Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Carmel Convalescent Hospital,	DATE: August 25, 1995
Petitioner,	
- v. -	Docket No. C-95-008 Decision No. CR389
Health Care Financing Administration.	

DECISION

I. BACKGROUND

The above-captioned action was brought by Petitioner, a skilled nursing facility, to challenge the decision of the Health Care Financing Administration (HCFA) to terminate Petitioner's Medicare provider agreement effective June 25, 1994. As I will discuss below, HCFA has issued three notices concerning the termination of Petitioner's provider agreement:

> 1. HCFA's letter dated January 24, 1994 informed Petitioner that its provider agreement would terminate on February 5, 1994 because Petitioner had failed to submit a plan of correction to address the deficiencies found during a Life Safety Code survey conducted on November 16, 1993;
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> 2. HCFA's letter dated May 25, 1994 informed Petitioner that HCFA had reviewed the findings of deficiencies from the November 16, 1993 Life Safety Code survey, reviewed Petitioner's plan of correction, denied Petitioner's request for waiver of some of the deficiencies, and concluded that the date for terminating Petitioner's provider

> agreement should be changed from February 5 to June 25, 1994;
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> 3. HCFA's letter dated July 7, 1994 informed Petitioner that HCFA had upheld its May 25, 1994 determination to terminate Petitioner's provider agreement on June 25, 1994. HCFA stated as its rationale for upholding its May 25, 1994 determination that it had considered the evidence upon which its earlier termination decision was based, as well as additional new information such as the results of a resurvey conducted on June 16, 1994, which indicated that the deficiencies had not been corrected.

Petitioner filed a hearing request on August 22, 1994, which stated:

> We are asking for an appeals hearing based on the fact that all work [to correct deficiencies] had been completed by 6-25-94.

HCFA moved to dismiss Petitioner's hearing request as untimely filed because it had not been filed within 60 days after receipt of HCFA's May 25, 1994 notice. Petitioner opposed HCFA's motion. In response to an order from me, the parties submitted supplemental briefs addressing both the timeliness issue and the question of whether Petitioner's hearing request stated a claim on which I could grant relief. For the reasons stated below, I conclude that Petitioner's hearing request was timely filed after receipt of HCFA's July 7, 1994 letter. However, I also conclude that the law and the uncontested facts demonstrate that HCFA was authorized to terminate Petitioner's provider agreement. Petitioner's letter requesting a hearing has not raised any issue on which Petitioner might be entitled to relief. Therefore, I am granting HCFA's motion to dismiss.

II. SUMMARY OF FINDINGS AND CONCLUSIONS

I am granting HCFA's motion to dismiss pursuant to the following findings and conclusions detailed in the text below:

> 1. HCFA's letter of January 24, 1994 was HCFA's initial determination. Pages 10 - 11.

2. HCFA's May 25, 1994 letter was HCFA's revised determination. Pages 11 - 12.

3. HCFA's July 7, 1994 letter was also a revised determination. Pages 12 - 14.

4. Petitioner's hearing request dated August 22, 1994 was timely filed. Page 14.

5. In accordance with governing regulations, HCFA made its decision to terminate Petitioner's provider agreement on June 25, 1994 based on the results of surveys conducted on November 16, 1993 and June 16, 1994. Pages 17 - 18.

6. In challenging HCFA's determination that Petitioner's provider agreement should terminate on June 25, 1994, the only matter raised by Petitioner in its hearing request is the contention that all work to correct the deficiencies found during the November 16, 1993 and June 16, 1994 surveys had been completed by June 25, 1994. Pages 15 - 16.

7. After filing its hearing request, Petitioner admitted that it had not completed all the remedial work by June 25, 1994, as alleged in its hearing request. Pages 18 - 20.

8. Even if true, Petitioner's asserted completion of all remedial work after HCFA's last survey and by the date of termination does not raise any material issue for hearing. Pages 16 - 18.

9. Even if true, Petitioner's asserted completion of remedial work after HCFA's last survey and by the date of termination fails to raise any matter on which relief may be granted. Pages 18 - 21.

10. Based only upon the contents of Petitioner's hearing request, HCFA's notices attached to the hearing request, and the relevant regulations, HCFA is entitled to prevail on its motion to dismiss Petitioner's hearing request

under 42 C.F.R. § 498.70(b). Pages 14 - 17; Findings 6, 8, and 9.

11. As of the June 16, 1994 survey, and through at least June 25, 1994, Petitioner was out of compliance with the condition of participation for physical environment. Pages 18 - 21.

12. Based on the pleadings and the evidence of record before me, HCFA is entitled to summary judgment in its favor on the issue of whether the termination of Petitioner's provider agreement was proper. Pages 18 - 21.

III. APPLICABLE AUTHORITY

To participate in the Medicare program, long-term care facilities such as skilled nursing facilities (SNFs) and nursing facilities (NFs) must meet certain requirements which are imposed by the Medicare statutes and which the Secretary of Health and Human Services has determined to be necessary for the health and safety of individuals to whom services are furnished in the facilities. 42 C.F.R. § 483.1. The survey process is the means by which HCFA and its agents assess providers' compliance with federal health, safety, and quality standards. 42 C.F.R. § 488.26(b)(1). The regulations contained in 42 C.F.R. Part 483, Subpart B, serve as the basis for survey activities. 42 C.F.R. § 483.1(b). HCFA may terminate an agreement with any provider if HCFA finds that the provider "no longer meets the appropriate conditions of participation or requirements (for SNFs and NFs) . . . ." 42 C.F.R. § 489.53(a)(3). HCFA's termination of a provider agreement is defined as an "initial determination." 42 C.F.R. § 498.3(b)(7).

A provider within the meaning of the regulation is not entitled to have HCFA reconsider its initial determination to end the provider agreement. 42 C.F.R. §§ 498.2, 498.22. Under the regulations, HCFA's initial determination to terminate a provider agreement remains binding unless (a) the provider obtains a hearing decision from an administrative law judge that reverses or modifies the initial determination, or (b) the initial determination is revised by HCFA in accordance with 42 C.F.R. §§ 498.32 or 498.100. 42 C.F.R. § 498.20(b).

HCFA has the discretion to reopen and revise any initial determination within 12 months after the date of the initial determination. 42 C.F.R. §§ 498.30, 498.32.

Like an initial determination to terminate a provider agreement, HCFA's revised determination on the termination of a provider agreement is also binding unless the affected party requests a hearing before an administrative law judge and obtains a hearing decision that reverses or modifies the revised determination, or HCFA further revises the revised determination on its own initiative. 42 C.F.R. § 498.32(b).

Any provider dissatisfied with HCFA's initial or revised determination to terminate its provider agreement is entitled to a hearing before an administrative law judge. 42 C.F.R. § 498.5(b). The regulation codified at 42 C.F.R. § 498.40 specifies the time limit for requesting a hearing to challenge HCFA's initial determination or revised determination:

> (a)(2) The affected party or its legal representative or other authorized official must file the request in writing within 60 days from receipt of the notice of initial . . . or revised determination unless that period is extended in accordance with paragraph (c) of this section.
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> (c) Extension of time for filing a request for hearing. If the request was not filed within 60 days --
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> (1) The affected party or its legal representative or other authorized official may file with the ALJ a written request for extension of time stating the reasons why the request was not filed timely.
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> (2) For good cause shown, the ALJ may extend the time for filing the request for hearing.

42 C.F.R. § 498.40(a)(2) and (c).

The regulations authorize an administrative law judge to dismiss a hearing request if the hearing request was not timely filed and if the administrative law judge does not find good cause for extending the filing period. 42 C.F.R. §§ 498.40(c), 498.70(c). An administrative law judge also may dismiss the hearing request if a party requesting a hearing is not a proper party or "does not otherwise have a right to a hearing." 42 C.F.R. § 498.70(b).

IV. THE PARTIES' SUBMISSIONS

A. HCFA's motion to dismiss the hearing request for untimeliness under HCFA's May 25, 1994 notice letter and Petitioner's request for extending the 60-day filing period for good cause

On March 31, 1995, HCFA filed a Motion to Dismiss, pursuant to 42 C.F.R. § 498.70(c).[1] According to HCFA, Petitioner's hearing request dated August 22, 1994 was untimely filed because HCFA's notice of termination was dated and sent on May 25, 1994, and Petitioner received the notice on May 26, 1994. HCFA Mem. 1 - 2; HCFA Exs. 1 - 4. HCFA's letter dated May 25, 1994 contained notification to Petitioner of its hearing rights, the time period within which a hearing should be requested, and the information that must be contained in a hearing request. HCFA Ex. 1.

Petitioner did not dispute that HCFA's termination notice dated May 25, 1994 was received at Petitioner's facility on May 26, 1994. Instead, Petitioner argued that I should extend the filing period because Petitioner had good causes for having failed to request a hearing within 60 days of its receiving the May 25, 1994 termination notice. According to Petitioner, it was not until August 22, 1994 that Petitioner received HCFA's letter dated July 7, 1994, in which HCFA stated also that Petitioner's provider agreement had been terminated on June 25, 1994. P. Mem. 5. Petitioner noted that the July 7, 1994 letter did not contain Petitioner's post office box number and, consequently, that letter was not delivered until August 22, 1994. Id. See also P. Ex. 1 at 7.

Petitioner argued, inter alia, that, until it received HCFA's July 7, 1994 letter on August 22, 1994, it was operating under the assumption that HCFA was reconsidering the termination decision dated May 25, 1994 and, therefore, there was no need to file an appeal until

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[1] HCFA filed a Memorandum in Support of Motion to Dismiss Petitioner's Untimely Hearing Request (HCFA Mem.) accompanied by eight exhibits (HCFA Exs. 1 - 8). Petitioner filed a Memorandum of Points and Authorities in Support of Opposition to Motion to Dismiss (P. Mem.) accompanied by four declarations by witnesses and documentary evidence. I have marked the declarations and documents as Petitioner's Exhibits (P. Exs.) 1 - 12. HCFA filed a reply accompanied by HCFA Exs. 9 - 19. Neither party objected to any of the exhibits. Accordingly, I have admitted them into evidence.

Petitioner obtained a subsequent response from HCFA. P. Mem. 5 - 6, 10. Petitioner said it formed its assumptions on the basis of its prior dealings with HCFA, when HCFA had changed its mind after notifying Petitioner by letter dated January 24, 1994 that its provider agreement would be terminated on February 5, 1994. P. Mem. 5 - 6. Petitioner argued also that I should find good cause for extending the filing period in order to avoid an inequitable result. P. Mem. 11 - 14. According to Petitioner, it had completed all required work except for placing flame retardant curtains in 50 percent of the patient rooms by the date of termination. P. Ex. 1 at 5 - 6.

B. The parties' supplemental submissions on the legal effect of HCFA's other notice letters, on whether Petitioner's August 22, 1994 letter constitutes a valid hearing request, and on whether the reason for Petitioner's seeking a hearing has been rendered invalid by its own admissions

Having reviewed the parties' arguments and evidence, especially as they pertained to the three notice letters from HCFA concerning the termination of Petitioner's provider agreement (HCFA's letter dated January 24, 1994, HCFA's letter dated May 25, 1994, and HCFA's letter dated July 7, 1994), I directed the parties to file additional briefs and evidence to address the following issues:

> 1. Which (if any) of HCFA's three termination notices to Petitioner should be considered a revised determination or a further revision of a revised determination by HCFA.
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> 2. Whether Petitioner's August 22, 1994 hearing request should be considered timely filed within the 60 days specified by 42 C.F.R. § 498.40(a) because HCFA's July 7, 1994 notice letter constituted a revised determination (or a further revision of a revised determination) by HCFA.
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> 3. Whether Petitioner's statement in its August 22, 1994 hearing request ("We are asking for an appeals hearing based on the fact that all work had been completed by 6-25-94") meets the criteria of 42 C.F.R. § 498.40(b), which specifies that a hearing request must --

> (1) Identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and
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> (2) Specify the basis for contending that the findings and conclusions are incorrect.
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> 4. Whether the reason for Petitioner's requesting a hearing to challenge the termination of its provider agreement on June 25, 1994 (i.e., "We are asking for an appeals hearing based on the fact that all work has been completed by 6-25-94") has been rendered invalid or obviated by Petitioner's admission that the required flame retardant curtains had not been installed in 50 percent of the patient rooms by June 25, 1994.

Order Directing Parties to File Additional Arguments and Evidence (June 7, 1995). My reasons for raising these issues were fully explained in my order. The parties filed additional submissions by the deadline I had set.[2]

In its supplemental memorandum, HCFA argues that its January 25, 1994 notice was its initial determination, that its May 25, 1994 notice was either an initial determination or a revised determination, and that its July 7, 1994 notice was merely a statement of reaffirmation which did not revise its earlier determination. HCFA Supp. Mem. 2. Based on the foregoing characterization of the notices and its previous arguments, HCFA maintains that the Petitioner's hearing request should be dismissed for untimeliness. HCFA Supp. Mem. 2 - 8. HCFA argues also that Petitioner has no right to a hearing because Petitioner's August 22, 1994 letter did not meet the content requirements of a

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[2] HCFA filed a Supplemental Memorandum in Support of HCFA's Motion to Dismiss Petitioner's Untimely Hearing Request (HCFA Supp. Mem.) accompanied by HCFA Ex. 20. Petitioner filed its Response to Order Directing Parties to File Additional Arguments and Evidence (P. Supp. Mem.) accompanied by supplemental declarations and documents. I have marked these as P. Exs. 13 and 14. In the absence of objection, I have admitted the additional exhibits submitted by the parties.

hearing request, and Petitioner, through its admissions that the work on flame retardant curtains was only 50 percent completed by June 25, 1994, has no legitimate basis for further disputing HCFA's termination action. HCFA Supp. Mem. 8 - 12.

Petitioner argues in its supplemental memorandum that HCFA's letter dated July 7, 1994, by its incorporation of new evidence from the June 16, 1994 resurvey, constituted a revised determination and triggered a new 60-day period for filing a hearing request. P. Supp. Mem. 3 - 5. Therefore, Petitioner contends that its August 22, 1994 hearing request was timely filed. Id. Petitioner is also of the view that its letter dated August 22, 1994 suffices as a hearing request because the letter "clearly gave HCFA adequate notice of Petitioner's allegations so that HCFA could respond[,]" Petitioner was not represented by legal counsel at the time, and HCFA has accepted Petitioner's letter as an adequate hearing request. P. Supp. Mem. 5 - 7.

In addition, Petitioner argues that it has a legitimate basis for disputing HCFA's decision to terminate the provider agreement, notwithstanding the admissions made on Petitioner's behalf.[3] According to Petitioner, having 50 percent or less non-flame retardant patient room curtains "is a legally insufficient reason upon which to base termination of a provider agreement[,]" and termination of the provider agreement is a "draconian sanction given the relative seriousness of the infraction." P. Supp. Mem. 8 (emphasis in original). Petitioner reasons that having no flame retardant curtains in patient rooms cannot be construed as posing a serious and immediate threat to patient safety because the situation is not specifically identified as a fire hazard in the Medicare and Medicaid Guide, which includes as an example of crisis situations where there is "[f]ailure to maintain the integrity of fire and smoke barriers, such as removal of stairway doors and major unprotected openings in corridor walls." P. Supp. Mem. 8 - 9.

According to Petitioner and the Supplemental Declaration of Floyd Hardcastle, Petitioner hired a seamstress in

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[3] Floyd Hardcastle is Petitioner's Administrator and owner. HCFA Ex. 13 at 1. He stated, "As of June 25, 1994, the facility had completed the process of installing flame retardant curtains in approximately fifty percent (50%) of the patient rooms." P. Ex. 1 at 6.

November of 1993 to begin making new curtains out of inherently noncombustible material even though Petitioner was not required to do so under the law. P. Ex. 13 at 2 - 3. Mr. Hardcastle, the facility's Administrator, stated that the same curtains had been hanging in the patient rooms for at least 10 years before a 1992 survey found them to be deficient. Id. at 3. Mr. Hardcastle thought it would have been acceptable to dip these old curtains in a flame retardant substance.[4] After the seamstress had completed only 50 percent of the new curtains around June of 1994, she broke her arm. Mr. Hardcastle said he then directed that the remaining old curtains be dipped in a flame retardant substance. Id. at 2. Mr. Hardcastle said he learned after August 22, 1994 that the dipping process had not been completed by June 25, 1994. Id. at 2 - 3.

V. THE MERITS OF HCFA'S MOTION TO DISMISS AND RELATED ISSUES

A. HCFA's letter of January 24, 1994

There is no dispute between the parties that HCFA's letter of January 24, 1994 was an initial determination. The letter notified Petitioner that, effective February 5, 1994, Petitioner would no longer have the right to participate in the Medicare program as a skilled nursing facility. As stated in the letter, HCFA made this initial determination on the basis of deficiencies found during the November 16, 1993 survey and Petitioner's failure to submit a plan of correction to address those deficiencies. HCFA Ex. 20. HCFA informed Petitioner in its January 24, 1994 letter, "Federal regulations at 42 C.F.R. § 488.28 state that a provider found to be deficient in one or more level B requirements may

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[4] I note that HCFA's surveyors did not require new curtains made of flame retardant materials. The Life Safety Code relied upon by HCFA during both the November 16, 1993 and June 16, 1994 surveys specified only that all combustible curtains and drapes shall be "rendered and maintained flame retardant." HCFA Exs. 7, 12 at 4 - 5. Thus, there is no real issue as to whether Petitioner could have dipped its existing curtains in a flame retardant substance. Petitioner could have done so and satisfied the requirement of the Life Safety Code relied upon by HCFA.

participate in the Medicare program only if an acceptable plan of correction is submitted." HCFA Ex. 20 at 1.[5]

There is no dispute that Petitioner filed no hearing request in response to HCFA's January 24, 1994 letter. Instead of requesting a hearing to challenge the results of the November 16, 1993 survey, Petitioner submitted a plan of correction and requested waiver of certain requirements. P. Ex. 1 at 2 - 3; P. Ex. 3.

B. HCFA's letter of May 25, 1994

I agree with the parties that HCFA's May 25, 1994 letter constituted a revised determination. In this letter, HCFA changed the effective date of termination from February 5, 1994 to June 25, 1994. More importantly, HCFA made known for the first time in the May 25, 1994 letter its conclusion that the deficiencies from the November 16, 1993 survey were seriously jeopardizing the health and safety of Petitioner's patients, and the "Level A requirement found at the C.F.R. 483.70 (Physical Environment) is not met." P. Ex. 3. These conclusions revised HCFA's earlier solicitation of a plan of correction under 42 C.F.R. § 488.28, which governs situations where a provider has been deficient only in Level B requirements which do not jeopardize the health and safety of patients. See 42 C.F.R. § 488.28(a).

There is no dispute that Petitioner did not file a hearing request within 60 days of having received HCFA's May 25, 1994 letter. I do not find it necessary to determine whether Petitioner had good cause for not filing a hearing request until August 22, 1994. As I will discuss below, HCFA issued a further revision of its May 25, 1994 letter on July 7, 1994, and Petitioner's hearing request dated August 22, 1994 was timely filed with respect to HCFA's revised determination of July 7, 1994. Petitioner filed its August 22, 1994 hearing request in response to HCFA's July 7, 1994 letter, as evidenced by Petitioner's statement at the beginning

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[5] The regulation cited by HCFA specifies also that, in order for a skilled nursing facility deficient in one or more level B requirements to continue participating in the Medicare program with an acceptable plan of correction, its level B deficiencies should "neither jeopardize the health and safety of patients nor are of such character as to seriously limit the provider's capacity to render adequate care." 42 C.F.R. § 488.28(a).

of the hearing request, "One [letter] dated May 25, 1994 . . . we did not appeal because we talked to your staff and let them know we would have the [corrective] work done before June 25, 1994." HCFA Ex. 6. In addition, the outcome would be the same whether Petitioner's basis for requesting a hearing (i.e., its assertion that "all work had been completed by 6-25-94") was directed to HCFA's May 25, 1994 determination referencing the November 16, 1993 survey, or to HCFA's July 7, 1994 revised determination referencing both the November 16, 1993 and June 16, 1994 surveys.

C. HCFA's letter of July 7, 1994 and the timeliness of Petitioner's hearing request dated August 22, 1994

As noted above, HCFA has the discretion to reopen and revise its initial determinations or revised determinations within 12 months after the date of such determinations. 42 C.F.R. §§ 498.30, 498.32. In this case, less than 12 months after issuing its determination in the May 25, 1994 letter, HCFA issued another letter to Petitioner on July 7, 1994. On its face, HCFA's letter dated July 7, 1994 revised the bases of the determination contained in the May 25, 1994 letter. HCFA stated in its July 7, 1994 letter that it had reviewed the evidence upon which the May 25, 1994 determination was based, "as well as additional evidence submitted since our initial determination, including evidence gathered from a survey of your facility completed on June 16, 1994." P. Ex. 7. Therefore, until it received the July 7, 1994 letter, Petitioner could not have known of HCFA's conclusions with respect to the "additional evidence submitted" since HCFA's May 25, 1994 determination or the results of the June 16, 1994 survey. Until it received the July 7, 1994 letter, Petitioner lacked the opportunity and basis for disputing HCFA's termination action grounded on events, observations, or conclusions that were not a part of HCFA's May 25, 1994 determination.

I do not find persuasive HCFA's argument that its July 7, 1994 letter cannot be viewed as a revision of the May 25, 1994 determination because HCFA did not change the previously stated effective date of termination or rescind its termination action. See HCFA Supp. Mem. 6 - 7. Without doubt, HCFA may change the effective date of terminations or reverse itself altogether when it issues a revised determination. But not doing so and changing only the factual basis and rationale of its determination still constitute material revisions which afford the provider with an opportunity to appeal. See 42 C.F.R. § 498.40(a)(2).

The regulations on reopening and revisions do not require that HCFA modify, reverse, or rescind every aspect of its preceding determination. Whether HCFA should have changed the effective date of termination when it issued its July 7, 1994 letter is beyond the scope of the disputes before me.[6] HCFA's failure to rescind its termination action based upon the new information HCFA chose to consider may constitute a basis for a valid hearing request. For example, a provider may choose not to appeal an initial determination because the provider agreed with the findings from the first survey and agreed that it should correct the deficiencies cited by HCFA in order to avoid the termination of its provider agreement. However, if HCFA subsequently surveys the corrective actions allegedly undertaken by the provider and again concludes that the provider agreement should be terminated due to outstanding deficiencies, these additional actions by HCFA may give rise to a legitimate dispute over matters such as whether HCFA's subsequent survey should have found the provider in compliance with Medicare requirements as a result of the provider's corrective actions. The opportunity to appeal a revised determination by HCFA exists by regulatory fiat even when, as in this case, HCFA did not inform Petitioner that it had 60 days within which to challenge the contents of HCFA's July 7, 1994 letter.

Nor was I persuaded by HCFA's argument that its July 7, 1994 letter is not a revised determination because the letter is an example of good government, which resulted from the courtesy extended by a public official who wished to keep Petitioner well-informed. HCFA Supp. Mem. 7. Whatever his motives may have been, the author of the July 7, 1994 letter relayed material new information and conclusions on behalf of HCFA. His motives and the principles of good government cannot legitimately bar the affected provider from disputing material new matters contained in HCFA's letter.

HCFA argues also that construing documents such as its July 7, 1994 letter as revised determinations is likely to result in extending a provider's appeal rights indefinitely. HCFA Supp. Mem. 7. I share HCFA's concern

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[6] Petitioner's hearing request does not contain any allegation that, based upon HCFA's issuance of a revised determination on July 7, 1994, HCFA should have also changed the effective date for terminating the provider agreement. Nor has Petitioner made such an argument in its other submissions to me. At this point, I deem the matter waived by Petitioner.

but note that HCFA holds the solution to the problem it fears. Nothing requires HCFA to conduct follow-up surveys, solicit new information, or issue new findings after it has determined initially to terminate a provider agreement. While there is nothing improper with HCFA's efforts to further buttress or re-verify its initial conclusions with additional facts and analysis, HCFA cannot also nullify the affected provider's right to challenge those additional facts or rationales asserted by HCFA.

For the foregoing reasons, I conclude that HCFA's July 7, 1994 letter constituted a revised determination (i.e., a further revision of the revised determination dated May 25, 1994), and, therefore, Petitioner's hearing request dated August 22, 1994 was timely filed under 42 C.F.R. § 498.40(a)(2) with respect to HCFA's July 7, 1994 revised determination.

D. The failure of Petitioner's hearing request to raise any matter which entitles it to a hearing or for which relief may be granted

Having found that Petitioner's request for hearing dated August 22, 1994 was timely filed with respect to HCFA's July 7, 1994 revised determination, I now reach the question of whether Petitioner's request has placed before me any issue which should be adjudicated pursuant to a hearing or which can result in relief for Petitioner. HCFA has argued that Petitioner's hearing request, even if timely filed, should be dismissed because Petitioner "does not otherwise have a right to a hearing." 42 C.F.R. § 498.70(b).

In substance, HCFA's motion is the equivalent of either a motion for judgment on the pleadings or a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12 (b)(6) and 12(c). Using the Federal Rules as guidance, I note that when matters outside the pleadings are used in support of such motions, the motions should be treated as motions for summary judgment. Id. Accordingly, I have evaluated the pleadings (consisting of Petitioner's request for hearing and HCFA's notices of termination attached to Petitioner's request), as well as the evidence outside of the pleadings the parties cite, in a light most favorable to Petitioner as the nonmoving party in deciding whether Petitioner's August 22, 1994 hearing request states a cause of action upon which relief can be granted or whether HCFA is entitled to prevail as a matter of law. For the reasons that follow, I conclude that, based on the pleadings alone, Petitioner "does not

otherwise have a right to a hearing," and, therefore, Petitioner's hearing request should be dismissed. Alternatively, when I evaluate the evidence submitted in addition to the pleadings, I conclude that there are no material issues of fact in dispute and HCFA is entitled to judgment as a matter of law.

The regulation specifies that a hearing request must --

> (1) Identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and
>
> (2) Specify the basis for contending that the findings and conclusions are incorrect.

42 C.F.R. § 498.40(b). Even though HCFA's July 7, 1994 letter did not state the foregoing requirements, it referred Petitioner to the appeal rights stated in HCFA's May 25, 1994 letter. P. Ex. 7. The top of HCFA's May 25, 1994 letter contained the advice "IMPORTANT NOTICE - PLEASE READ CAREFULLY," and the body of the letter informed Petitioner that "[t]he hearing request must state the specific issues, or findings of fact, and conclusions of law with which you disagree and your rationale." HCFA Ex. 1.

In the letter dated August 22, 1994, Petitioner, by its Administrator and owner, Floyd Hardcastle, stated only as follows:

> We are asking for an appeals hearing based on the fact that all work had been completed by 6-25-94.

P. Ex. 8; HCFA Ex. 13 at 1.

Mr. Hardcastle stated no other basis for seeking a hearing to dispute HCFA's decision to terminate the provider agreement. Even though Petitioner alleges that Mr. Hardcastle was not represented by counsel in August of 1994 (P. Supp. Mem. 6), nothing before me establishes that Mr. Hardcastle was unable to read, understand, or follow the very simple instructions provided by HCFA on what to place into a hearing request. Nor do I believe that Mr. Hardcastle, as Petitioner's owner and operator (HCFA Ex. 13), lacked the intelligence or resources to obtain the assistance of counsel if he were uncertain about what to place in Petitioner's hearing request or what could be placed in the hearing request. Therefore,

I conclude that the sole basis for the hearing sought by Petitioner is Petitioner's assertion of "the fact" that it had completed all work by June 25, 1994.

Petitioner argues that Mr. Hardcastle's statement suffices as a valid hearing request because HCFA accepted the August 22, 1994 letter as a hearing request. P. Supp. Mem. 6. As should be clear from the regulations, it is not within HCFA's authority to either accept or dismiss requests for hearings. 42 C.F.R. § 498.70. Moreover, HCFA's motion to dismiss the hearing request is proof that HCFA does not accept Petitioner's August 22, 1994 letter as a valid hearing request.

Petitioner argues also that Mr. Hardcastle's statement suffices as a valid hearing request because it placed HCFA on notice as to what HCFA needed to defend against. P. Supp. Mem. 6. I agree that under the principle of notice pleading, Petitioner's August 22, 1994 letter imparted adequate notice of the fact which Petitioner wished to prove at hearing and against which Petitioner believes HCFA should defend. However, I find that the adequacy of Petitioner's notice does not provide Petitioner with a right to be heard on an assertion of a fact that is false by Petitioner's own admissions and which, even if assumed to be true in the absence of Petitioner's admissions, cannot make invalid HCFA's decision to terminate Petitioner's provider agreement. These conclusions apply equally whether the contents of Petitioner's August 22, 1994 letter are evaluated in light of HCFA's May 25, 1994 notice or HCFA's July 7, 1994 notice.

HCFA correctly points out that Petitioner's merely stating in its hearing request that all work had been completed by the date of termination, June 25, 1994, does not provide Petitioner with a valid basis for a hearing. HCFA Supp. Mem. 9. By asserting that the completion of all work by June 25, 1994 was the sole issue of fact it wished to pursue at hearing, Petitioner waived its right to challenge the deficiencies found by HCFA during the November 16, 1993 and June 16, 1994 surveys. In essence, Petitioner's hearing request is an admission that the deficiencies HCFA relied on in its July 7, 1994 revised determination were in existence on June 16, 1994, as found by the survey. See P. Ex. 7.

The June 16, 1994 survey found Petitioner out of compliance with four Life Safety Code requirements: (1) failure to meet minimum construction standards for a two-story structure, in that the facility was not constructed of two-hour fire resistive materials; (2) failure to have

one-hour fire resistive walls in a basement storage room; (3) failure to have a smoke barrier on each floor; and (4) failure to have flame retardant curtains in all patient rooms. HCFA Ex. 8. By failing to challenge these findings in its hearing request, Petitioner admitted their existence, as of the survey date.

I note that with respect to the first of these deficiencies from the June 16, 1994 survey, evidence introduced into the record suggests that, in 1995, the Fire Marshall may have granted a waiver request, which exempted Petitioner from having to meet the Code's requirement on the use of two-hour fire resistive construction materials in two-story structures. See HCFA Ex. 15. However, there is no evidence or allegation that Petitioner had been granted such a waiver when Petitioner was surveyed, when its provider agreement was terminated, or when it filed its hearing request. According to other evidence generated or submitted by Petitioner, Petitioner did not seek a waiver for this requirement (HCFA Prefix Tag #K12) until December 26, 1994. HCFA Exs. 1, 13; P. Ex. 3.

Petitioner has also argued in its brief that the Fire Marshall confirmed after a survey that the facility has always had a smoke barrier in place. P. Mem. 13. This argument is misleading because the Fire Marshall stated that, as of March 31, 1995, he verified that a smoke barrier existed, but that it showed evidence of recent repair. HCFA Ex. 18. The Fire Marshall's statement is in accord with the information Petitioner provided to HCFA by letter dated December 26, 1994, stating that Petitioner was still awaiting a construction permit for the "construction and/or repairs to the existing second floor smoke barrier wall" at that time. HCFA Ex. 13 at 1.

Notwithstanding the foregoing evidence and arguments added to the record by the parties, the fact remains that Petitioner's hearing request did not challenge the existence of any deficiency found by HCFA. Therefore, the deficiencies cited in HCFA's July 7, 1994 revised determination remain binding upon Petitioner. 42 C.F.R. §§ 498.20(b), 498.32(b). Based on the relevant regulations and Petitioner's failure to challenge the deficiencies found during the June 16, 1994 survey, HCFA is entitled to dismissal of the hearing request.

HCFA used the results of the June 16, 1994 survey to determine that Petitioner was not in compliance with the Life Safety Code. P. Ex. 7. As Petitioner is aware, the survey found Petitioner out of compliance with a

requirement of participation for "physical environment," which incorporates the Life Safety Code requirements. P. Supp. Mem. 9 - 10; P. Ex. 14. "Physical environment" is contained in Subpart B of 42 C.F.R. § 483, which lists all of the requirements an institution must meet in order to qualify to participate as a SNF in the Medicare program or as a NF in the Medicaid program. See 42 C.F.R. § 483.1(b). Regulations such as the one governing "physical environment" also serve as a basis for the surveying activities which determine whether a facility meets the requirements for participation in Medicare and Medicaid. Id. When the survey shows that a SNF or NF is no longer meeting the appropriate requirements for participation, HCFA has the authority to terminate the provider agreement. 42 C.F.R. §§ 483.1(b), 488.26(a)(1), 489.53(a)(1). For these reasons, HCFA's rationale for terminating Petitioner's provider agreement is valid on its face and is in accord with the relevant regulations.

HCFA has never used the status of Petitioner's work completion as of June 25, 1994 or the conditions at Petitioner's facility on June 25, 1994 as grounds for its termination action. Thus, Petitioner's claim that it had completed all work by that date can have no impact on the validity of HCFA's termination decision. Nor does Petitioner's asserted fact constitute a valid affirmative argument. As a matter of law, Petitioner's claim of work completion by June 25, 1994 does not constitute a valid basis for relief or affirmative defense because the regulations specify that surveys shall be the means by which HCFA assesses providers' compliance with federal health, safety, and quality standards. 42 C.F.R. § 488.26(a)(1). HCFA conducted no additional survey after June 16, 1994 and before terminating Petitioner's provider agreement on June 25, 1994. No law or regulation compelled HCFA to conduct another survey after finding deficiencies on June 16, 1994 and before actually effectuating its termination decision. Thus, it is immaterial whether Petitioner then completed all work to correct the deficiencies after the June 16, 1994 survey. HCFA's prima facie valid termination of Petitioner's provider agreement cannot be set aside on the basis of the conditions at Petitioner's facility post-survey.

Additionally, HCFA is entitled to summary judgment in its favor when the pleadings are considered together with the evidence of record. It will not be possible for Petitioner to prove its alleged completion of all work by June 25, 1994, even if such a fact were relevant or could constitute a valid affirmative claim for relief. Petitioner's owner and operator, Floyd Hardcastle, recently admitted that, on June 25, 1994, 50 percent of

the patient room curtains were not made of a flame retardant material and not all of the remaining curtains had been treated with a flame retardant substance. P. Ex. 13 at 2 - 3.[7] His admissions make untrue his earlier contention in the hearing request: "the fact that all work had been completed by 6-25-94." In both the November 16, 1993 and June 16, 1994 surveys, HCFA found the same violation under the same Life Safety Code section (LSC 17-4151) because "patient room curtains are not flame retardant." HCFA Exs. 7, 12.[8] Even setting aside Petitioner's additional admissions that all of its patient rooms have had the same non-flame retardant curtains for at least 10 years prior to 1992 and that Petitioner's owner and operator failed to discover until after August 22, 1994 that not all patient room curtains had been made flame retardant as of June 25, 1994, the fact remains that Petitioner had not succeeded in making all of its patient room curtains flame retardant during the seven month period between being cited for the deficiency in November of 1993 and having its provider agreement terminated on June 25, 1994. P. Ex. 13 at 1 - 3.

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[7] I note that Mr. Hardcastle did not mention in his initial declaration that Petitioner was hanging up new curtains made of flame retardant material as well as dipping old curtains in a flame retardant substance. What he stated in his initial declaration was, "the facility had completed the process of installing flame retardant curtains in approximately fifty percent (50%) of the patient rooms" and, by June 25, 1994, Petitioner had completed all items of work "except 50% of the curtains. . . ." P. Ex. 1 at 6. However, for the purposes of deciding HCFA's motion to dismiss and whether HCFA is entitled to summary judgment, I have assumed all of the facts asserted by Mr. Hardcastle to be true and construed them in a light most favorable to Petitioner.

[8] According to the evidence of record, the requirements for Life Safety Code 17-4151 is as follows:

> All combustible draperies, cubicle curtains, and curtains for decorative and acoustical purposes shall be rendered and maintained flame retardant.

HCFA Exs. 7, 12; P. Ex. 14.

With respect to other deficiencies cited by HCFA pursuant to the November 16, 1993 and June 16, 1994 surveys, the evidence shows that Petitioner informed HCFA on December 26, 1994 that the work on constructing or repairing its second floor smoke barrier wall would begin as soon as Petitioner received a construction permit. HCFA Exs. 8, 13. Petitioner has been told since the November 16, 1993 survey that it failed to meet the requirement for a smoke barrier wall on each floor and that Petitioner should obtain the necessary construction permit. HCFA Ex. 8 at 4; HCFA Ex. 13 at 4 - 5. Yet, Petitioner's December 26, 1994 letter to HCFA indicates that, more than one year after the deficiency was noted, Petitioner was making phone inquiries concerning the issuance of a construction permit. HCFA Ex. 13 at 1. Whatever the merits of Petitioner's reasons for the delay,[9] Petitioner had not yet constructed or repaired a second floor fire barrier wall by December 26, 1994. Id. Therefore, I conclude that the information contained in Petitioner's December 26, 1994 letter to HCFA also makes untrue Petitioner's August 22, 1994 contention that all remedial work had been completed by June 25, 1994.

There is no legitimate reason why this case should proceed to a hearing for the purpose stated in Petitioner's hearing request: for Petitioner to prove the fact that all work had been completed by June 25, 1994. Such proof does not exist, according to Petitioner's admissions. With respect to the four deficiencies still in existence as of the June 16, 1994 survey, Petitioner will not be able to prove that "all work had been completed by 6-25-94" even if Petitioner could prove the truth of his statements that a seamstress' broken arm had caused the work-stoppage, that Mr. Hardcastle's subordinate had disregarded his directive to dip the remaining old curtains in a flame retardant by June 25, 1994, or that construction or repair work had not begun on the second floor fire

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[9] The November 16, 1993 and June 16, 1994 survey reports cited a deficiency under the requirement for a smoke barrier wall on each floor used for sleeping rooms "for more than 30 institutional occupants." HCFA Ex. 8 at 4. Petitioner's December 26, 1994 letter claimed that Mr. Hardcastle did not associate the deficiency with the second floor because he thought the November 16, 1993 survey found a deficiency with the fire wall on the first floor, which housed less than 30 patients. HCFA Ex. 13 at 1. Petitioner did not dispute the need to construct or repair a fire barrier wall on its second floor. HCFA Ex. 13.

barrier wall by December 26, 1994 due to Petitioner's failure to seek a construction permit at an earlier time. See P. Ex. 13 at 2 - 3; HCFA Ex. 13. Moreover, as noted earlier, in 1995, Petitioner sought a waiver of Code requirements in order to resolve the cited deficiency on construction materials required of a two-story building. See HCFA Exs. 13, 15. In its brief and the supporting declaration of Mr. Hardcastle, Petitioner does not claim to have done any work to correct the construction materials deficiency because the building was erected in 1929 and strict compliance with Code requirements would "require that the building be demolished and rebuilt." P. Ex. 1 at 5; P. Mem. 12. At best, Petitioner had completed the work to remedy only one of the four cited deficiencies by June 25, 1994: the failure to have one-hour fire resistive walls in a basement storage room. E.g., P. Exs. 1, 5.

I find also that, even if the conditions at Petitioner's facility on June 25, 1994 were relevant, no genuine issue of material fact is raised by Petitioner's arguments that the absence of flame retardant curtains in all patient rooms posed only minor safety risks to patients and therefore cannot legally justify HCFA's "draconian sanction" of terminating Petitioner's provider agreement. See P. Supp. Mem. 8 - 9. First, the Life Safety Code provision submitted by Petitioner in support of its arguments states plainly that "All combustible draperies, cubicle curtains, and curtains for decorative and acoustical purposes shall be rendered and maintained flame retardant." P. Ex. 14. (emphasis added). More importantly, Petitioner's arguments incorrectly suggest that the lack of flame retardant curtains was the only deficiency still in existence at the date of termination. As noted above, Petitioner had not corrected the smoke barrier wall deficiency on its second floor even when it corresponded with HCFA on December 26, 1994, and there is no allegation or evidence that the requirement for using two-hour fire resistive construction materials had been waived on or before June 25, 1994. HCFA Exs. 8, 13, 15, 18. Even though Petitioner minimizes the importance of flame retardant curtains in patient rooms, Petitioner acknowledges that the alleged noncompliance with smoke barrier walls and construction materials (neither of which allegation was disputed in Petitioner's hearing request) posed serious threats to patient care. P. Supp. Mem. 9. Thus, if conditions at Petitioner's facility on June 25, 1994 were relevant, I would still conclude that HCFA's decision to terminate Petitioner's provider agreement is valid irrespective of the merits of Petitioner's arguments concerning its failure to replace or dip all patient room curtains.

VI. CONCLUSION

Based only upon the pleading and the relevant regulations discussed above, I grant HCFA's motion to dismiss Petitioner's hearing request under 42 C.F.R. § 498.70(b) for Petitioner's failure to raise any claim for which relief may be granted. Further, based on the pleadings and other evidence of record before me, I conclude that HCFA is entitled to summary judgment as a matter of law.

/s/

Mimi Hwang Leahy
Administrative Law Judge