DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Tohono O'odham Nation,	DATE: JUN 30, 1989
Appellant,	
- v. -	Docket No. C-84
Indian Health Service,	DECISION CR 30
Appellee.	

DECISION OF ADMINISTRATIVE LAW JUDGE

Appellant Tohono O'odham Nation requested a hearing, protesting Appellee Indian Health Service's decision to rescind a component of a contract which had been entered into between Appellant and Appellee. Appellee moved to dismiss Appellant's hearing request, on the ground that it was moot. I reserved judgment on the motion and conducted a hearing. Based on the facts, the law, and applicable regulations, I conclude that the case is not moot, and I deny Appellee's motion. I conclude further that Appellee did not properly terminate the contract component in compliance with applicable law and regulations, and I am deciding this case in favor of Appellant.

BACKGROUND

On August 12, 1988, Appellee notified Appellant that it had decided to rescind the psychological services component of a contract between the parties to provide behavioral health services to Appellant's tribal members. Appellee told Appellant that the decision to rescind the contract component was based on Appellee's conclusion that Appellant's performance constituted an "immediate threat to the safety of the intended beneficiaries . . . and to other members of the Indian community served by

that component of the contract." J. Ex. 6/1.[1] Appellee cited as authority for the rescission General Provision Clause No. 16(c)(2) of the contract, 25 U.S.C. 450m, and 42 C.F.R. 36.233(c)(2). Id.

Appellant timely requested a hearing, and the case was assigned to me for a hearing and decision. On February 3, 1989, Appellee filed a motion to dismiss the case on the ground that it was moot, and Appellant filed opposition to the motion on February 17, 1989. I conducted a hearing in the case in Sells, Arizona, on March 15, 1989, in Tucson, Arizona, on March 16-17, 1989, and in Washington, D.C., on April 3, 1989. Appellant and Appellee filed post hearing briefs on May 15 and May 19, 1989, respectively.[2] The parties filed reply briefs on June 7, 1989, and I closed the record of this case on that date.

ISSUES

The issues presented in this case are whether:

1. Appellant's request for hearing should be dismissed because the case is moot; and

2. Appellee properly rescinded the psychological services component of the behavioral health services contract between Appellee and Appellant.

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[1] The parties' exhibits and memoranda, and the transcript of the hearing, will be cited as follows:

Joint Exhibit	J. Ex. (number)/(page)
Appellant's Exhibit	At. Ex. (number)/(page)
Appellee's Exhibit	Ae. Ex. (number)/(page)
Transcript	Tr. (month/day) at (page)
Memorandum in Support of Appellee's Motion to Dismiss for Mootness	Ae.'s Memorandum Supporting Dismissal at (page)
Appellant's Opposition to Motion to Dismiss	At.'s Memorandum Opposing Dismissal at (page)
Appellant's Post-Hearing Brief	At.'s Brief at (page)
Appellee's Post Hearing Brief	Ae.'s Brief at (page)
Appellant's Reply Brief	At.'s Reply Brief at (page)
Appellee's Reply to Appellant's Post-Hearing Brief	Ae.'s Reply Brief at (page)

[2] Pursuant to my directive, Appellee's post-hearing brief was embargoed from Appellant until Appellant filed its post-hearing brief.

APPLICABLE LAW AND REGULATIONS

A. Statutes.

1. The Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450a-m.

2. The Administrative Procedure Act, 5 U.S.C. 551 et seq.

B. Regulations.

1. 42 C.F.R. Part 36--Indian Health.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On December 31, 1987, Appellee and Appellant entered into a contract, pursuant to 25 U.S.C. 450g(a), to provide behavioral health services to Appellant's members. J. Ex. 1A.[3]

2. The term of the contract ran from January 1, 1988, to September 30, 1988. J. Ex. 1A.

3. The contract includes as a component the delivery of psychological services by the Tohono O'odham Psychological Services Branch (TOPS). J. Ex. 1A/12-13.

4. TOPS was formed in 1969, and Appellant and Appellee contracted beginning in 1975 to have psychological services rendered by TOPS. J. Ex. 1A/12; Tr. 3/15 at 236.[4]

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[3] The contract states that, in meeting contract requirements, Appellant shall perform work and services in accordance with a technical proposal dated August 9, 1987. J. Ex. 1A/3. After completion of testimony, the parties offered, and I received into evidence, a document titled "Revised Scope of Work and Budget for Psychological Services and the Alcoholism Program," dated August 21, 1987, which they represent as the technical proposal referenced in the contract. J. Ex. 90. This document does not describe contract obligations different from those stated in the contract and recited in these Findings of Fact and Conclusions of Law.

[4] The transcript of testimony taken on March 15, 1989, incorrectly states on the cover page that it contains testimony taken on March 14, 1989. The transcript of testimony taken on March 16, 1989,

(continued...)

5. The contract requires TOPS to conduct psychological service clinics at Appellee's and tribal and school facilities on Appellant's reservation. J. Ex. 1A/5, 12.

6. TOPS is also required to provide psychological consults to Appellee's, and contractor's, facilities where Appellant's members are treated as inpatients. J. Ex. 1A/5.

7. The contract specifies that psychological services, including psychological assessment and psychotherapy for individuals, families, and children, will be rendered by four Mental Health Technicians (MHTs). J. Ex. 1A/12.

8. MHTs are required by the contract to conduct intake interviews, assist with the formulation of diagnoses, and provide ongoing psychotherapy under the supervision of a Behavioral Health Clinical Supervisor (clinical supervisor) and a psychiatrist employed by Appellee. J. Ex. 1A/12, 13.

9. MHTs are required to schedule and conduct psychological service clinics at least twice weekly and to provide individual counseling of at least 16 scheduled hours per MHT, per week. J. Ex. 1A/13.

10. With respect to Appellee's Sells Hospital, the contract requires MHTs to qualify for paraprofessional staff privileges, to attend morning rounds and discharge planning meetings, and to be available for inpatient consultations during week days. J. Ex. 1A/13.

11. The contract does not require all MHTs to have paraprofessional staff privileges at Appellee's Sells Hospital. See J. Ex. 1A/12-13.

12. The contract does not make paraprofessional staff privileges a prerequisite for MHTs to perform their duties under the contract, except for those duties described in Finding 10, supra. See J. Ex. 1A/12-13; Tr. 3/15 266-267.

13. The contract requires MHTs to be present at specific locations at scheduled hours to provide emergency referrals and treatment recommendations for Appellant's

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[4](...continued)
incorrectly states on the cover page that it contains testimony taken on March 15, 1989. Citations to the transcripts of these dates will be to the correct date, and not to the cover page date.

tribal members who need and seek such services. See J. Ex. 1A/12-13; 3/16 at 536-541.

14. The contract gives TOPS discretion to establish locations and schedules for MHTs' clinical services, within the minimum total hours of service required by the contract. J. Ex. 1A/12-13.

15. The contract does not require TOPS to maintain emergency services beyond the minimum total hours of service required by the contract. See J. Ex. 1A/12-13.

16. The contract does not state the minimum training and experience required to qualify individuals to perform the duties of MHTs. See J. Ex. 1A/12-13.

17. Individuals performing the duties of MHTs are required by the contract to possess sufficient training and experience to enable them to perform the duties specified by the contract and described in Findings 5-11. J. Ex. 1A/12-13.

18. The contract does not state the minimum training and experience required to qualify an individual to perform the job of clinical supervisor. See J. Ex. 1A/12-13.

19. A person performing the job of clinical supervisor is required by the contract to possess sufficient training and experience to enable him or her to perform the supervisory duties specified by the contract. J. Ex. 1A/12-13.

20. The contract requires that client assessment and psychotherapy treatment plans be in accordance with Appellee's program standards and that, at minimum, 75 percent of treatment plans be completed. J. Ex. 1A/13.

21. The contract does not identify the program standards with which psychotherapy and treatment plans must comply. See J. Ex. 1A/13.

22. The contract does not require that all contract performance must be in accord with the requirements of the Indian Health Manual Part 3 - Professional Services, Chapter 14 - Mental Health Programs. See J. Ex. 1A/13; J. Ex. 15.

23. The contract requires that MHTs maintain client records and that at least 75 percent of these records include an intake assessment, treatment plan, progress notes, and a discharge plan. J. Ex. 1A/13.

24. It also requires that MHTs utilize the Patient Care Information System (PCIS), a computerized record-keeping system developed by Appellee, to record client services. J. Ex. 1A/15.

25. The contract does not require TOPS to maintain a register of chronically mentally ill individuals on Appellant's reservation. See J. Ex. 1A/12-13.

26. Effective March 1, 1989, the Credentials Committee of the Executive Committee of the Medical-Dental Staff of Appellee's Sells Hospital restricted the paraprofessional privileges of one of TOPS' MHTs. J. Ex. 14/10.

27. As a consequence of the restriction, this MHT was permitted to evaluate and counsel patients at Appellee's Sells Service Unit facilities only under the direct supervision of Appellee's psychiatrist or Sells Service Unit credentialed TOPS clinical supervisor or consultants. J. Ex. 14/10.

28. Also, this MHT was required to document her assessments for the medical charts only with the co-signature of either Appellee's psychiatrist or the credentialed TOPS clinical supervisor. J. Ex. 14/10.

29. Two of the remaining three MHTs employed by TOPS resigned on or about April 1, 1988. Tr. 3/15 at 249-250; 3/16 at 523; 4/3 at 52.

30. TOPS' clinical supervisor resigned in early March, 1988. J. Ex. 2/1; Tr. 3/16 at 460.

31. As of April, 1988, TOPS employed one credentialed MHT, one MHT whose credentials were restricted, and no clinical supervisor. Tr. 4/3 at 52; see Findings 17-19, supra.

32. This loss of personnel diminished TOPS' capability to perform contracted services. Tr. 4/3 at 53-55.

33. TOPS experienced difficulty assigning MHTs to counsel emotionally disturbed patients who had been discharged from psychiatric hospitalization. Tr. 4/3 at 69.

34. Some individuals who had regularly been treated by MHTs who resigned were not assigned a replacement therapist. Tr. 4/3 at 69.

35. School counselors and teachers had difficulty getting assistance from TOPS when they sought to refer individuals for treatment. Tr. 4/3 at 70.

36. Physicians at Appellee's Sells Service Unit facilities experienced difficulty in getting patients' psychological status assessed by MHTs within a reasonable period of time. Tr. 3/17 at 73.

37. On April 18, 1988, Appellee requested Appellant to present a plan to resolve the deficiencies caused by loss of personnel. J. Ex. 2.

38. In May, 1988, Appellant presented Appellee with a proposal to resolve the deficiencies. See J. Ex. 17; Tr. 3/15 at 251.

39. This proposal was not accepted by Appellee. See J. Ex. 17; Tr. 3/15 at 251.

40. Additional discussions and document exchanges occurred between Appellant and Appellee which failed to produce a mutually acceptable plan to resolve the deficiencies created by the loss of personnel. J. Ex. 26; Tr. 3/15 at 251-256.

41. Representatives of Appellant and Appellee met in June, 1988, and Appellant offered a plan which, among other things, proposed to replace the resigned clinical supervisor with a person supplied by a subcontractor, Palo Verde Hospital. J. Ex. 26; Tr. 3/17 at 96-97; 3/15 at 256.

42. Although this proposal was not formally accepted by Appellee, in writing, Appellee accepted the concept of replacing resigned personnel with qualified subcontract personnel. J. Ex. 26; Tr. 3/17 at 97.

43. By letter dated June 23, 1988, Appellee advised Appellant that if corrective action was not accomplished by July 15, 1988, Appellee intended to immediately reassume the psychological services component of its contract with Appellant. J. Ex. 3.

44. Appellant decided to hire an individual to replace the resigned clinical supervisor and to subcontract with Palo Verde Hospital to obtain personnel to replace the resigned MHTs. J. Ex. 27.

45. Appellant notified Appellee of its intentions on July 6, 1988. J. Ex. 27.

46. The individual hired by Appellant to serve as its clinical supervisor had no prior experience in supervising the performance by mental health clinicians of clinical responsibilities. Tr. 3/15 at 130-131.

47. This employee had extensive administrative experience managing alcoholism treatment and other Indian health care programs. Tr. 3/15 at 113-114.

48. The clinical supervisor was fluent in Appellant's tribal language. Tr. 3/15 at 114.

49. Appellant's new clinical supervisor commenced his employment with Appellant on July 25, 1988. Tr. 3/15 at 112.

50. Appellant entered into a contract with Palo Verde Mental Health Services, d/b/a Palo Verde Hospital (the subcontract), on July 15, 1988. J. Ex. 64/29-34.

51. The subcontractor agreed to supply Appellant with the services of a clinician to perform the duties of client assessment, individual counseling and psychotherapy with written assessments, treatment plans, and progress notes as needed by Appellant. J. Ex. 64/30.

52. The subcontractor agreed that the clinician would be a master's degree social worker or have a master's degree in another behavioral health area. J. Ex. 64/30.

53. The subcontractor agreed that in the clinician's absence, a substitute clinician satisfactory to Appellant, would be designated. J. Ex. 64/30.

54. The subcontractor agreed that the clinician would perform 32 hours per week of direct clinical service. J. Ex. 64/31.

55. The person assigned to work for TOPS pursuant to the subcontract had a master's degree in education with a practicum in mental health counseling. Tr. 3/15 at 156.

56. This person had worked since December, 1981, as a mental health counselor. Tr. 3/15 at 156.

57. This individual's duties for the two and one-half years prior to his assignment under the subcontract, consisted of crisis intervention. Tr. 3/15 at 157.

58. His entire responsibility during this period consisted of performing emergency psychiatric evaluations. Tr. 3/15 at 157.

59. This individual had the training and experience to perform all of the duties assigned to MHTs under the contract. J. Ex. 64/30-31; Tr. 3/15 at 152-157; Tr. 4/3 at 128; 129-130.

60. The clinician provided by subcontract began rendering clinical services for TOPS in July, 1988. Tr. 3/15 at 153-154; 3/16 at 570.

61. During the two weeks that the clinician was on vacation, from late July until early August, the subcontractor supplied another clinician to perform his duties. Tr. 3/15 at 155.

62. Both the contract clinician and his replacement actively performed evaluations and made referrals in clinical settings for TOPS. Tr. 3/15 at 168-171.

63. On July 27, 1988, Appellant notified Appellee that it had met the conditions of its plan to correct contract deficiencies. J. Ex. 4.

64. On July 27, 1988, Appellee wrote to Appellant concerning the status of the TOPS program. J. Ex. 8.

65. Appellee demanded that Appellant devise a work plan to provide and manage psychological services. J. Ex. 8/4.

66. Appellee set a deadline of August 8, 1988, for Appellant to submit its work plan to Appellee, and told Appellant that an inspection team would inspect TOPS' operations at noon on August 5, 1988. J. Ex. 8/5.

67. Appellee's team conducted its inspection of TOPS on August 5, 1988. J. Ex. 6; J. Ex. 42; Tr. 3/17 at 104-105.

68. The inspection team was composed of four individuals: Dr. George McCoy, Dr. Patricia Nye, and Maria Stetter, all employees of Appellee; and Dr. Marvin Kahn, a consultant to Appellant, J. Ex. 6/1.

69. The inspection team conducted its review on the afternoon of August 5, 1988. J. Ex. 42/15; Tr. 3/17 at 104.

70. Members of the inspection team spoke with Appellant's representatives and clinicians. J. Ex. 42/15; Tr. 3/17 at 127-128.

71. Members of the inspection team did not interview clinicians furnished through Appellant's subcontract with Palo Verde Hospital. Tr. 3/17 at 168.

72. Members of the inspection team reviewed about 50 randomly selected patient records. Tr. 3/17 at 129.

73. Dr. McCoy was not familiar with the contractor's obligations under the psychological services component. Tr. 3/17 at 132, 135, 142, 146, 148.

74. Dr. McCoy based many of his judgments regarding Appellant's performance of the contract component on his conclusions that Appellant had obligations which were not in fact required by the contract. Tr. 3/17 at 133, 135, 142, 146, 148.

75. Dr. McCoy was the only member of the team who recommended in writing that Appellee rescind the contract component. J. Ex. 42/7-11.

76. The inspection team did not produce a report with recommendations. See J. Ex. 42.

77. Individual members of the inspection team submitted separate reports. J. Ex. 42

78. On August 12, 1988, Appellee rescinded the psychological services component of its contract with Appellant and assumed operation and control of the psychological services program. J. Ex. 6.

79. Appellee did not offer a hearing to Appellant prior to rescinding the contract component. J. Ex. 6.

80. Appellee concluded that Appellant's performance under the psychological services component of the contract constituted an immediate threat to the safety of members of the Indian community served by that component. J. Ex. 6.

81. On August 5, 1988, August 12, 1988, and all dates between August 5 and 12, 1988, the TOPS program had sufficient trained and experienced personnel to perform the duties assigned to MHTs under the contract. Tr. 3/15 at 265-266; 275-277; Tr. 4/3 at 195.

82. On August 5, 1988, August 12, 1988, and all dates between August 5 and 12, 1988, the TOPS program had a clinical supervisor who was qualified to perform all of the administrative supervisory requirements of the contract. Tr. 3/15 at 113-114.

83. TOPS' relationship with its subcontractor enabled it to obtain clinical supervision of the MHTs; this, in conjunction with the clinical supervision provided by Appellee's psychiatrist pursuant to the contract, would satisfy the clinical supervision requirements of the contract. Tr. 3/15 at 134-135; 261, 263; Tr. 3/16 at 571-572.

84. On August 5, 1988, when Appellee's review team inspected TOPS, TOPS' new clinical supervisor did not present a schedule which allocated personnel in a manner which met all contract personnel requirements. Tr. 3/15 at 118-119.

85. Appellant's clinical supervisor prepared a schedule allocating personnel but forgot to bring it to the meeting with Appellee's review team. Tr. 3/15 at 118.

86. Appellant has not established that on August 5, 1988, August 12, 1988, or any date between August 5 and 12, 1988, it tendered a copy of the schedule to Appellee. See Tr. 4/3 at 195; 201-202.

87. The Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450a-m, provides at 25 U.S.C. 450m, that the Secretary may immediately rescind a contract entered pursuant to the Act without first holding a hearing, if he or she finds that there is an immediate threat to safety.

88. Regulations adopted pursuant to the Act provide that, where Appellee's Director or his or her delegate determines that a contractor's performance poses an immediate threat to the safety of any person, the Director or delegate may immediately rescind a contract without first holding a hearing. 42 CFR 36.233 (c)(2).

89. Failure by the contractor to perform the contract will not necessarily justify peremptory rescission of the contract. See 25 U.S.C. 450a, g, m; 42 C.F.R. 36.233(c)(2).

90. Peremptory rescission is justified where the contractor's performance of the contract creates a substantial likelihood of imminent harm to individuals. 25 U.S.C. 450m

91. In hearings on peremptory rescissions, the contractor has the burden of proving a prima facie case that the contract was improperly rescinded. See 5 U.S.C. 556; 25 U.S.C. 450m; 42 C.F.R. 36.233(c)(2); (d)(1).

92. Once the contractor meets this burden, the burden shifts to the agency to prove that the peremptory rescission was in accordance with statutory criteria. See 25 U.S.C. 450a, g, m.

93. Appellee has not established that as of August 12, 1988, August 12, 1988, or any date between August 5 and August 12, 1988, an immediate threat existed to the safety of any person by virtue of Appellant's performance of, or failure to perform, the contract. See Findings 81-85, supra.

94. Appellee improperly rescinded the psychological services component of the contract.

95. On October 11, 1988, Appellee notified Appellant that it declined to renew the psychological services component of the contract. At. Ex. 13.

96. The issue of the propriety of the declination is not an issue in this case.

97. The September 30, 1988 expiration of the contract and the October 11, 1988 declination have not completely and irrevocably eradicated the effects of the rescission.

98. To the extent that Appellant has suffered pecuniary loss by virtue of Appellee's improper rescission of the psychological services component of the contract, a finding of improper rescission in this case may provide Appellant a basis to seek additional relief in another forum.

99. The expressed reasons for the declination include many of the grounds for rescission offered by Appellee. At. Ex. 13; At. Ex. 21.

100. A finding of improper rescission in this case may provide Appellant with grounds to challenge the declination.

101. This case is not moot.

ANALYSIS

A. This case is not moot.

Appellee moved to dismiss this case, arguing that even if Appellee improperly rescinded the psychological services component of its contract with Appellant, there is no likelihood that such action would recur and that developments subsequent to the rescission completely and

irrevocably eradicated the effects of the rescission. I deny Appellee's motion because the effects of the rescission and reassumption of the psychological services component of the contract between Appellant and Appellee have not been completely and irrevocably eradicated by subsequent events.

The standard employed by federal courts to determine whether a case has become moot is set forth in County of Los Angeles v. Davis, 440 U.S. 625, (1979). The Supreme Court stated in Davis that a case becomes moot when the issues presented are no longer "live," or where the parties lack a legally cognizable interest in the outcome of the case. 440 U.S. at 631. The court identified two elements which must be present in order for a case to be moot: (1) there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. Id.[5]
The Supreme Court also concluded in Davis that there is a heavy burden on a party advocating dismissal on the basis of mootness to establish that a case is moot. 440 U.S. 625. Implicit in this statement is the conclusion that courts (and by extension, administrative agencies) should not terminate the adjudicative process on mootness grounds except in those cases where it is clear that a decision will provide no meaningful remedy.

Appellant argues that this case cannot be moot, because Appellant has a reasonable expectation that the alleged violation (wrongful rescission of the contract component) will recur. Appellant asserts that this is a fair conclusion based on the history of prolonged federal domination of Indian service programs. At.'s Memorandum

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[5] Appellant questions whether I have the authority to decide if this case is moot. At.'s Memorandum Opposing Dismissal at 8-9. The regulations governing this proceeding are silent on the issue. See 42 C.F.R. 36.233(d). Neither party offers federal case law or administrative precedent which directly addresses whether I have the authority to rule on questions of mootness. I conclude that the authority for me to rule on mootness issues is implicit in the authority to hear and decide cases conferred by the regulations. It is apparent from Davis that the mootness doctrine is an efficiency-promoting mechanism which enables courts to dispose of cases, consistent with due process requirements, in which no meaningful remedy may be granted to litigants. Identical efficiency imperatives apply to quasi-judicial proceedings such as the present case.

Opposing Dismissal at 18; see 25 U.S.C. 450a(b). Appellee strongly contests this assertion. Ae.'s Reply Brief at 5.

Regardless of the history of federal-Indian relations, I find nothing in the record of this case which supports Appellant's contention that wrongful rescission of this or similar contract components is likely to recur. The record of this case shows that the rescission was a singular occurrence, based on unique facts.

Central to Appellee's motion is its argument that a finding by me that the psychological services component was improperly rescinded will be meaningless, because it will have no effect on past or future contractual relations between the parties. Appellee notes that the contract has expired and that it has declined to renew the psychological services component. Ae.'s Memorandum Supporting Dismissal at 6. Appellee argues that I cannot order the parties to resume the expired contract, and, as the issue of the propriety of the declination is not before me, I cannot order that the contract be renewed. Therefore, according to Appellee, there is no meaningful relief that I can order and the case is moot.

Appellee's assertion that I cannot order that the contract be resumed or renewed is correct, but it begs the question of whether this case is moot. It appears that Appellee's decision to decline to renew the psychological services component was, at least in part, grounded on its reasons to rescind the component. A conclusion by me that the component was improperly rescinded may provide Appellant with support in another proceeding for its assertion that the subsequent declination was improper.[6]

Appellant argues that, to the extent that the component was improperly rescinded, Appellant has been financially damaged, and, for that reason, the case is not moot. It asserts that I should order that the rescission be set aside and direct Appellee to pay Appellant all costs properly incurred by it in operating the component in the

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[6] Appellant asserts that the declination is based on "the same set of circumstances" by which Appellee seeks to justify rescinding the psychological services component and that, if it prevails in its challenge of the rescission, "the declination cannot stand." At.'s Reply Brief at 32. It is unnecessary for me to make a finding on this claim in order to resolve the mootness issue.

period following the rescission. At.'s Memorandum Opposing Dismissal at 11-12. Appellee contends that there is no issue as to damages, because it has offered to reimburse Appellant for all properly incurred program operation costs through the end of the contract period. Ae.'s Reply Brief at 19.

There is no provision in the law or in relevant regulations which authorizes me to award damages in this case. See 25 U.S.C. 450m; 42 C.F.R. 36.233(d). I am not prepared to conclude that I have such authority in the absence of legal authority which states that I do. There was no evidence offered or received at the hearing of this case concerning damages, if any, sustained by Appellant. Therefore, I make no finding in this case that Appellant is entitled to damages.

However, it is conceivable that Appellant has sustained damages as a result of Appellee's actions and that Appellant may have a right to prove those damages in another forum. A decision as to the propriety of the rescission may be a necessary prerequisite to seeking damages. My findings may constitute a meaningful remedy in the sense that they give Appellant a basis upon which to seek additional relief.[7]

Therefore, my decision in this case may provide a basis for tangible benefits to Appellant, even if I am without authority to reinstate the contract component, to address the propriety of the declination, or to award damages. For this reason, the case is not moot.

B. Appellee improperly rescinded the psychological services component of the contract.

1. Burden of proof.

This case consists of a quasi-judicial administrative appeal of Appellee's decision to rescind a contract component entered pursuant to the provisions of The Indian Self Determination and Education Assistance Act,

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[7] Appellee's assertion that it has agreed to pay reasonable program operating costs to Appellant for the period between the date of rescission and the end of the contract period does not resolve the issue of damages. The parties have not agreed as to these costs and, furthermore, their positions as to appropriate reimbursement may in some respects be affected by my findings in this case.

25 U.S.C. 450a-m (the Act).[8] A threshold issue in this case is which party has the burden of proof. I conclude that Appellant bears the burden to make a prima facie showing of improper termination; once that burden is met, the burden shifts to Appellee to establish that the rescission is justified, based on the law and regulations.

Neither the Act nor regulations governing rescissions contain an explicit statement as to allocation of burdens of proof in hearings on rescissions. See 25 U.S.C. 450m; 42 C.F.R. 36.233(c)(2); (d)(1). The Administrative Procedure Act, states that in administrative adjudications, where not otherwise provided by statute, the "proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d).

Appellant is the proponent of an order. Appellee terminated a component of a contract between Appellant and Appellee, and Appellant asks that I declare that action to be improper. Therefore, under section 556(d) of the Administrative Procedure Act, Appellant bears the burden of establishing a prima facie case that Appellee unreasonably rescinded the component.

The additional necessary elements of proof in this case can be inferred from the language of 25 U.S.C. 450a-m. As I note in subpart 2 of this Analysis, infra, Congress directed that federal services to Indian tribes be contracted for and made it plain that these contracts could be terminated only in narrowly defined circumstances. This amounts to a rebuttable presumption that contracts made pursuant to the Act, once entered, are valid.[9] Therefore, Appellant makes a prima facie

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[8] Appellant filed its hearing request pursuant to 42 C.F.R. 36.233(c)(2) and (d), which provides that hearings on rescissions be conducted by The Indian Health Service Contract Appeals Board. In November, 1988, Congress amended the Act to provide at section 450m that, in cases of rescission, the contracting party must be provided with a hearing "on the record." In January, 1989, the Contract Appeals Board decided that this case should be assigned to an administrative law judge for a hearing and decision.

[9] Appellant cites legislative history to the Act to support its contention that the burden of persuasion in rescission cases falls on Appellee. At.'s Brief at 8-16. Although this history supports my analysis, I do not rely on it because I do not find that there exist ambiguities

case for improper rescission when it establishes: (1) that a contract was entered between Appellant and Appellee; and (2) that Appellee rescinded a component of that contract prior to its expiration date.

Once Appellant establishes its prima facie case, then, consistent with Congressional intent, the burden shifts to Appellee to establish that as of the moment of rescission there no longer exists a valid contract. Appellee meets that burden by proving, by a preponderance of the evidence, that its rescission of the component is consistent with statutory and regulatory criteria for rescission. This evidence may be rebutted by Appellant.

There is no dispute between the parties that a contract was entered and that Appellee rescinded a component prior to the contract expiration date. Appellant's prima facie case is, therefore, established. The issue in dispute is whether Appellee properly rescinded the component. Appellee bears the burden of showing, by a preponderance of the evidence, that the rescission was justified.

2. Statutory and regulatory basis for contracting and rescinding contracts.

The starting point for determining whether Appellee properly rescinded the component is to identify the legal standards for contracting and rescinding contracts established by the Act and implementing regulations contained in 42 C.F.R. Part 36. The Act establishes a federal policy to assure maximum Indian participation in the direction of federal services to Indian communities in order to be more responsive to the needs and desires of those communities. 25 U.S.C. 450a(a). It declares a commitment to an orderly transition from federal domination of Indian services to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those services. 25 U.S.C. 450a(b).[10]

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in the Act relating to this issue which need clarifying by reading legislative history.

[10] In a separate enactment, Congress found that:

> (T)he prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied

The Act implements these objectives, in part, by directing the Secretary of Health and Human Services (the Secretary) to enter into contracts with Indian tribes, at the tribes' request, to perform functions previously reserved by law to the Secretary. 25 U.S.C. 450g. The contract between Appellant and Appellee, including the component at issue, was entered pursuant to this section of the Act.

The Act prohibits agencies from lightly taking back that which they have contracted out. The Act and implementing regulations permit the Secretary or his or her delegate (including Appellee's Director or the Director's delegate) to rescind a contract or contract component only under narrowly defined circumstances. 25 U.S.C. 450m. Congress' directive to the Secretary to contract services, coupled with the restrictive rescission language of section 450m, establishes that mere unsatisfactory performance by a contractor will not justify rescission.

The Secretary, the Director, or the Director's delegate may, after providing a contracting tribe with a notice and hearing, rescind a contract or component if he or she concludes that the contractor's performance involves the violation of the rights or endangerment of the health, safety, or welfare of any persons, or gross negligence or mismanagement in the handling or use of contract monies, and the contractor has failed to take prescribed corrective action. 25 U.S.C. 450m; 42 C.F.R. 36.233(a). However, where the Secretary, the Director, or the Director's delegate determines that a contractor's performance poses an immediate threat to the safety of any person, then he or she may rescind the contract without first giving notice and holding a hearing. 25 U.S.C. 450m; 42 C.F.R. 36.233(c)(2).

Neither the Act nor regulations define the expressions "immediate threat to safety" or "endangerment of the health, safety, or welfare." It is evident from the plain meaning of these expressions, as well as from their context, that Congress intended that peremptory rescission without a prior hearing would not be justified except in the case where the contractor's performance of the contract creates a substantial likelihood of imminent harm to individuals. This distinguishes "immediate

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> to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities. . . . 25 U.S.C. 450.

threat" from "endangerment," where rescission can be effected only upon notice, a hearing, and a demonstrated failure by the contractor to take corrective action. Only some measurable risk of harm need be present to justify rescission after a hearing and a demonstrated failure by the contractor to correct deficiencies.

There are neither judicial nor administrative decisions applying section 450m, so this is a case of first impression. However, decisions applying similar rescission provisions in other statutes support this interpretation of the Act.

Analogous language exists in Social Security Act provisions providing for decertification of Medicare and Medicaid provider facilities. 42 U.S.C. 1395cc(f); 1396i(c). These sections provide for immediate decertification in cases where facilities are not operated in compliance with statutory requirements and where operations "immediately jeopardize" the health and safety of patients, 42 U.S.C. 1395cc(f)(1)(A); and decertification after a hearing and appeals process in circumstances where noncompliance without immediate jeopardy is present, 42 U.S.C. 1396i(c)(2). Courts have held that peremptory decertification is unlawful absent the presence of some immediate jeopardy to patients' health and safety. Wayside Farms v. United States Department of Health, 663 F. Supp. 945 (N.D. Ohio 1987); Lexington Management Co. v. Department of Social Services, 656 F.Supp. 36 (W.D. Mo. 1986).

The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136, permits the Environmental Protection Agency to immediately suspend the registration of a pesticide if its Administrator "determines that action is necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings . . . ." 7 U.S.C. 136(c)((1). (Emphasis added.) This language has been interpreted to require a "substantial likelihood" that continued use of a pesticide during the administrative review process will cause serious harm. Environmental Defense Fund v. Environmental Protection Agency, 548 F. 2d 998, 1001 (D.C. Cir. 1976), cert. denied sub nom. Velsicol Chemical Corp. v. Environmental Protection Agency, 431 U.S. 925 (1977).

The rescission at issue in this case was effected by Appellee pursuant to the peremptory rescission provisions of 25 U.S.C. 450m and 42 C.F.R. 36.233(c)(2). Appellee asserts that Appellant's operation of the psychological services component constituted an immediate threat to the safety of individuals. In order to sustain the

rescission, Appellee must establish that, by virtue of Appellant's performance of the contract, there existed at the time of rescission a substantial likelihood of imminent harm to individuals served by the psychological services component.

Appellee suggests that, because of the nature of the contract component at issue (provision of mental health services), evidence of nonperformance by Appellant justifies peremptory rescission. Ae.'s Brief at 19. I disagree. Certainly, nonperformance by Appellant of mental health services contracted under the component could create an "immediate threat" situation. However, neither the Act nor regulations support a conclusion that nonperformance of the psychological services component creates a per se basis for peremptory rescission. I conclude that whether rescission is justified depends on proof of the effects of failure by the contractor to perform the contract. That in turn requires examination of evidence establishing: the contractor's duties; whether the contractor performed those duties; and the actual or potential consequences of the performance or non-performance of contract duties.

Appellee also argues that its interpretation of the rescission provisions of the Act and regulations must be afforded substantial deference, citing Chevron, U.S.A., Inc. v. Natural Resource Defense Council, 467 U.S.843 (1984). Ae.'s Brief at 24. Appellee further asserts that the rescission decision constitutes an agency decision which must be accorded deference, and which should not be overturned absent a clear error of judgment. Ae.'s Brief at 27-28. These arguments are merged by Appellee to support the proposition that its decision to rescind the component is presumptively correct. Id.

I do not accept this analysis. Agency interpretations of statutes embodied in regulations are accorded substantial deference by the courts. Chevron, U.S.A., Inc., supra. But that is not what is at issue in this case. This case addresses the lawfulness of a management decision. The Chevron case does not address the question of whether such management decisions will be accorded the kind of deference given by the courts to policies implemented as regulations.[11] Furthermore, the decision to rescind the

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[11] The regulations contained in 42 C.F.R. Part 36 constitute the kind of statutory interpretations at issue in the Chevron case. Their legitimacy is not at issue here.

component is not the kind of final agency determination to which a presumption of correctness attaches. Both 25 U.S.C. 450m and 42 C.F.R. 36.233(d) provide that the "final" decision in this case will be the final agency decision based on the hearing afforded Appellant, and not the management decision to rescind the contract component. Therefore, Appellee's rescission action is not presumptively correct.

3. Appellant's contractual obligations.

Not only must the peremptory rescission comport with the legal criteria established by the Act, but it must be based on Appellant's performance of the contract component. A rescission cannot lawfully be based on a contractor's failure to perform functions it is not contractually obligated to perform. It is, therefore, necessary to determine the obligations incurred by Appellant under the psychological services component.

Unfortunately, the contract (and in particular, the psychological services component) is not a document which is easy to understand. There are several aspects to the document which make it ambiguous.

Other documents incorporated by reference in the contract either do not appear to exist, or are not accurately identified by the contract. For example, the contract incorporates by reference a "technical proposal" ostensibly dated August 9, 1987. See J Ex. 1A/3. The parties tendered an exhibit, J. Ex. 90, which they represent as the "technical proposal." However, this document is dated August 21, 1987. Another problem arises from the contract's incorporation of "standards" which are not described or identified. For example, the contract provides that client assessment and psychotherapy treatment plans "will be in accordance with ... [Appellee's] program standards," but never identifies the standards. See J. Ex. 1A/13. An additional problem is created by the contract's failure to define many key terms like "psychotherapy." Although some of the contractor's duties are simply declared, much of the contract language pertaining to the component is written in terms of a narrative background statement. Other TOPS functions are stated as "goals," rather than as obligations.[12]

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[12] Vague contract language may in some respects account for the fact that there was considerable confusion among the witnesses as to what the contract required. For example, Appellee's witness, Dr. George

I am not suggesting that much of the language pertaining to TOPS is meaningless. The problem lies in giving meaning to opaque language. In particular, I do not accept Appellant's assertion that the narrative language of the component is mere "statement of fact" which can be dismissed as not defining the contractor's duties. At.'s Reply Brief at 17-19. This language, despite its format, describes the contractor's duties.

The contract requires Appellant to maintain a staff of paraprofessional MHTs to assist medical employees of Appellee in diagnosing and treating mental illness. Findings 5-10. Although the specific duties of the MHTs are not clearly defined, it is reasonable to conclude from the terms of the contract that these individuals are required to: identify mental illness in patients; make some educated conclusions as to the nature of that illness; make treatment recommendations; provide counseling and followup care; and refer seriously disturbed individuals to more highly trained specialists. Id. The contract provides that TOPS will employ four MHTs who will each provide at least 16 scheduled hours of individual counseling per week. Findings 7, 9. The contract does not specify where clinics and counseling sessions must be held but presumes that TOPS will regularly schedule them at accessible locations on Appellant's reservation. Finding 13.

The contract states no minimum education or experience requirements for MHTs. I do not conclude from this that the contract allows any individual to serve as an MHT; it is reasonable to infer from the contract that each MHT must have enough training and experience to be able to perform contract duties. I conclude, however, that there is no formula for determining what education and experience qualifies. Findings 16, 17.

The contract requires that MHTs qualify for paraprofessional staff privileges to assist the medical staff at Appellee's Sells, Arizona hospital. Finding 10. The contract does not require that all MHTs have such privileges, nor does it state that privileges are a prerequisite for performance of MHT duties other than the specified duties performed at the hospital. Findings

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McCoy, whose opinion was clearly instrumental to Appellee's decision to rescind the component, erroneously asserted that the contract required TOPS to maintain off-hours emergency services and a register of chronically mentally ill patients. Tr. 3/17 at 142; 173.

11, 12. The contract fails to identify the training or experience necessary to qualify an MHT for privileges, and it does not state what a "privileged" MHT is permitted to do in the hospital.

The contract provides that the MHTs are to be jointly supervised in performing their clinical duties by a clinical supervisor and a psychiatrist employed by Appellee. Finding 8. As with the MHTs, the contract does not specify the minimum education or experience requirements for the clinical supervisor. I conclude that the contract requires that this person have enough training and experience to be able to perform the duties specified by the contract. Findings 18, 19.

4. Appellant's performance of the contract component.

TOPS began experiencing difficulties meeting its contractual obligations in March, 1988.[13] These difficulties were the direct result of the sudden resignations of two of TOPS' four MHTs, and its clinical supervisor.[14] Findings 29, 30. The consequence of these resignations was that TOPS was unable to provide the staff and services that it had agreed to provide and which clinicians, other government entities, and tribal members expected TOPS to provide. Findings 32-36.

During the months following the staff resignations, Appellant attempted to reconstitute its TOPS program. Findings 38-59. Meetings were held between Appellant and Appellee concerning Appellant's proposals to replace the resigned staff, and memoranda were exchanged, without producing an agreement between the parties. Findings 38-42. In June, 1988, Appellee gave Appellant a

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[13] Appellant's performance of the contract component in the months prior to the August 12, 1988 rescission is not relevant to the issue of whether peremptory rescission was justified in August, except to provide some background and context to this case.

[14] Each party attempted to assign blame to the other for these employees' resignations, and TOPS' consequent difficulties in performing the contract. Evidence as to blame is of questionable relevance to the issue of whether conditions existed which justified peremptory rescission. In any event, the evidence offered by the parties fails to establish that either of them should be assigned blame for the employees' resignations.

July 15, 1988 deadline to undertake corrective action, or face immediate rescission of the component. Finding 43.

The solution finally arrived at by Appellant had two features. First, Appellant hired an individual to replace the resigned clinical supervisor. Finding 44. Second, Appellant entered a subcontract with a local psychiatric hospital to obtain personnel to replace the resigned MHTs. Id. In late July, Appellant notified Appellee that the deficiencies in the TOPS program were corrected; on August 5, 1988, Appellee sent an inspection team to examine the status of the program. Findings 63, 64-67.

5. The August 5, 1988 inspection.

The inspection team consisted of three of Appellee's employees and a consultant employed by Appellant. Finding 68. The team spent an afternoon on Appellee's reservation; members of the team spoke with some clinicians at local facilities, interviewed TOPS' new clinical director, and examined some randomly selected treatment records. Findings 66, 69.

The inspection team had no organized approach to examining the TOPS program. One member, Dr. McCoy, was unfamiliar with the terms of the contract. Finding 73. No attempt was made to systematically interview entities or individuals serviced by TOPS. The team failed to contact the subcontractor and did not determine whether the subcontracted services fulfilled contract obligations. Finding 71. The team did not produce a report; rather, individual members reported their findings in separate memoranda. Findings 76, 77.

Shortly after this visit, Appellee's local management decided to rescind the contract. On August 12, 1988, Appellee advised Appellant that it was rescinding the contract pursuant to the peremptory rescission provisions of 25 U.S.C. 450m and 42 C.F.R. 36.233(c)(2). J. Ex. 6. Appellee effected its rescission on that date. Finding 78.

6. Whether Appellant's performance of the contract created an immediate threat to any individual.

The determinative question in this case is whether Appellee has proven that, on August 5, 1988, August 12, 1988, or any date between August 5 and 12, 1988, Appellant's performance of the contract created an immediate threat to any individual.[15] I conclude that Appellee has not established that by virtue of Appellant's contract performance there existed a substantial likelihood of imminent harm to any person. Appellee has not met its burden of proving that there existed a condition which justified a peremptory rescission pursuant to 25 U.S.C. 450m and 42 C.F.R. 36.233(c)(2).

Appellee's principal contention is that failure by TOPS to provide contracted services would jeopardize the health and safety of Appellant's tribal members and that there was no coherent plan in place to deliver these services on August 5, 1988 and thereafter. Ae.'s Brief at 21-23.

Failure by TOPS to deliver certain contracted services could create a situation justifying peremptory rescission. TOPS functioned as an integral part of a mental health safety net, and it provided some critical services. As is noted supra, TOPS agreed to provide MHTs at scheduled locations and times to assist clinicians in making diagnoses, treatment, and to provide referrals of individuals in need of specialized care. These services included assisting with the care of potentially, and in some circumstances, actually dangerous or harmful individuals. Tr. 3/16 at 556. Furthermore, the record establishes that clinicians and tribal members relied on TOPS to perform these services. Tr. 3/17 at 73.[16]

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[15] Although the inspection occurred on August 5, Appellee did not rescind the contract until August 12. Had Appellee established that a condition existed on August 5, August 12, or any date in between which justified peremptory rescission, then Appellee would have sustained its burden in this case.

[16] The parties offered considerable evidence as to whether TOPS' personnel problems increased the risk of suicide on Appellant's reservation. See, for example, Tr. 3/16 at 334-341; 372-375; Tr. 4/3 at 55-75. Much of this evidence related to the period between April and the end of July, 1988, and it is irrelevant to the question of whether an immediate threat existed to the safety of

It is arguable that, during the period between April and late July, 1988, the loss of staff by TOPS made it impossible for TOPS to perform these vital services, thereby justifying peremptory rescission of the contract component.[17] However, what is relevant to the rescission issue is the circumstances pertaining as of the date of the rescission. The record establishes that by late July TOPS was in the process of effecting improvements. By August 5, TOPS replaced all of its resigned personnel in a manner which enabled it to meet its critical contract obligations. Findings 81-83.

The services rendered by the MHTs are the heart of the TOPS program. TOPS' July 1988 subcontract with Palo Verde Hospital provided TOPS with clinical services to sufficiently augment those provided by the two MHTs still employed by TOPS to meet the service requirements of the contract. Finding 81. In late July, TOPS hired a clinical supervisor who was qualified to carry on the administrative duties allocated to the supervisor. Finding 82. TOPS also agreed with its subcontractor to obtain clinical supervision to support that being provided by Appellee's psychiatrist. Finding 83.

I conclude that Appellant had restored many contract services by early August. The clinician provided by subcontract began rendering clinical services for TOPS in July. Finding 60. During the two weeks that this individual was on vacation in late July and early August, the contractor supplied another clinician to perform his duties. Finding 61. Both the contract clinician and his replacement actively performed evaluations and made referrals in clinical settings. Finding 62. Although Appellant's new clinical supervisor obviously had not become completely at ease with his responsibilities in the two weeks between the date of his hire and Appellee's inspection, he was actively working towards that end. Tr. 3/16 at 117.

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any person on August 5. Moreover, the evidence was inconclusive, even for the period between April and July. Appellee's witness, Dr. Nye, testified that the suicide rate on Appellant's reservation decreased in 1988. Tr. 4/3 at 120.

[17] Indeed, much of Appellee's evidence concerning the dangers created by Appellant's performance of the contract pertained to this time period. See Tr. 4/3 at 55-85.

Therefore, by August 5, 1988, TOPS acquired the personnel and the expertise to meet critical contract requirements and communicated these developments to Appellee. Finding 63. Yet, when Appellee inspected the TOPS program on August 5, it did not make the inquiries necessary to determine whether these developments had rectified the problems caused by resignation of staff. As I have noted supra, Appellee's team made no effort to interview or meet with Appellant's subcontractor. Finding 71. It did not systematically survey local clinicians or facilities to determine whether the added personnel were providing contracted services.

There were two questions which Appellee's inspection team members had to address in order to make a reasoned determination as to whether peremptory rescission of the contract component was justified. First, they had to determine to what extent, if at all, contract services had been restored by Appellant's subcontract with Palo Verde Hospital. Second, they needed to learn whether, assuming some contract services had not been restored, the continuing absence of services created an immediate threat to the safety of any person. Appellee's team members failed to address the first question, and, thus, were unable to reasonably address the second.

The failure of the inspection team to systematically address the question of whether Appellant's subcontractor effectively replaced lost personnel is apparent from its members' testimony. Not only did these individuals reach their conclusions without interviewing the subcontractor, but the information they relied on largely consisted of anecdotes concerning the period prior to Appellant's execution of a subcontract with Palo Verde Hospital. For example, Dr. Nye, one of the team members, testified concerning problems with emotionally disturbed patients which occurred on Appellant's reservation between April and July 1988. Tr. 3/4 at 55-84. She testified, additionally, that these problems were at least potentially exacerbated by the loss of TOPS staff. Id. Dr. Nye also testified that Appellant's obtaining subcontract personnel in July failed to rectify the problems she perceived. Tr. 3/4 at 138-139. But it is clear from Dr. Nye's testimony that this judgment was made without complete investigation of the actual services rendered by subcontract personnel.

Appellee argues that the failure of TOPS' new clinical supervisor to produce a coherent schedule of services on August 5 renders TOPS' personnel replacement efforts meaningless. It asserts that even if Appellant had contracted for adequate replacement personnel, there was

no evidence as of August 5 or 12 that critical services were actually being performed. Appellee argues, in effect, that Appellant's efforts amounted to, at best, a potential for services, rather than the supply of actual services. See Ae.'s Reply Brief at 14.

I disagree with these assertions. Appellant's clinical supervisor had prepared a schedule of services, although he did not produce it at the August 5 inspection. Finding 85. Moreover, the issue is not whether Appellant had a schedule of services, but whether Appellee has shown that Appellant was failing to perform its contract in a manner that created an immediate threat to safety.[18] Given Appellant's efforts to rectify personnel losses and, further, given Appellee's failure to systematically examine these actions, I conclude that Appellee has not established that on August 5, August 12, or any date between August 5 and 12, a condition existed which justified peremptory rescission.

I am not concluding that on August 5, August 12, or any date between Appellant fully complied with all of its obligations under the psychological services component. As I have noted supra, the issue before me is whether Appellant's performance of the contract component created circumstances justifying rescission, not whether it was performing all contracted duties.

Furthermore, although I disagree with the opinions expressed by Appellee's witnesses, I do not question these witnesses' sincerity. As I noted during the hearing, I was impressed with the forthrightness of all of the witnesses.

My conclusion, that Appellee failed to meet its burden of proving that a condition existed which justified peremptory rescission, takes into consideration that Appellant had no contractual obligation to correct some of the "deficiencies" asserted by Appellee or its employees. The only member of Appellee's investigation team who concluded in writing that the component should be rescinded was Dr. McCoy. Finding 75. His conclusion was instrumental to Appellee's decision to rescind the component. However, his conclusion was in large measure based on his finding that TOPS did not provide emergency

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[18] The schedule was merely a weekly calendar showing which MHT would be at a given location at a given time to deliver services. See J. Ex. 64 at 97. It could easily be prepared by any person familiar with TOPS' personnel and their work hours.

services outside of regular business hours. J. Ex. 42/10. TOPS had no obligation to provide such services. Finding 15. Dr. McCoy also asserted in his testimony that TOPS was deficient in failing to maintain a register of chronically mentally ill individuals. Tr. 3/17 at 142. TOPS had no contractual obligation to maintain such a register. Finding 25. Dr. McCoy also claimed that TOPS was obligated to perform all contracted services in conformity with standards contained in the Indian Health Manual Part 3 - Professional Services, Chapter 14 - Mental Health Programs. Tr. 3/17 at 142, 175. In fact, this was not required by the contract. Finding 22.

Other deficiencies alleged by Appellee are either not established by credible evidence or are insubstantial. For example, Appellee produced witnesses who testified that TOPS failed to maintain records in keeping with contract requirements. However, this evidence is, at best, anecdotal. No systematic review was made by Appellee of TOPS' records to determine whether contract requirements were being complied with. The investigation team merely looked at random examples on August 5. Finding 72. The contract did not even require that all records be maintained in accordance with established procedures. Finding 23.

An example of an insubstantial deficiency is the suspension of hospital staff privileges of one TOPS' MHT in March, 1988. Appellee argues that this meant that "only one out of the required four credentialed MHTs were available to perform services." Ae.'s Brief at 18.

I disagree with both the contention and Appellee's apparent implication that the suspension of the MHT's privileges critically weakened TOPS' capacity to render services. Many of the MHTs' duties were performed outside of a hospital setting where the possession or nonpossession of privileges was irrelevant. Furthermore, with the addition of qualified clinical staff in July, TOPS had the personnel to cover those circumstances where privileges might be required. Finding 81.

Another example of an insubstantial contract deficiency is the question of the credentials of TOPS' new clinical supervisor. At least one member of Appellee's inspection team concluded that the supervisor's lack of clinical supervisory experience in the mental health field raised serious concerns. J. Ex. 42/14. I agree that unavailability of a qualified person to provide clinical supervision to the MHTs might have posed serious risks to patients. But the record establishes that there was no lack of qualified supervision. The contract provided for

joint supervision by the clinical supervisor and Appellee's psychiatrist. Finding 8. Furthermore, Appellant's subcontractor was able to provide a qualified supervisor and did so on short notice. Finding 83. Therefore, the fact that the clinical supervisor hired by Appellant may not have been able to perform all of the clinical supervisory duties required by the contract did not create a situation of immediate threat to the safety of any individual.[19]

CONCLUSION

Based on my findings in this case, I conclude that on August 12, 1988, Appellee improperly rescinded the psychological services component of its behavioral health services contract with Appellant. Therefore, I enter my decision in favor of Appellant.

/s/

Steven T. Kessel
Administrative Law Judge

[19] The individual supplied by the subcontractor to provide clinical services was more qualified to render these services than were the MHTs he replaced. See Findings 56-58.