Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Hillcrest Health Facility, Inc.,	Date: August 6, 1997
Petitioner,	
- v. -	Docket No. C-97-251 Decision No. CR489
Health Care Financing Administration.	

DECISION DISMISSING REQUEST FOR HEARING

I grant the motion of the Health Care Financing Administration (HCFA) to dismiss the hearing request of Petitioner, Hillcrest Health Facility, Inc., from a determination by HCFA dated July 19, 1996 to impose a civil money penalty against Petitioner. I do so because the hearing request is untimely and because Petitioner has not shown good cause for its failure to make a timely hearing request. My granting of HCFA's motion means that HCFA may collect from Petitioner a civil money penalty of $1,500 per day, beginning on March 1, 1996, and continuing until August 7, 1996. This decision does not affect Petitioner's right to a hearing from determinations by HCFA of February 3, 1997 and March 28, 1997 to impose civil money penalties against Petitioner.

I am separating this case, and my decision, from the cases which involve Petitioner's hearing requests from HCFA's February 3, 1997 and March 28, 1997 determinations. These remaining cases will be consolidated under a new docket number. I will advise the parties in the near future of the procedures to be followed in the remaining case. There is no reason to retain this decision as an interlocutory order in the remaining case. By my separating this decision from the remaining case, Petitioner will be able to appeal this decision now, if it wishes to take an appeal, rather than awaiting my decision in the remaining case.

On March 5, 1997, Petitioner requested hearings from two determinations by (HCFA) to impose civil money penalties against Petitioner. These two determinations consist of determinations:

(1) of July 19, 1996, to impose a civil money penalty of $1,500 per day against Petitioner beginning on March 1, 1996. The total civil money penalty at issue under this determination is $182,500; and

(2) of February 3, 1997, to impose a civil money penalty of $450 per day against Petitioner beginning on November 7, 1996. The total civil money penalty at issue under this determination is $72,900.

On March 28, 1997, HCFA determined to impose a third civil money penalty against Petitioner, of $250 per day, commencing on January 30, 1997. HCFA asserts that this civil money penalty continued to accrue until April 18, 1997. Petitioner has also requested a hearing from this determination and has requested that the hearing be consolidated with the hearings concerning the first two determinations.

HCFA moved to dismiss Petitioner's request for a hearing from HCFA's July 19, 1996 determination. HCFA has not asserted that the requests for hearings from HCFA's February 3, 1997 and March 28, 1997 determinations should be dismissed.

HCFA submitted 13 exhibits (HCFA Ex. 1 - 13) to support its motion. Petitioner has not objected to my considering these exhibits in deciding HCFA's motion. In opposing HCFA's motion, Petitioner submitted three exhibits (P. Ex. 1 - 3). HCFA has not objected to my considering their exhibits. I am receiving HCFA Ex. 1 - 13 as evidence in support of HCFA's motion, and P. Ex. 1 - 3 in support of Petitioner's opposition to the motion.

I make findings of fact and conclusions of law (Findings) in support of my decision. I state each Finding below, as a separate heading, and I discuss each Finding in detail.

1. In order to be entitled to a hearing from a determination by HCFA, a party must file its hearing request no more than 65 days from the date of HCFA's mailing to that party of the notice of HCFA's determination.

The regulations which govern hearings involving HCFA require that a party file a hearing request no more than 65 days from the date of mailing of notice of a determination by HCFA in order to be entitled to a hearing from that determination. Specifically, a party that is entitled to a hearing from a determination by HCFA must make its request within 60 days from its receipt of the notice of the determination. 42 C.F.R. § 498.40(a)(2). Receipt

of a notice of a determination is presumed to occur five days from the date of mailing of the notice. Id. ; 42 C.F.R. § 498.22.

2. A party may receive from an administrative law judge an extension of time for filing a request for a hearing from a determination by HCFA only where that party establishes good cause for not filing timely its hearing request.

If a party does not make a timely hearing request, that party is not entitled to a hearing. See 42 C.F.R. § 498.40(a)(2). An administrative law judge may dismiss a request for a hearing in a case involving HCFA if the party requesting a hearing has not filed its request timely and has not established good cause for failing to file its request timely. 42 C.F.R. § 498.70(c).

A party requesting a hearing may receive from an administrative law judge an extension of time for filing a hearing request if that party establishes good cause for not filing a hearing request timely. 42 C.F.R. § 498.40(c)(2). The regulation does not define the term "good cause." The term "good cause" has been held to mean a circumstance or circumstances beyond a party's ability to control which prevented a party from making a timely hearing request. Hospicio San Martin, DAB CR387, at 2, (1995).

3. Petitioner did not file timely its hearing request from HCFA's July 19, 1996 determination to impose a civil money penalty against Petitioner and, therefore, Petitioner is not entitled to a hearing from that determination.

On July 19, 1996, HCFA provided Petitioner with notice of the determination which is at issue here. Petitioner did not request a hearing from this determination until March 5, 1997, more than 65 days from the date of mailing of this notice. Consequently, Petitioner is not entitled to a hearing from HCFA's July 19, 1996 determination. See 42 C.F.R. § 498.40(a)(2).

4. Petitioner did not establish good cause for its failure to file timely its hearing request from HCFA's July 19, 1996 determination to impose a civil money penalty against Petitioner.

Petitioner did not establish good cause for its failure to file timely a hearing request from HCFA's July 19, 1996 notice. Petitioner has not established the presence of any circumstance that was beyond Petitioner's ability to control which prevented Petitioner from filing timely a hearing request.

Petitioner contends that its failure to file timely a hearing request from HCFA's July 19, 1996 determination was a consequence of Petitioner being misled by representatives of the Mississippi State survey agency into believing that it need not file a hearing request from the determination. Petitioner asserts that it was told by agents of the Mississippi State survey agency that a moratorium was in effect on the imposition of civil money penalties by HCFA. Petitioner contends that it was led to believe by these asserted representations that no adverse consequences would accrue to it from the survey which was the basis for HCFA's July 19, 1996 determination. From this, Petitioner asserts that it concluded that it was unnecessary for it to request a hearing from HCFA's July 19, 1996 determination.

Petitioner has not offered sworn statements of any of its officers or employees to support its fact contentions. With one exception, Petitioner has not identified the particulars of the conversations in which the Mississippi State survey agency representatives allegedly told Petitioner that there was a moratorium in effect on the imposition of civil money penalties by HCFA.

In its brief in opposition to HCFA's motion, Petitioner asserts that, after an informal dispute resolution meeting conducted by the Mississippi State survey agency on May 29, 1997, Petitioner was:

> contacted and advised that none of the deficiencies were going to be changed, but that it was useless to carry the matter forward since there was a moratorium on . . . [civil money penalties] and any further appeal would have no effect on outcome.

Petitioner's brief at 3. It is unclear what communication Petitioner is referring to, inasmuch as Petitioner has not identified it more precisely than the assertion in its brief. Petitioner has not introduced any documents or statements to prove that the asserted communication occurred.

There is credible evidence which refutes Petitioner's account of this purported communication with the Mississippi State survey agency. On June 6, 1996, the Mississippi State survey agency wrote to Petitioner to advise Petitioner of the results of an informal dispute resolution proceeding that occurred on May 31, 1996. HCFA Ex. 8. In that letter, the Mississippi State survey agency told Petitioner that the deficiency that had been identified in Petitioner's operations was warranted. Id. The letter is silent as to any moratorium on the imposition of civil money penalties by HCFA. There is no suggestion in the letter that a civil money penalty would not be imposed against Petitioner based on the finding of a deficiency. Id.

Petitioner asserts that its conclusion that a civil money penalty would not be imposed against it was reinforced by Petitioner's reading of policy statements in the State Operations Manual (SOM). Petitioner asserts that the SOM makes it clear that HCFA vests a great deal of authority in State survey agencies to decide whether to recommend to HCFA to impose remedies against long-term care facilities such as Petitioner. According to Petitioner, the statements that Petitioner attributes to representatives of the Mississippi State survey agency to the effect that a civil money penalty would not be imposed were given added weight by Petitioner's understanding from its reading of the SOM that HCFA would defer to the recommendation of the Mississippi State survey agency.

Petitioner contends also that the SOM and associated documents state that there was a moratorium on the imposition of civil money penalties which was in effect on July 19, 1996. Petitioner argues that it was reasonable for Petitioner to conclude that it was subject to the moratorium, especially in light of the purported statements that Petitioner attributes to representatives of the Mississippi State survey agency.

Finally, Petitioner argues that it was misled into not filing a hearing request from HCFA's July 19, 1996 determination evidenced by the fact that it had vigorously pursued its rights up through informal dispute resolution by the State survey agency. Petitioner asserts that it would not have abandoned pursuing its rights had it concluded that it might be subject to liability.

HCFA disputes Petitioner's contentions concerning the alleged statements made by representatives of the Mississippi State survey agency. As evidence that the State survey agency employees would not have made the statements that Petitioner alleges them to have made, HCFA points to the fact that, on four occasions prior to July 19, 1996, the Mississippi State survey agency advised Petitioner in writing that it would be recommending to HCFA that HCFA impose a civil money penalty of $1,500 per day against Petitioner. HCFA Ex. 4 - 6; 10. By contrast, there is nothing in writing from the Mississippi State survey agency to Petitioner to suggest that Petitioner would not have a civil money penalty imposed against it. HCFA argues that it is not reasonable to conclude that State survey agency employees would contradict orally the express written notices that were sent to Petitioner by the Mississippi State survey agency.

HCFA asserts that, even if for argument's sake, representatives of the Mississippi State survey agency had made misleading statements to Petitioner concerning Petitioner's potential liability for a civil money penalty, HCFA provided Petitioner with written notice, effective July 19, 1996, that HCFA had determined to impose a civil money penalty against Petitioner of

$1,500 per day. HCFA Ex. 11. HCFA avers that the July 19, 1996 notice superseded anything that representatives of the Mississippi State survey agency might have told Petitioner. Furthermore, the July 19, 1996 notice explicitly told Petitioner that it had appeal rights from HCFA's determination which Petitioner had to exercise within 60 days of its receipt of the notice. HCFA Ex. 11 at 2 - 3.

I am not satisfied from the evidence presented by Petitioner that representatives of the Mississippi State survey agency ever told Petitioner that a civil money penalty would not be imposed, or suggested to Petitioner that it could safely ignore HCFA's July, 19, 1996 notice of its determination to impose a civil money penalty. Petitioner has offered no credible evidence to substantiate its assertions of statements by representatives of the Mississippi State survey agency. The closest Petitioner has come to identifying a communication that supports its contentions is to assert that the Mississippi State survey agency told Petitioner, in conjunction with its notice to Petitioner of the results of an informal dispute resolution, that there was no point in Petitioner pursuing its hearing rights because there was a moratorium in effect on the imposition of civil money penalties. But, contrary to Petitioner's assertion, the documentation of a communication between the Mississippi State survey agency and Petitioner concerning the results of informal dispute resolution contains nothing to suggest that a civil money penalty would not be imposed. HCFA Ex. 8.

Furthermore, Petitioner's assertions of what it purportedly was told by representatives of the Mississippi State survey agency are belied by the notices that were sent to Petitioner by the Mississippi State survey agency. HCFA Ex. 4 - 6; 10. These notices say nothing about a moratorium on the imposition of civil money penalties. To the contrary, they advise Petitioner expressly that the Mississippi State survey agency would recommend that HCFA impose a civil money penalty against Petitioner. Id.

I do not find that Petitioner had good cause for not requesting a hearing timely from HCFA's July 19, 1996 determination to impose a civil money penalty against Petitioner even assuming that representatives of the Mississippi State survey agency told Petitioner that a civil money penalty would not be imposed against it. Petitioner had no reasonable basis to rely on oral representations in disregard of what it received in writing from the Mississippi State survey agency. Whatever Petitioner might have been told orally by representatives of the Mississippi State survey agency, it was given specific written notice by that agency on four separate occasions that the agency intended to recommend that HCFA impose a civil money penalty against Petitioner. HCFA Ex. 4 - 6; 10. At the very least, the clear discrepancy between what Petitioner avers it was told orally and

what it was told in writing put Petitioner on notice that it faced potential liability.

Furthermore, anything that the Mississippi State survey agency might have communicated to Petitioner plainly was superseded by HCFA's July 19, 1996 notice to Petitioner. That notice unequivocally told Petitioner that HCFA had determined to impose a civil money penalty of $1,500 per day against Petitioner. And, the July 19, 1996 notice stated in clear and unmistakable terms that Petitioner was obligated to request a hearing within 60 days from Petitioner's receipt of the notice. Thus, even if Petitioner was misled, prior to July 19, 1996, into believing that no civil money penalty would be imposed by HCFA, that misunderstanding would have been resolved by HCFA's July 19, 1996 notice to Petitioner.

I find nothing in the excerpts from the SOM offered by Petitioner to support Petitioner's assertions that it was misled into not requesting a hearing. The language of the SOM cited to by Petitioner would not have given Petitioner a reasonable basis to conclude that a civil money penalty would not be imposed against it, even assuming that the Mississippi State survey agency representatives made the oral representations that Petitioner attributes to them.

First, the SOM does no more than restate a process that is stated in regulations whereby a State survey agency makes a recommendation to HCFA concerning whether to impose a civil money penalty against a long term care facility. See 42 C.F.R. § 488.400 et seq. The SOM states simply that HCFA will act on a recommendation by a State survey agency and will defer to that recommendation except in the most extraordinary circumstances. What happened in this case is consistent with both the SOM and the regulations. The Mississippi State survey agency made a recommendation to HCFA that HCFA impose a civil money penalty against Petitioner, and HCFA accepted that recommendation. All of the notices that are in evidence plainly notify Petitioner of this process. HCFA Ex. 4 - 6; 10; 11.

Second, the SOM and associated documents neither state nor suggest that civil money penalties would not be imposed against long-term care facilities, such as Petitioner, during the period which included July 19, 1996, the date of HCFA's notice to Petitioner of HCFA's determination to impose a civil money penalty against Petitioner. Petitioner cites to communications between HCFA and State survey agencies, dated January 7, 1997, in which HCFA advised State survey agencies that a moratorium on the imposition of some civil money penalties would be lifted. P. Ex. 3. In these documents, HCFA recites that, prior to January, 1997, civil money penalties were not processed for long-term care facilities who manifested deficiencies at certain, specified, lower levels of severity. P. Ex. 3 at 5. These documents do not

state that a moratorium ever was in effect on the imposition of *all* civil money penalties.

Assuming that Petitioner was aware of a moratorium on the imposition of some civil money penalties by HCFA, the most that Petitioner could have concluded, reasonably, was that HCFA might exercise discretion in some cases not to impose civil money penalties for some lower level deficiencies. When Petitioner received HCFA's July 19, 1996 notice that HCFA had determined to impose a civil money penalty against Petitioner, the only reasonable conclusion that Petitioner could have reached is that HCFA had determined that the deficiencies that were manifested by Petitioner were not of such a low level as to fall within whatever moratorium HCFA might have imposed.

I am unpersuaded by Petitioner's argument that it would not have abandoned its pursuit of its rights but for its being misled by representatives of the Mississippi State survey agency. It is evident that Petitioner committed a judgment error in not requesting a hearing timely from HCFA's July 19, 1996 determination. But, the issue here is not whether Petitioner erred, or even whether it misunderstood the process. What is at issue is whether any communications to Petitioner, either from the State survey agency or from HCFA, were so deficient or misleading as to cause Petitioner not to file a hearing request timely. There is no evidence of communications that would have so misled Petitioner.

/s/

Steven T. Kessel
Administrative Law Judge