its determination that Mimiya had achieved substantial compliance, thus creating an end date to the CMP, was not an initial determination and the Board's decision created an initial determination not contemplated by the regulations. CMS further argued that the Board's decision was inconsistent with earlier decisions that sustained the dismissal of a hearing request because of a lack of timeliness.

CMS's arguments fail to persuade us that the Board's decision was erroneous, and we accordingly deny the petition to reopen. As we stated in our decision, CMS's second notification was an initial determination that Mimiya had failed to achieve substantial compliance until June 23, 2000. If, as CMS's argument suggests, a facility is precluded from appealing the date when it is deemed by a state survey agency to have returned to substantial compliance, a facility will have no recourse when the state survey agency, for whatever reason, delays its revisit to the facility and the CMP continues to run.

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* Mimiya has appealed the Board's decision in Federal Court.

CMS's reliance on Cary Health and Rehabilitation Center, DAB No. 1771 (2001), is misplaced. The factual situation presented by that case is not comparable to Mimiya's situation. Furthermore, the other two ALJ decisions cited by CMS are likewise inapposite, in no way presenting the issue of whether a petitioner may contest a finding of the date a per day penalty stops accruing when it has not contested the original deficiency finding, but was not notified of the duration and total number of days in the original notice.

Contrary to what CMS argued, the Board's decision does not hamper CMS's ability to impose remedies in a timely manner to promote compliance. While Medicare regulations could have been read to require CMS to include the date a per day CMP stops accruing in any notice of a per day CMP, the Board's decision instead interpreted those regulations to permit CMS to give notice of a per day CMP at a point in time when CMS has not yet determined the full number of days that the facility was not in substantial compliance (and to require the facility to timely appeal that determination in order to contest the underlying findings). See 42 C.F.R. §§ 488.434(a)(2)(vi) and 488.430. On the other hand, the Board's holding recognizes the facility's statutory right to notice and an opportunity to be heard. See section 1128A(c) of the Social Security Act. Until the facility has notice of what date CMS finds is the date on which the facility achieved substantial compliance, the facility does not know whether CMS has accepted the facility's position about when it came into compliance. Indeed, the regulations specify that when CMS determines that a facility achieves substantial compliance it must send the facility a separate notice informing the facility of the "number of days involved" (42 C.F.R. § 488.440(d)(1)(ii)), and the facility is entitled to provide documentation that compliance was achieved at an earlier date (42 C.F.R. § 488.440(h)). Mimiya is entitled to attempt to prove earlier compliance, even though it is not entitled to contest the initial deficiency finding.

The Board's decision balances the affected interests by permitting CMS to issue a notice of noncompliance resulting in a per day CMP before CMS has determined the date a per day CMP will stop accruing and by treating as an appealable initial determination a subsequent notice of continued noncompliance resulting in the imposition of a CMP for an additional number of days beyond the date of the first notice. This result is, moreover, consistent with the appeals procedures at 42 C.F.R. part 498, read as a whole. Those procedures recognize that enforcement is a dynamic process, providing for revision by CMS

of its determinations and for the addition of new issues prior to a hearing.

Conclusion

For the reasons discussed above, we deny the petition to reopen.

/s/
Judith A. Ballard

/s/
Donald F. Garrett

/s/
Marc R. Hillson
Presiding Board Member