Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Sharwood Health Center,	DATE: February 10, 1997
Petitioner,	
- v. -	Docket No. C-96-390 Decision No. CR460
Health Care Financing Administration.	

DECISION

Below, I explain my reasons for dismissing this case pursuant to 42 C.F.R. § 498.70 (a), (b), and (c).

The only document in this case purporting to be a hearing request is a letter from Petitioner dated July 29, 1996. This case was docketed by the Departmental Appeals Board (DAB) following the receipt of Petitioner's letter dated July 29, 1996. Petitioner's letter requested a hearing on matters contained in a June 4, 1996 letter from the Illinois Department of Public Health (IDPH), which summarized the recommendations made by the IDPH to the Health Care Financing Administration (HCFA). After receiving IDPH's recommendations, HCFA issued its own determinations by notices dated August 9, 1996 and September 9, 1996. HCFA's August 9, 1996 notice contained HCFA's determination to impose three enforcement remedies against Petitioner; HCFA's September 9, 1996 notice contained HCFA's determination to rescind two of the three previously imposed enforcement remedies, and to impose a civil money penalty (CMP) remedy as well.

On October 18, 1996, I directed the issuance of an order for Petitioner to show cause why this case should not be dismissed for the following three reasons set forth in the order:

> 1. "There is no indication that Petitioner filed a hearing request containing the information specified by regulation within 60 days after its receipt of HCFA's August 9, 1996 Notice. 42 C.F.R. § 498.40(a) and (b).";

2. "In addition, Petitioner's status report dated October 4, 1996, indicates that HCFA has rescinded the remedies imposed in its August 9, 1996 notice. Therefore, it would appear that if Petitioner had any right to a hearing pursuant to its hearing request dated July 29, 1996, such right has been extinguished by HCFA's rescission of the remedies. See e.g., Arcadia Acres, Inc., v. HCFA, DAB CR424 (1996)."; and

3. "According to Petitioner's status report, HCFA has issued a Notice which imposed a civil monetary penalty (CMP) and which informed Petitioner of its right to request a hearing to contest the imposition of the CMP. If Petitioner files a request to contest HCFA's imposition of a CMP, the Departmental Appeals Board's practice is to docket the matter as a separate action."

Petitioner responded to my order to show cause by contending that "Sharwood's July 29, 1996 correspondence was a valid request for a hearing pursuant to 42 C.F.R. § 498.40." Sharwood's Response to the Tribunal's Sua Sponte Motion to Dismiss (P. Response), 2[1]; see, Sharwood's Memorandum of Law in Support of Its Response to the Tribunal's Sua Sponte Motion to Dismiss (P. Brief). Petitioner argued also that its letter dated July 29, 1996 includes a challenge to HCFA's imposition of said CMP and, therefore, I already have jurisdiction over the CMP matter. E.g., P. Response, 3; P. Brief, 7. In addition, Petitioner took the position that "[e]ven if HCFA's September 9, 1996 letter had rescinded all of the remedies it had previously imposed, Sharwood's right to appeal would remain intact." P. Brief, 5.[2]

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[1] Petitioner has requested the opportunity to present oral argument on whether the case should be dismissed. P. Response, 3. I find no need for granting Petitioner's request for oral argument. There has been no allegation or showing that Petitioner has some argument which it cannot set down on paper.

[2] Petitioner supports this argument in part by attributing to me a view I did not express in Arcadia Acres, Inc. and with which Petitioner disagrees. (According to Petitioner, my decision in Arcadia Acres, Inc. "indicates" that a remedy imposed by HCFA must actually be implemented in order for a provider to acquire or retain hearing rights. P. Brief, 5.) My decisions in Arcadia Acres, Inc. and like cases do not contain such a view.

HCFA asked that Petitioner's request for hearing dated July 29, 1996 be dismissed by noting that said hearing request was filed prematurely and in response to the recommendations of HCFA's agent, the IDPH, for HCFA to impose certain remedies. HCFA argued, moreover, that no cause of action lies in any event with respect to those enforcement remedies which were imposed by HCFA and then withdrawn by HCFA prior to their effectuation dates. Reply to Petitioner's Memorandum in Response to Judge Leahy's Notification of Possible Dismissal (HCFA Brief); see, HCFA Exs. 2 - 4.[3]

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLs)

Relevant laws, regulations, and decisions

1. The administrative appeal rights provided by 42 C.F.R. Part 498, including hearings before an administrative law judge, are not available unless HCFA has issued an initial determination as defined by the regulations. 42 C.F.R. § 498.3(a); 42 C.F.R. § 498.20 (specifying contents of HCFA's notice of initial determination).

2. Absent an extension of time granted by the administrative law judge for good cause shown, a written request for hearing must be filed by an affected party within 60 days after it has received HCFA's notice of its initial determination. 42 C.F.R. § 498.40; see also, section 205(b) of the Social Security Act (Act), as incorporated by section 1866(h) of the Act (re termination of Medicare provider agreements).

3. To be considered a request for hearing within the meaning of the regulations, the document must identify the specific issues and the findings of fact and conclusions of law with which the affected party disagrees, and specify the basis for contending that the findings and conclusions are incorrect. 42 C.F.R. § 498.40(b).

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[3] With their briefs, the parties have filed various documents. Petitioner has filed those documents it has marked as Petitioner's Exhibits (P. Ex.) A through F. I note that Petitioner did not comply with the directions set forth in the Civil Remedies Division Procedures concerning the marking of exhibits. However, I have chosen not to require Petitioner to re-mark the exhibits in order to avoid increasing the costs in this litigation. HCFA has filed those documents it has marked as HCFA Exhibits (HCFA Ex.) 1 through 4.

4. The administrative law judge has the authority to dismiss hearing requests that are not "timely filed," including those which were filed prematurely or prior to the receipt of HCFA's notice of initial determination. 42 C.F.R. § 498.70(c); Canton Healthcare Center v. HCFA, DAB CR443 at 14 (1996).

5. The administrative law judge has the authority to dismiss hearing requests where the requesting parties do not have a right to a hearing. 42 C.F.R. § 498.70(b).

6. The administrative law judge has the authority to dismiss a hearing request where there has been a previous determination which became final because the affected party did not timely request a hearing with respect to that determination. 42 C.F.R. § 498.70(a).

7. Even where HCFA has issued a notice of initial determination by HCFA and an affected party has timely filed a request for hearing with respect to said notice, HCFA has the right to rescind the disputed initial determination on its own initiative within 12 months of the date of the notice. 42 C.F.R. §§ 498.30 and 498.32; Arcadia Acres, Inc., v. HCFA, DAB CR424 at 10 - 11 (1996); Country Club Center, II v. HCFA, DAB CR433 at 7, 8 (1996); Rolling Acres Care Center v. HCFA, DAB CR437 at 8, 10 (1996).

8. Where the request for hearing is based on HCFA's having made an initial determination to impose an enforcement remedy specified by regulation (see, 42 C.F.R. § 498.3(b)(12) and its incorporation of 42 C.F.R. § 488.406), HCFA's rescission of its previously imposed enforcement remedy cancels any previously existing hearing rights to challenge said remedy or its bases. Arcadia Acres, Inc.,; Country Club Center, II; Rolling Acres Care Center; Fort Tryon Nursing Home v. HCFA, DAB CR425 (1996).

Petitioner's July 29, 1996 letter and IDPH's recommendations to HCFA

9. On April 5, 1996, IDPH issued a letter to Petitioner, identifying the findings of noncompliance made by the IDPH pursuant to a survey completed on April 2, 1996 and the enforcement remedies recommended by IDPH for imposition by HCFA. HCFA Ex. 1.

10. On June 4, 1996, IDPH issued a letter to Petitioner, summarizing IDPH's recommendations to HCFA based on the surveys conducted by IDPH on April 2 and May 30, 1996. P. Ex. A.

11. The June 4, 1996 letter from IDPH does not purport to be or constitute an initial determination by HCFA. FFCLs 1, 10; P. Ex. A.

12. The June 4, 1996 letter from IDPH did not give rise to any hearing rights under 42 C.F.R. Part 498. FFCLs 1, 10, 11.

13. The only document in this case purporting to be a hearing request is Petitioner's letter dated July 29, 1996. P. Ex. B.

14. Petitioner's letter dated July 29, 1996 stated that Petitioner was requesting a hearing before an administrative law judge of the Departmental Appeals Board pursuant to the IDPH's letter dated June 4, 1996. P. Ex. B at 1.

15. Petitioner's letter dated July 29, 1996 acknowledged that IDPH's June 4, 1996 letter was "recommending to the Health Care Financing Administration . . . that certain enforcement actions be imposed." P. Ex. B at 1.

16. Petitioner has no right to a hearing on those matters set forth in its letter dated July 29, 1996. FFCLs 1, 10 - 15.

17. Petitioner's July 29, 1996 request for a hearing must be dismissed in the absence of any law or regulation permitting Petitioner to challenge IDPH's recommendations to HCFA. 42 C.F.R. § 498.70(b); FFCLs 1, 16.

Petitioner's July 29, 1996 letter and HCFA's initial determinations dated August 9 and September 9, 1996

18. At the time Petitioner requested a hearing by letter dated July 29, 1996, HCFA had not yet issued any initial determination subject to administrative reviews. FFCLs 9 - 15.

19. On August 9, 1996, HCFA issued a notice of its initial determinations. P. Ex. C; 42 C.F.R. § 498.20.

20. HCFA's notice letter dated August 9, 1996 stated that a CMP may be imposed and did not contain any initial determination by HCFA to impose a CMP against Petitioner. P. Ex. C.

21. HCFA's notice letter dated August 9, 1996 contained HCFA's initial determination to impose the following three remedies based on the findings of noncompliance made at the surveys of Petitioner:

> Directed inservice training effective August 29, 1996, and to be completed by September 15, 1996;
>
> Denial of Payment for new Medicare and Medicaid admissions (DPNA) effective August 29, 1996, and

Termination of Petitioner's provider agreements absent compliance by October 3, 1996.

P. Ex. C.

22. The contents of HCFA's August 9, 1996 notice gave rise to Petitioner's right to request a hearing for the review of HCFA's findings of noncompliance that resulted in HCFA's imposition of the specified remedies. 42 C.F.R. §§ 498.3(a) and (b)(12), 498.20(a), 498.40.

23. HCFA's notice letter dated August 9, 1996, correctly advised Petitioner that Petitioner may exercise its hearing rights in accordance with the procedures specified in 42 C.F.R. § 498.40. P. Ex. C at 3.

24. By letter dated September 9, 1996, HCFA rescinded the DPNA and termination remedies imposed by its August 9, 1996 notice, but not the directed inservice training remedy also imposed by its August 9, 1996 notice. P. Exs. C and E.

25. By letter dated September 9, 1996, HCFA notified Petitioner also that HCFA was imposing a CMP totalling $7,350, for 147 days of alleged noncompliance at the rate of $50 per day. P. Ex. E.

26. HCFA's letter dated September 9, 1996, informed Petitioner that it had a right to request a hearing to contest HCFA's imposition of a CMP within 60 days of Petitioner's receiving said letter. P. Ex. E.

27. Based upon HCFA's August 9, 1996 notice, Petitioner had the right to timely request a hearing for the review of HCFA's findings of noncompliance that resulted in HCFA's imposition of the directed inservice training remedy, which was not rescinded by HCFA. 42 C.F.R. §§ 498.3(b)(12) and 488.406; 42 C.F.R. § 498.40; FFCLs 21 - 24.

28. Petitioner's letter dated July 29, 1996, even if arguably intended to challenge an initial determination Petitioner thought HCFA might issue after that date (but see, FFCLs 14 - 16), was premature and therefore untimely filed to any extent it might relate to HCFA's August 9, 1996 or September 9, 1996 determinations. FFCLs 2, 4, 21; 42 C.F.R. §§ 498.40 and 498.70(c).

29. Petitioner's letter dated July 29, 1996, even if arguably intended to challenge an initial determination Petitioner thought HCFA might issue after that date (but see, FFCLs 14 - 16), does not constitute a hearing request within the meaning of the regulations for the purpose of challenging HCFA's August 9, 1996

or September 9, 1996 determinations. 42 C.F.R. § 498.40(b); P. Ex. B; FFCL 3.

30. No hearing rights were created by HCFA's written acknowledgements that it had received and then forwarded to the DAB Petitioner's letter dated July 29, 1996. See, P. Ex. C at 3 and E at 2; 42 C.F.R. Part 498.

31. No hearing rights were created by the DAB's written acknowledgement that Petitioner's letter dated July 29, 1996 had been received and docketed as a case. P. Ex. C at 3; 42 C.F.R. § 498.70.

32. Petitioner's filing of its letter dated July 29, 1996 did not validly preserve any right of review for the outstanding initial determinations contained in HCFA's August 9 and September 9, 1996 notices. FFCLs 5-6, 13, 25 - 31; 42 C.F.R. §§ 498.20(b), 498.40, 498.70.

33. Petitioner's letter dated July 29, 1996, which seeks a hearing, must be dismissed. 42 C.F.R. § 498.70(a), (b) or (c). FFCLs 13, 17, 18 - 32.

DISCUSSION

A. There is no right to a hearing on recommendations made by the IDPH to HCFA.

Petitioner alleges that its July 29, 1996 letter constitutes "a valid request for a hearing pursuant to 42 C.F.R. § 498.40." P. Response at 2. I conclude that Petitioner's contention is without factual or legal support.

By letter dated April 5, 1996, IDPH notified Petitioner of its findings from the April 2, 1996 survey and informed Petitioner that IDPH was recommending that two remedies be imposed: directed inservice training and a CMP effective April 2, 1996. HCFA Ex. 1. Nothing purporting to be a hearing request references the IDPH's April 5, 1996 letter or its contents.

By letter to Petitioner dated June 4, 1996, the IDPH stated that it was recommending to HCFA that four remedies (directed inservice training, DPNA, CMP, and termination) be imposed by HCFA based on the results of surveys conducted by IDPH on April 2, 1996 and May 30, 1996. P. Ex. A.

On July 29, 1996, Petitioner, by counsel, sent a letter to HCFA stating in relevant part:

> In correspondence dated June 4, 1996 (copy enclosed), our client . . . was notified that the Illinois Department of Public Health ("IDPH") was recommending to the Health Care Financing Administration . . . that certain enforcement actions be imposed. Pursuant to the June 4, 1996 notice, Sharwood requests a hearing before an Administrative Law Judge of the Department of Health and Human Services, Departmental Appeals Board, because it considers such determinations to be in error including, but not limited to, the findings that the facility was not in substantial compliance with Medicare and Medicaid program requirements, denial of payments for new admissions, imposition of a civil money penalty, directed inservice, and termination from participating in the Medicare and Medicaid programs.

P. Ex. B.

There is no statutory or regulatory authority for providing hearings in this forum to adjudicate recommendations made by HCFA's agent to HCFA. The regulation codified at 42 C.F.R. § 498.40, as well as other regulations such as 42 C.F.R. § 498.3, which also govern the administrative hearing process, require at the very minimum an initial determination made by HCFA. When Petitioner submitted its letter dated July 29, 1996 to request a hearing, HCFA had not yet made any initial determination in this case. See, P. Exs. B and C.

The language I have quoted above from Petitioner's July 29, 1996 letter leaves no doubt that Petitioner was well aware that the IDPH letter dated June 4, 1996 constituted recommendations to HCFA and that Petitioner was seeking a hearing on those recommendations made by IDPH. Re-emphasizing the same awareness in its brief to me, Petitioner stated again that "Sharwood further considered the recommendation that the remedies of denial of payments for new admissions, imposition of a civil money penalty, directed inservice training, and termination from participating in the Medicare/Medicaid programs to be in error." P. Brief, 1 (emphasis added). I find it significant also that Petitioner did not file a request for hearing with respect to the IDPH's April 5, 1996 letter, which also contained only the IDPH's recommendations or proposals to HCFA. In fact, there is no law

or regulation which permits Petitioner to request a hearing to challenge recommendations made to HCFA. FFCL 17.

B. Petitioner's filing of its letter dated July 29, 1996 did not entitle it to a hearing on those initial determinations which HCFA issued on August 9 and September 9, 1996.

1. Petitioner's arguments on the legal effect of its July 29, 1996 request for hearing

After Petitioner filed its request for hearing dated July 29, 1996 to challenge the IDPH's recommendations, HCFA issued its initial determinations. The issuance of these initial determinations by HCFA was accompanied by notices to Petitioner of its right to request a hearing, including the time period for filing such a request. As discussed below, I reject Petitioner's arguments that the filing of its July 29, 1996 request for hearing entitles Petitioner to an adjudication of those initial determinations made by HCFA on August 9 or September 9, 1996.

In a letter dated August 9, 1996, HCFA notified Petitioner that, based on the IDPH's recommendations contained in the dated June 4, 1996 letter (which referenced the results of the April 2 survey), as well as the results of a revisit survey completed on May 30, 1996, HCFA has decided to impose the following remedies against Petitioner:

> -- Directed inservice training effective August 29, 1996, and to be completed by September 15, 1996;
>
> -- DPNA effective August 29, 1996; and
>
> -- termination of Petitioner's Medicare and Medicaic provider agreements unless compliance is attained by October 3, 1996.

P. Ex. C.[4] HCFA's August 9, 1996 letter notified Petitioner also that, with respect to Petitioner's hearing rights concerning HCFA's imposition of the above cited three remedies:

> you or your legal representative may request a hearing before an administrative law judge of the . . . Departmental Appeals Board. Procedures governing this process are set out in Federal regulations at 42 C.F.R. [§] 498.40, et seq.

P. Ex. C, 3.

The notification of hearing rights provided by HCFA in its August 9, 1996 letter is proper because the three remedies HCFA had decided to impose (i.e., inservice training, DPNA, and termination of provider agreement) are among those listed in 42 C.F.R. § 488.406 and, additionally, HCFA had made findings of noncompliance which led to the imposition of those three remedies. See, 42 C.F.R. § 498.3(b)(12). Therefore, HCFA's August 9, 1996 notice contained HCFA's initial determinations. HCFA's issuance of these initial determinations entitled Petitioner to request a hearing within the time period and in the manner specified by regulation. 42 C.F.R. §§ 498.3(a) and 498.40.

However, HCFA's subsequent actions limited the issues for which Petitioner was entitled to seek a hearing. By letter dated September 9, 1996, HCFA informed Petitioner that HCFA had decided not to impose the remedies of DPNA and termination. P. Ex. E. HCFA's rescission actions had the effect of extinguishing

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[4] In addition, HCFA's August 9, 1996 letter notified Petitioner as follows of the possibility that HCFA may in the future impose a CMP, and that Petitioner will have appeal rights if a CMP is imposed:

> the IDPH has also recommended imposition of a civil money penalty (CMP) in the amount of $50 per day effective April 2, 1996. We concur with the State's recommendation and may impose the CMP. . . . . You will receive a separate letter relating to this CMP at a later date, including your appeal rights, if the CMP is actually imposed.

P. Ex. C (emphasis added).

Petitioner's right to challenge HCFA's prior decision to impose those two remedies. FFCL 8.[5]

Because HCFA did not rescind its imposition of the directed inservice training remedy, Petitioner continued to have the right (up to 60 days after its receipt of HCFA's August 9, 1996 notice) to request a hearing on HCFA's findings of noncompliance that resulted in its imposition of the inservice training remedy.[6]

In addition, HCFA's issuance of its September 9, 1996 notice letter entitled Petitioner to request a hearing to challenge the CMP determination made by HCFA. 42 C.F.R. § 498.3(b)(12) and (13). In the letter dated September 9, 1996, HCFA notified Petitioner that HCFA had decided to impose a CMP in the total amount of $7,350 for the period from April 2 through August 27, 1996. HCFA's September 9, 1996 letter stated also:

> As you are aware, we previously acknowledged your July 29, 1996 request for a hearing in our August 9, 1996 notice. However, since we are now

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[5] In urging against dismissal of its case, Petitioner argues in its brief that there are various differences between the facts in Arcadia Acres and this case. (I dismissed Arcadia Acres' hearing request because HCFA had rescinded all remedies it had imposed against Arcadia Acres.) The differences with this case pointed out by Petitioner, such as HCFA's actual imposition of a CMP against Petitioner, are without any legal consequence to my conclusion that Petitioner's July 29, 1996 request for a hearing on the IDPH's recommendations does not entitle Petitioner to a hearing on those recommendations, or on HCFA's August 9 or September 9, 1996 determinations to impose a directed inservice training remedy and a CMP, respectively.

[6] As noted earlier, one of my reasons for directing Petitioner to show cause why the case should not be dismissed was my impression that HCFA had rescinded all previously imposed remedies by its letter dated September 9, 1996. I had stated this impression in the show cause order in order to allow the parties to comment on it. One of the documents submitted by Petitioner in response to my order, P. Ex. E, establishes that my impression was in error, as HCFA did not rescind the inservice training remedy.

In its brief to me, Petitioner does not state whether it wants to challenge HCFA's August 9, 1996 determination to impose the directed inservice training remedy. I discuss the inservice training remedy in this decision only because Petitioner's July 29, 1996 letter had objected to the IDPH's recommendation to impose this remedy.

> imposing the CMP, you may request a hearing before an ALJ within 60 days of your receipt of this notice.

P. Ex. E.

The show cause order I issued on October 18, 1996 also reminded Petitioner of its opportunity to request a hearing on HCFA's imposition of a CMP by stating as follows:

> According to Petitioner's status report, HCFA has issued a Notice which imposed a civil monetary penalty (CMP) and which informed Petitioner of its right to request a hearing to contest the imposition of the CMP. If Petitioner files a request to contest HCFA's imposition of a CMP, the Departmental Appeals Board's practice is to docket the matter as a separate action.

Despite the notices of hearing rights provided in HCFA's letters dated August 9 and September 9, 1996, the reminder of Petitioner's hearing rights contained in my show cause order, and the contents of the relevant regulations codified at 42 C.F.R. Part 498, Petitioner has chosen to rely on its July 29, 1996 request concerning the IDPH's June 4, 1996 letter.

Petitioner's response to my show cause order indicates that it wants an adjudication of HCFA's initial determinations, but only pursuant to its July 29, 1996 request. Petitioner argues, for example, that "[w]hile Sharwood may be entitled to file an additional request for a hearing under HCFA's September 9, 1996 correspondence [which imposed the CMP], this Tribunal currently has jurisdiction over the claim . . . ." P. Resporse, 3. Petitioner argued also that I should not be "[r]equiring the Petitioner to refile a request for an appeal . . . . ." after HCFA issued its CMP determination on September 9, 1996. P. Brief, 7.

There is no legal or factual support for Petitioner's arguments. The regulations make very clear that HCFA's initial determinations become final and binding if no hearing request is filed to challenge those determinations. 42 C.F.R. §§ 498.20(b), 498.70(a). Under the regulations, in order to challenge the findings of noncompliance which led to HCFA's imposition of the directed inservice training remedy, Petitioner needed to file, within 60 days after its receipt of HCFA's August 9, 1996 notice, a request for hearing by identifying the specific issues, findings, or conclusions in dispute and by specifying the basis for contending that the findings or conclusions are incorrect. 42 C.F.R. § 498.40(a), (b). In order to challenge the findings

of noncompliance which led to HCFA's imposition of the CMP remedy, Petitioner needed to file, within 60 days after its receipt of HCFA's September 9, 1996 notice, a request for hearing by identifying the specific issues, findings or conclusions in dispute, and by specifying the basis for contending that the findings or conclusions are incorrect. Id. Petitioner has failed to do either of these things.

Instead, Petitioner asserts hearing rights on the basis of a document which does not refer to any initial determination made by HCFA and which predated the issuance of any initial determination by HCFA. I have never read the regulations as entitling any affected entity to a hearing merely because it had filed a document containing the words "request" and "hearing." See, Canton Healthcare Center v. HCFA, DAB CR443 at 13 - 16. I conclude in this case that Petitioner's filing of its July 29, 1996 letter did not entitle Petitioner to a hearing on the merits of the determinations made by HCFA on August 9 and September 9, 1996.

2. Petitioner's arguments on judicial economy and efficiency

Petitioner argues that, if it had filed a hearing request after receipt of HCFA's August 9 or September 9, 1996 notices, a case arising from such a hearing request would likely be assigned to me as well. P. Brief, 7. Petitioner contends that, given the foregoing possibility, my requiring it to file another hearing request would contravene the goals of judicial efficiency and economy. P. Brief, 7 - 8. I find that Petitioner's arguments are immaterial and without merit. These arguments are based on Petitioner's erroneous supposition that, in the present case, I have jurisdiction to adjudicate the matters raised in Petitioner's July 29, 1996 request for hearing, as well as those determinations made by HCFA on August 9 and September 9, 1996.

As discussed elsewhere in this decision, I do not have the authority to hear and decide the merits of those recommendations challenged by Petitioner in its July 29, 1996 request for hearing. Nor did Petitioner's filing of its July 29, 1996 letter entitle it to a hearing on the merits of HCFA's initial determinations dated August 9 or September 9, 1996. These jurisdictional flaws created by Petitioner require dismissal of the above-captioned action in its entirety.

3. Petitioner's references to letters which acknowledged receipt of the July 29, 1996 request for hearing

Petitioner referenced also the fact that it has received written acknowledgements of its July 29, 1996 request from HCFA as well as the DAB. P. Response, 2. Reading of the documents cited by

Petitioner shows that acknowledgements of Petitioner's July 29, 1996 request were made thusly by HCFA and the Departmental Appeals Board:

> We [i.e., HCFA] are in receipt of your legal counsel's request for a hearing dated July 29, 1996. We have forwarded his request for hearing to the Departmental Appeals Board of the Department of Health and Human Services. That Department will contact you concerning your request for hearing.

P. Ex. C at 3 (HCFA's August 9, 1996 notice);

> As you are aware, we previously acknowledged your July 29, 1996 request for a hearing in our August 9, 1996 notice.

P. Ex. E at 2 (HCFA's September 9, 1996 notice); and

> This is to acknowledge receipt by the Civil Remedies Division of Petitioner's July 29, 1996 request for hearing and the related August 9, 1996 notice of adverse action by the Health Care Financing Administration (HCFA).[7] Petitioner based its request on a June 4, 1996 letter from the Illinois Department of Public Health (included with the hearing request) which recommended the actions ultimately taken by HCFA.

Departmental Appeals Board acknowledgement letter dated August 13, 1996 (P. Ex. D, 1).

I do not find these acknowledgements to have any bearing on the legal validity of Petitioner's request dated July 29, 1996. In these documents, there were acknowledgements that Petitioner's request had been received and processed. There was no acknowledgment that Petitioner's request for hearing was legally valid. No one employed by HCFA or the DAB had expressed any legal opinions in these acknowledgement letters concerning

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[7] HCFA had transmitted a copy of its August 9, 1996 notice in forwarding Petitioner's July 29, 1996 request to the Departmental Appeals Board. Petitioner's July 29, 1996 request predated the existence of HCFA's August 9, 1996 notice, and Petitioner's July 29, 1996 request states only that a copy of the IDPH's June 4, 1996 letter was enclosed. P. Ex. B, 1.

Petitioner's request. More importantly, it is the administrative law judge's responsibility to consider and decide whether a request for hearing should be dismissed. 42 C.F.R. § 498.70. The actions described in these acknowledgement letters (i.e., HCFA's receiving and forwarding Petitioner's request to the DAB, and the DAB's docketing it and assigning it to me) enabled me to raise the issue of whether the hearing request should be dismissed. The regulation specifies that I may raise on my own initiative the issue of whether a hearing request should be dismissed for cause. 42 C.F.R. § 498.70. In this case, Petitioner may have attached undue significance to the letters acknowledging the receipt and processing of its request for hearing.

CONCLUSION

For the foregoing reasons, I conclude that dismissal of the entire case is appropriate and necessary. Accordingly, I now dismiss the hearing request and the case pursuant to the alternative grounds specified in 42 C.F.R. § 498.70(a), (b), and (c).

/s/

Mimi Hwang Leahy

Administrative Law Judge