DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Minnesota Department of Public Welfare
Docket No. 82-50-MN-HC

DATE: September 29, 1982

RULING ON REQUEST FOR RECONSIDERATION

On September 24, 1981 the Board issued Decision No. 215 pertaining to a disallowance of costs claimed for thirteen Minnesota intermediate care facilities for the mentally retarded (Docket No. 79-213-MN-HC). In that decision, at page 5, the Board stated:

> Therefore, under the rule enunciated in our Ohio decision, FFP should be available . . . for services rendered by Nekton on Mississippi and Nekton on Frost between January 1, 1979 and January 31 1979.

In the Conclusion the Board stated that the amount of FFP appropriately paid for services at these facilities in accordance with our determination should be calculated by the parties. The parties could return to the Board if they were unable to reach an agreement.

By letter dated December 8, 1981, the Agency sent its calculation of the proper amount of the disallowance to the State. This letter asked the State to respond within 14 days of receipt as to whether it agreed or disagreed with the recalculation. The Agency has said it did not receive a response. The Agency sent a disallowance letter on February 9, 1982 confirming the recalculation set forth in the earlier letter. Then in a letter dated March 22, 1982, the State finally disputed the calculation.

The State has tried to characterize the current dispute as relating to the recalculation of the disallowance by the Agency, but, in effect the State is asking that we reconsider our earlier decision based on evidence that it now wishes to introduce. The State has attempted to document that there was a two-month extension of the two facilities provider agreements in 1978, to which twelve months would be added (see Decision No. 215) so that FFP would be allowable for the period January 1 1979 through March 31, 1979.

Based on the considerations below, we reject the State's request.

Although the Board's former regulations did not explicitly provide that the Board might reconsider its determinations, the Board Chair had ruled that the Board nonetheless had inherent, discretionary authority to reconsider its decisions in exceptional circumstances, considering factors such as the nature of the alleged error or omission prompting the reconsideration request, the length of time which had passed since the original decision was issued, and any harm that might be caused by reliance on that decision. Ruling of September 11, 1980, Florida Department of Health and Rehabilitative Services, Decision No. 105.*

Timeliness of Request

Although the State knew the Board's decision as to the disallowance period upon receipt of the September 24, 1981 decision, it did not protest until six months later. Indeed, even after the Agency sent the State its recalculation in December 1981 and asked for a response within 14 days the State did not do so. In a conference call held on August 9, 1982, the State did not provide any explanation for the delay beyond the fact that while it knew about the possibility of a two month extension, its applicability did not occur to the State until it saw the recalculation (Transcript, p. 2). This reason is insufficient especially in light of the fact that the State did not question the recalculation when it was first sent in December 1981. The State has not provided sufficient justification for its delay in questioning the Board's decision.

Nature of New Information

The State has not argued that the information about the 60-day extensions was newly discovered; it admitted that it knew that the regulations provided for such a possibility. Rather, the State argued that it never raised the issue in Docket No. 79-213 because it did not consider it relevant, since neither the Board nor the Agency raised it. But as the Agency correctly pointed out in the conference call, the State had the responsibility to raise relevant arguments and produce documentation to support these arguments, especially with regard to information that would be uniquely within the knowledge of the State (as this information would be). The State had notice of the legal standard that the Board would apply during this appeal; it had the responsibility to provide any factual information that was relevant, but it did not do so in a timely fashion.

* The Board's new regulations, published after the inception of the appeal in this case, explicitly provide that the Board has discretion to reconsider a decision where a party promptly alleges a clear error of fact or law. See, 45 CFR 16.13 (1981).

The record in the earlier case shows that the State had numerous opportunities to present such information, but did not do so. The State's appeal focused solely on the appeal status of the facilities and attendant legal arguments. Although it did mention surveys and certifications, there was no mention of the extensions. The State's characterization of the issues set the course of the proceedings.

In the informal conference held in Washington, D.C. on February 11-12, 1981, the State was specifically asked about the two month extension possibility (Transcript, p. 64-65), but the State gave no indication that it was present in the appeal (see also, Transcript p. 402, where the State asserted that states have used the extension, but did not assert that that was the case here).

No mention of extensions was made in the State's post-conference brief. The State was sent a copy of Ohio Department of Public Welfare Decision No. 173, April 30 1981 in which it was made clear that the determination of the day that a valid provider agreement ended was crucial, and that the two month extension would extend the term of the provider agreement. Yet, in its subsequent discussions with the Agency and submissions to it as well as submissions to the Board, all based on the principles enunciated in the Ohio decision, the extensions were not mentioned.

Reliance on the Decision

The determination that the State was questioning was a factual one. The legal principle as enunciated in our Ohio decision was not contested. Since the factual determination as stated in the decision has no precedential value, there would be no harm in relying on this decision in the future.

Conclusion

The State failed to present the argument raised here during the months following the conference in Docket No. 79-213 and even following a minimum of four months after a very specific decision and dollar determination had been rendered. It has provided insufficient reasons for not doing so, even though it was on notice that such information might have an effect on its appeal.

We therefore reject the State s request to reconsider Decision No. 215.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

/s/ Norval D. (John) Settle
Presiding Board Member

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