Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Piedmont Family Clinic,	)	DATE: January 30, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-94-418
	)	Decision No. CR355
Health Care Financing Administration.	)	
	)	

DECISION

In the case before me, the Piedmont Family Clinic (Petitioner) challenges the determination made by the Health Care Financing Administration (HCFA) to terminate Petitioner's Medicare provider agreement effective June 1, 1994. As a rural health clinic, Petitioner had obtained a waiver from HCFA in May of 1993 exempting Petitioner from meeting the staffing requirements specified by section 1861(aa)(2)(J) of the Social Security Act (Act). HCFA considers the waiver to have expired on April 7, 1994. It terminated Petitioner's provider agreement because it concluded, based on surveys conducted in late March and late May of 1994, that Petitioner was out of compliance with the staffing requirements of the Act. Petitioner contends that HCFA's termination action was improper because HCFA had affixed an incorrect expiration date to the waiver. Petitioner contends also that HCFA's termination action was barred because Petitioner was entitled to request or receive another waiver.

Having reviewed the parties' evidence and arguments,[1] I find in favor of HCFA for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Background Facts and Law

1. Petitioner is a medical clinic located in Piedmont, Missouri. E.g., P. Ex. 1.

2. The Lucy Lee Hospital operates Petitioner and other medical clinics, including the Van Buren Medical Clinic. HCFA Ex. 2 at 2; P. Ex. 2, 3, 5, 6, 8, 9.

3. Except during the period from June 2 to August 9, 1994, Petitioner was participating in the Medicare program as a rural health clinic. See, e.g., P. Ex. 4; Section 1866(a) of the Act.

4. To meet the definition of a rural health clinic for participation in the Medicare program, a clinic must satisfy two staffing requirements:

> a) the clinic must employ a nurse practitioner, a physician assistant, or a certified nurse-midwife, and
>
> b) the employed nurse practitioner, physician assistant, or certified nurse-midwife must be available to furnish patient care services not less than 50 percent of the time the clinic operates.

Section 1861(aa)(2)(J) of the Act.

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[1] As discussed below, the parties agreed to submit this case for decision on a written record. I have admitted into evidence all exhibits submitted by the parties, consisting of HCFA's Exhibits 1 to 15 (HCFA Ex. 1 to 15) and Petitioner's Exhibits 1 to 10 (P. Ex. 1 to 10). In the analysis section of this decision, I explain why I have overruled Petitioner's objections to HCFA's evidence. I note that there is some duplication among the parties' exhibits. However, because each party has referred to its own exhibits by number, I am admitting all the exhibits.

Each party has filed a brief in chief (P. Br. and HCFA Br.), as well as a response brief (P. Resp. and HCFA Resp.).

5. A facility which otherwise meets the definition of a rural health clinic may request that the Secretary of Health and Human Services (Secretary) waive one or both of the staffing requirements specified by the Act's section 1861(aa)(2)(J). Section 1861(aa)(7) of the Act.

6. If a rural health clinic demonstrates to the Secretary's satisfaction that it has been unable, despite reasonable efforts, to meet the requirements of section 1861(aa)(2)(J) of the Act during the previous 90-day period, the Secretary shall grant a waiver for a period of one year. Section 1861(aa)(7)(A) of the Act.

7. The Act states also: "The Secretary may not grant such a waiver under subparagraph (A) to a facility if the request for the waiver is made less than 6 months after the date of the expiration of any previous such waiver for the facility." Section 1861(aa)(7)(B).

8. The Secretary has delegated to HCFA her responsibilities for administering the Medicare program, including making determinations on whether to grant staffing waivers and whether to terminate provider agreements. HCFA Ex. 14 at 2 (49 Fed. Reg. 35247, 35248 (1984)); 42 C.F.R. § 498.1(f).

9. HCFA has authority to terminate a Medicare provider agreement with a rural health clinic if the clinic: a) no longer meets conditions for certification under 42 C.F.R. § 491; or b) is not in substantial compliance with the provisions of the agreement, other applicable regulations of 42 C.F.R. § 405, subpart X, or any applicable provisions of Title XVIII of the Act (Medicare). 42 C.F.R. § 405.2404(b); sections 1861(aa)(2)(K) and 1866(b)(2)(B) of the Act.

10. HCFA's Kansas City Regional Office (Region VII) has jurisdiction over Medicare providers located in the State of Missouri. HCFA Ex. 1, 2, 12; P. Ex. 4.

11. HCFA has contracted with the Missouri Department of Health to conduct surveys and assist HCFA in determining whether providers in Missouri are in compliance with the conditions of participation in the Medicare program. See Section 1864 of the Act; e.g., HCFA Ex. 6; P. Ex. 1, 7.

II. Relevant Events

A. **Events between April, 1993 and April 7, 1994**

12. By letter dated April 9, 1993, HCFA's Region VII Office notified Petitioner: a) that Petitioner's request for a staffing waiver had been approved; b) that the waiver would expire on April 7, 1994; and c) that no subsequent request for waiver by Petitioner would be approved within six months of April 7, 1994. HCFA Ex. 1.

13. Barbara Goodrick, of HCFA's Region VII Division of Health Standards and Quality, who reviewed Petitioner's request for a staffing waiver, discussed HCFA's waiver approval letter with Warren N. Kerber, Lucy Lee Hospital's Director of Outreach Services. Ms. Goodrick informed Mr. Kerber that, absent a waiver, a nurse practitioner or physician assistant would be required to work in the rural health clinic for at least 50 percent of the clinic's operating hours. HCFA Ex. 2 at 2.

14. Mr. Kerber was a duly designated representative and spokesperson for Petitioner. E.g., HCFA Ex. 2, 3, 5, 7.

15. On or about January 3, 1994, a nurse practitioner named Barbara Collrin began working for Petitioner and the Van Buren Medical Clinic. P. Ex. 2; HCFA Ex. 5 at 4 - 6.

16. By letter dated February 3, 1994 to the Missouri Department of Health, Mr. Kerber represented that Ms. Collrin was scheduled to work alternate weeks at Petitioner's facility (i.e., 40 hours at Petitioner's facility and then 40 hours at the Van Buren Medical Clinic). P. Ex. 2.

17. On February 24, 1994, HCFA received a complaint from an individual purporting to be Barbara Collrin, who alleged, inter alia, that Petitioner and Van Buren Medical Clinic were engaged in unfair practices against her by restricting her scope of practice, by not permitting her to care for patients, and by improperly utilizing her to do clerical work at times. HCFA Ex. 4, 6 at 2.

18. Effective March 3, 1994, Ms. Collrin resigned from her position with Petitioner and the Van Buren Medical Clinic. HCFA Ex. 5 at 1.

19. Petitioner did not immediately report Ms. Collrin's resignation to HCFA or to the Missouri Department of Health. See HCFA Ex. 7.

20. While conducting an investigation of the above described complaints (see Finding 17) at the Van Buren Medical Clinic on March 23, 1994, the Missouri Department of Health learned of Ms. Collrin's resignation. HCFA Ex. 5 at 1 - 2; HCFA Ex. 6 at 2; see also Finding 11.

21. While investigating the allegations against Petitioner and the Van Buren Medical Clinic, the Missouri Department of Health surveyor obtained information from Mr. Kerber and also reviewed patient records at the Van Buren Medical Clinic. HCFA Ex. 5 at 1.

22. On March 31, 1994, the Missouri Department of Health adopted the surveyor's conclusions that there was corroboration for the allegations that Petitioner had engaged in "unfair practices" with respect to Ms. Collrin and her scope of practice by not having properly utilized her as a nurse practitioner in a rural health setting under the Medicare program. HCFA Ex. 5 at 1 - 2; HCFA Ex. 6 at 2; see also Finding 55, infra.

23. In a letter dated April 1, 1994, Mr. Kerber confirmed to the Missouri Department of Health that Ms. Collrin had resigned effective March 3, 1994 and that Petitioner was operating without a nurse practitioner. HCFA Ex. 7.

24. On April 7, 1994, Petitioner's staffing waiver expired under its own terms. P. Ex. 1.

B. Events after April 7, 1994 and until June 2, 1994

25. On April 15, 1994, Ms. Goodrick noted that Ms. Collrin's working every other week at Petitioner's facility was not the equivalent of working 50 percent of Petitioner's operational hours as required by law. HCFA Ex. 5 at 3.

26. On April 29, 1994, the Missouri Department of Health recommended that HCFA terminate Petitioner's Medicare provider contract, based on the results of the March 23, 1994 survey. HCFA Ex. 6.

27. In a letter dated May 4, 1994, HCFA's Region VII Office notified Petitioner of its determination to terminate Petitioner's provider contract "at the close of" June 1, 1994, due to Petitioner's noncompliance with the conditions of coverage, staffing, and staff responsibility requirements set forth in 42 C.F.R. § 491.8. P. Ex. 4.

28. Also in its May 4, 1994 letter to Petitioner, HCFA's Region VII Office reiterated its belief that Petitioner was not eligible for another waiver within six months of the date the previous waiver expired, April 7, 1994. P. Ex. 4.

29. In a letter dated May 18, 1994, Petitioner requested a hearing by asserting that:

> a) Petitioner's employment of the certified nurse practitioner (Ms. Collrin) on January 3, 1994 "interrupted the staffing waiver that was in effect until April 7, 1994;"
>
> b) Petitioner hired the certified nurse practitioner on January 3, 1994 with the intent to "immediately expire the waiver that was in effect until April 7, 1994;" and
>
> c) Petitioner was eligible to apply for a staffing waiver from 42 C.F.R. § 491.8 "if unable to locate a nurse practitioner after ninety (90) days" of Ms. Collrin's resignation.

P. Ex. 5.

30. Ninety days after Ms. Collrin's resignation date (March 3, 1994) would have been June 1, 1994. See Findings 23, 29.

31. In a letter dated May 19, 1994, Mr. Kerber asserted to HCFA that, as of May 18, 1994, Petitioner had come into compliance with the conditions for coverage, staffing, and staff responsibilities set forth in 42 C.F.R. § 491.8. P. Ex. 6.

32. On May 27, 1994, the Missouri Department of Health, at HCFA's request, surveyed Petitioner and found that:

> a) Sondra Reese, who graduated from a nurse practitioner program on May 14, 1994, was working for Petitioner;
>
> b) Petitioner's facility was open for a total of 49 hours each week; and
>
> c) Ms. Reese worked at Petitioner's facility for a total of 18.5 hours each week.

See HCFA Ex. 10 at 1.

33. Ms. Reese's hours of work equalled less than the required 50 percent of the hours that Petitioner was in operation. See Section 1861(aa)(2)(J) of the Act; Finding 32.

34. In a letter dated June 2, 1994, HCFA's Region VII Office notified Petitioner of HCFA's determination that Petitioner remained out of compliance with the law because the nurse practitioner (Ms. Reese) was not available to provide services for at least 50 percent of the time Petitioner's facility was in operation, and, therefore, Petitioner's participation in the Medicare program had been terminated at the close of June 1, 1994. P. Ex. 7.

C. **Events after June 2, 1994 and until August 10, 1994**

35. HCFA's termination notice dated June 2, 1994 also informed Petitioner that it could reapply for participation in the Medicare program and that it would have to demonstrate compliance for a period of 60 days before HCFA would readmit it into the program. P. Ex. 4 at 2; P. Ex. 7.

36. In a letter dated June 14, 1994, Mr. Kerber informed HCFA that Petitioner was meeting the staffing requirements by using two nurse practitioners to provide patient care services. P. Ex. 8.

37. By June 28, 1994, HCFA had determined to its satisfaction that Petitioner had reduced its operation to 35.5 hours per week and, therefore, Petitioner's employing two nurse practitioners to work a total of 18.5 hours per week satisfied the staffing requirements. HCFA Ex. 11 at 2.

38. HCFA issued Petitioner a new provider agreement effective August 10, 1994. HCFA Br. at 4 (Proposed Finding #15); P. Resp. at 3.

III. Expiration Date of the Staffing Waiver

A. **HCFA's Policy Statements**

39. Under the Act, the latest date on which Petitioner's staffing waiver could have expired was on April 7, 1994. Findings 6, 12.

40. Since at least November 8, 1991, HCFA's policy has been to grant waivers to requesting rural health clinics that do not employ a nurse practitioner, physician

assistant, or nurse-midwife, or because such individuals do not furnish services during at least 50 percent of the time the clinic is in operation. HCFA Ex. 13.

41. Instructions implementing HCFA's policy, dated November 8, 1991, refer to a "1 - YEAR WAIVER" but do not address the situation where a rural health clinic that has received a one year waiver comes into compliance with the law during the waived period. HCFA Ex. 13.

42. In a memorandum dated July 14, 1994, HCFA advised all Associate Regional Administrators:

> If an RHC [rural health clinic] which has been granted a waiver employs the required staff member subsequent to the effective date of the waiver, the expiration date of the waiver is the effective date of employment of the staff member.

HCFA Ex. 12 at 2.

43. Nothing in the Act or the Secretary's regulations prevents HCFA from ending a staffing waiver before one calendar year has elapsed from the date the waiver was approved. See section 1861(aa)(7)(A) of the Act.

44. As long as the term "required staff member" refers to both of the staffing requirements found in section 1861(aa)(2)(J) of the Act, HCFA's policy of using the hiring of the "required staff member" to end an outstanding one year waiver does not contravene section 1861(aa)(7) of the Act. HCFA Ex. 12, 13. See Findings 47, 48.

45. Using the hiring of the "required staff member" to end an outstanding one year waiver is not inconsistent with or precluded by the instructions contained in HCFA's implementing instructions dated November 8, 1991. See HCFA Ex. 12, 13.

46. The evidence is insufficient to prove that, prior to July 14, 1994, HCFA's policy directed its Regional Office(s) to set the expiration dates of all waivers at one full year after the waivers were granted.

B. HCFA's Policy on Expiration Dates as applied to this Case

47. HCFA's policy statement concerning the hiring of a "required staff member" (HCFA Ex. 12 at 2 (emphasis added)) means that a waiver will expire during the 12-

month period with the employment of a nurse practitioner, nurse-midwife, or physician assistant who is available to provide patient care services at least 50 percent of the time the rural health clinic operates. See section 1861(aa)(2)(J) of the Act.

48. HCFA's policy cannot be interpreted as meaning that a staffing waiver will expire automatically whenever a clinic hires a nurse practitioner, nurse-midwife, or physician assistant. See section 1861(aa)(2)(J) of the Act; HCFA Ex. 12, 13.

49. During the Missouri Department of Health's investigation of March 23, 1994, Mr. Kerber stated that Ms. Collrin resigned because the physician(s) working for Petitioner refused to sign a collaborative work agreement with her, and others heard Ms. Collrin say that she was unwilling to work under and in the presence of a physician 100 percent of the time. HCFA Ex. 5 at 1 - 2; HCFA Ex. 6 at 2.

50. Mr. Kerber's admission for Petitioner is consistent with the complaint that HCFA received against Petitioner and Van Buren Medical Clinic. Findings 14, 17, 22, 49.

51. As defined by statute, "collaboration" means:

> a process in which a nurse practitioner works with a physician to deliver health care services within the scope of the practitioner's professional expertise, with medical direction and appropriate supervision as provided for in jointly developed guidelines or other mechanisms as defined by the law of the State in which the services are performed.

Section 1861(aa)(6) of the Act.

52. In order for Petitioner to qualify for the receipt of Medicare reimbursement as a rural health clinic, the nurse practitioner's responsibilities must include: a) participation with a physician in a periodic review of the patients' health records; b) to the extent they are not being performed by a physician, arranging or referring patients for services that cannot be provided at the facility; and c) assuring that adequate patient health records are maintained and transferred as required when patients are referred. 42 C.F.R. §§ 491.1, 491.8(c).

53. Ms. Collrin's alternating her presence for one week at a time between Petitioner's clinic and the Van Buren Medical Clinic did not satisfy Petitioner's obligation under the Medicare program to staff its facility with a nurse practitioner, nurse-midwife, or physician assistant who is available to provide services during at least 50 percent of the time that Petitioner was in operation. See section 1861(aa)(2)(J); P. Ex. 2.

54. The evidence of record supports HCFA's contention that Ms. Collrin's employment by Petitioner did not substantially satisfy the staffing requirements for a rural health clinic. See HCFA Resp. at 1 n.1; Findings 49 - 53.

55. The evidence is insufficient to show that, if the Missouri Department of Health had conducted its March 27, 1994 investigation at Petitioner's facility instead of at the Van Buren Medical Clinic, the surveyor would have concluded that Petitioner was utilizing Ms. Collrin as a nurse practitioner in a manner required for Medicare participation. See, e.g., Findings 21, 22, 49 - 53.

56. Petitioner has not introduced sufficient evidence to support its affirmative argument that Petitioner was in compliance with the staffing requirements of section 1861(aa)(2)(J) during Ms. Collrin's employment from January 3 to March 3, 1994. See P. Br. at 10 - 11.

57. There is no statutory or regulatory basis for tolling the time period covered by a staffing waiver granted by HCFA.

58. Even if legal authority existed for tolling the time period covered by a staffing waiver, Petitioner has introduced no evidence to rebut HCFA's evidence that Petitioner improperly utilized or under-utilized Ms. Collrin as a nurse practitioner. See, e.g., Findings 54 - 56.

59. On the facts of this case, the staffing waiver granted by HCFA to Petitioner expired on April 7, 1994. Findings 47 - 58.

IV. Petitioner's Asserted Right to Request or Receive a Staffing Waiver to Cover the Period up to August 9, 1994

60. A rural health clinic seeking a staffing waiver must apply for it. See Section 1861(aa)(7) of the Act.

61. HCFA will not approve a request for waiver unless the applicant attaches its request to a HCFA-29 form and supplies documentation showing that, during the preceding 90 day period and despite reasonable efforts, it has been unable to hire the staff required by law, or that the individual hired is unavailable to work the quantity of time specified by law. HCFA Ex. 13 at 2 - 3.

62. Petitioner's hearing request does not suffice as an application for waiver. See P. Ex. 5; Finding 61.

63. A waiver request is deemed granted only if the Secretary, by HCFA, has received the request and has failed to deny the request within 60 days of the date it was received. Section 1861(aa)(7)(C) of the Act.

64. Under HCFA's longstanding policy, a waiver request that is not specifically disapproved by HCFA is deemed approved (and becomes effective) on the 61st day after the date HCFA received the application. HCFA Ex. 13 at 2; see section 1861(aa)(7)(C).

65. Under HCFA's longstanding policy, the effective date of a waiver specifically approved by HCFA may not be any earlier than the date HCFA's regional office approves it. HCFA Ex. 12 at 2.

66. HCFA's policies do not contravene any statute or regulation. See Findings 60 - 65.

67. Petitioner has not submitted a waiver request to HCFA for consideration at any time since HCFA granted Petitioner a staffing waiver in April of 1993.

68. Petitioner's contention that it "was entitled to a new waiver effective on or before" June 1, 1994 (P. Resp. at 7) is wrong as a matter of law. Findings 60 - 65, 67.

69. While Petitioner was operating under an unexpired staffing waiver from April of 1993 until April 7, 1994, Petitioner was not entitled to receive another staffing waiver even if Petitioner had requested it. See, e.g., Section 1861(aa)(7) of the Act.

70. There is no support for Petitioner's affirmative argument that HCFA was required to consider a request for a subsequent waiver from Petitioner pursuant to section 1861(aa)(7)(A) of the Act "because there had been no 'expiration of any previous such waiver for the facility'" within the meaning of section 1861(aa)(7)(B). P. Br. at 11; Finding 69.

71. Petitioner did not reapply for a waiver prior to June 1, 1994 pursuant to Petitioner's own interpretation of its legal rights. P. Ex. 4, 5; Finding 29.

72. Before and after June 1, 1994, Petitioner consistently sought to demonstrate to HCFA that it had come into compliance with Medicare's staffing requirements as of May 18, 1994. P. Ex. 6 - 8; Findings 31, 36, 37.

73. From at least May 18, 1994 until October 9, 1994, Petitioner could not have alleged in good faith to HCFA that Petitioner needed a waiver because, despite reasonable efforts to do so during the preceding 90 days, it had not been able to hire the necessary staff member to work the hours required by law. See Finding 72.

74. HCFA's decision to recertify Petitioner for participation in the Medicare program effective August 10, 1994 means that HCFA found Petitioner in compliance with the staffing requirements during the 60 days preceding August 10, 1994 (i.e., from June 10 to August 9, 1994). E.g., P. Ex. 7.

75. The facts of this case do not support Petitioner's alternative affirmative argument that it was eligible to apply for a subsequent waiver pursuant to section 1861(aa)(7)(b) of the Act by July 3, 1994 (i.e., six months after Petitioner hired Ms. Collrin). See P. Br. at 11; Findings 62, 73, 74.

76. From June 10 until August 9, 1994, Petitioner was not in need of, nor was it entitled to receive, any staffing waiver from HCFA even if Petitioner had applied for one to cover that period. Findings 73, 74.

77. The evidence does not show that Petitioner's failure to seek a second waiver from HCFA was due to the information from HCFA's Region VII Office that no subsequent waiver request would be approved if it was submitted before October 7, 1994 (i.e., within six months of the date the prior waiver expired). See HCFA Ex. 1; P. Ex. 7; Findings 28, 71, 72.

78. Petitioner has not proven its contention that, "[a]bsent HCFA's arbitrary, capricious and unreasonable determination" that no waiver request would be granted if it was submitted before October 7, 1994, "Petitioner would have had a waiver in effect as of June 1, 1994, and the termination [of the provider agreement] would not have occurred." P. Resp. at 8; see Findings 60 - 77.

79. The Secretary has not delegated to administrative law judges the authority to grant or deny requests for staffing waivers. See Finding 8.

80. It is not appropriate for me to grant Petitioner's requested relief by remanding this case to HCFA for the purpose of permitting Petitioner to file with HCFA, or for HCFA to consider, a new request to waive Petitioner's staffing requirements during any period from June 2 to August 9, 1994. See 42 C.F.R. §§ 498.56(d), 498.78; Findings 64, 65, 71 - 78.

V. HCFA's Basis for Terminating Petitioner's Provider Agreement

81. Petitioner did not have a nurse practitioner, physician assistant, or nurse-midwife on staff between March 3 and May 18, 1994. HCFA Ex. 7; P. Ex. 6.

82. Beginning on April 7, 1994, Petitioner was no longer exempt from complying with the staffing requirements for a rural health clinic. E.g., Finding 59.

83. Petitioner was out of compliance with the staffing requirements when the Missouri Department of Health conducted its survey on May 27, 1994. Section 1861(aa)(2)(J) of the Act; HCFA Ex. 10; see Findings 32, 33.

84. Petitioner did not hire additional staff, shorten its hours of operation, or otherwise comply with the requirement that a nurse practitioner be available during 50 percent of its hours of operation until some time after June 1, 1994. P. Ex. 8; HCFA Ex. 11.

85. Petitioner has introduced no evidence to support its statement, "Petitioner disputes ... that it was not in compliance with RHC [Rural Health Clinic] staffing requirements as of May 27, 1994." P. Resp. at 3.

86. In the face of HCFA's evidence that Petitioner was out of compliance with the staffing requirements from April 7, 1994 until some time after June 1, 1994 (e.g., Findings 81 - 84), Petitioner's allegations or denials do not suffice to create any genuine issues of fact requiring an in-person hearing. See generally Fed. R. Civ. P. 56(e).

87. There exists no genuine issue of fact concerning Petitioner's non-compliance with the Medicare staffing requirements at the time HCFA terminated Petitioner's provider agreement. Findings 81 - 86.

88. On May 4 and June 2, 1994, HCFA correctly determined that Petitioner's provider agreement should be terminated due to Petitioner's failure substantially to meet the applicable provisions of section 1861 and 42 C.F.R. § 405, subpart X, and § 491, subpart A. See, e.g., Section 1866(b)(2)(B) of the Act; 42 C.F.R. § 405.2404(b); P. Ex. 4, 7; Findings 27, 34, 81 - 87.

89. HCFA properly set the effective date for terminating the provider agreement at June 1, 1994 (27 days after the date of its May 4, 1994 notice letter to Petitioner). See 42 C.F.R. § 405.2404(b)(2); Finding 27.

VI. HCFA's Recertification of Petitioner as a Medicare Provider, effective August 10, 1994

90. The Act and regulations do not specify hearing rights for providers dissatisfied with HCFA's decision to recertify them following the termination of their provider agreements. See Section 1866(h); 42 C.F.R. §§ 498, subpart A, 405, subpart X.

91. Even if Petitioner could be considered a "prospective provider" for purposes of seeking its recertification after termination, Petitioner is not entitled to a hearing unless it has requested a reconsideration from HCFA and obtained an adverse reconsideration determination from HCFA. 42 C.F.R. §§ 405.2402(f), 498.2, 498.5(a).

92. Assuming that Petitioner had the status of a prospective provider after June 1, 1994, there is no evidence of any reconsideration determination by HCFA on the issue of whether Petitioner should have been recertified as a provider prior to August 10, 1994.

93. I am without authority to grant the relief Petitioner requested, i.e., placing into effect a provider agreement earlier than the date of Petitioner's recertification by HCFA (August 10, 1994). Findings 88 - 92.

ANALYSIS

Many of my findings of fact and conclusions of law are self-explanatory and therefore require no discussion. However, I will use this part of my decision to analyze the parties' arguments on various issues that they consider to be controlling, as well as the facts on which their contentions are based. I do so for the purpose of providing a context for the findings and conclusions I have reached.

In order to emphasize the parties' respective burdens of proof, I will begin with the evidentiary principles I applied in this case. Then I will discuss the prima facie case established by HCFA. Finally, I will discuss the affirmative arguments and requests for relief advanced by Petitioner.

I. Summary Judgment and Disposition on the Written Record

In analyzing the merits of the case, I have been mindful of the parties' request that I apply the principles of summary judgment to the extent possible, and, if there remain any disputed issues of fact to which neither side is entitled to prevail on summary judgment, I am to resolve such factual disputes on the basis of the written record before me. See Confirming Letter for December 1, 1994 prehearing conference. Both parties have repeatedly stated to me at the prehearing conferences I held in this case that they did not wish to present evidence at an in-person hearing. Petitioner confirmed at the last prehearing conference that it did not have any additional evidence to present on the issues before me.

Rule 56 of the Federal Rules of Civil Procedure contains the principles for adjudicating summary judgment motions. To prevail on a summary judgment motion in federal district court, a moving party must establish, by use of affidavits or other filings of record, that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When the motion for summary judgment is properly supported, the adverse party may not rest upon mere allegations or denials. Fed. R. Civ. P. 56(e). The very function of the summary judgment procedure is to pierce the pleadings and to assess the parties' proof to determine whether there is a genuine need for further proceedings. Therefore, summary judgment may be entered if the adverse party does not respond to a properly supported summary judgment motion or does not set forth

specific facts showing that there is a genuine issue that should be reserved for trial or other disposition. Fed. R. Civ. P. 56(e) and advisory committee's note.

Even though the Federal Rules of Civil Procedure have no binding force in administrative proceedings, the legal principles they embody have often been used for guidance. I agree with the parties that summary judgment is an appropriate and useful method for promptly disposing of disputes in which there exists no genuine issue as to any material fact. Therefore, I have used the above-discussed contents of Rule 56 to resolve many of the arguments before me. Where application of the standards and principles inherent in Rule 56 does not entitle either party to judgment as a matter of law on a given issue, I have (as requested by the parties) proceeded to evaluate and weigh the documentary evidence of record to reach my conclusions.

As noted in my prehearing order dated August 25, 1994, the standard of proof required to prevail on any genuine issues of material fact is a preponderance of the evidence. HCFA must prove, by use of a summary judgment motion or otherwise, that there is a basis for terminating Petitioner's provider agreement. Prehearing Order dated August 25, 1994. Petitioner has the burden of proving the affirmative defenses it has advanced. Id.

II. HCFA's Prima Facie Case

The ultimate issue before me is whether Petitioner's provider agreement was properly terminated by HCFA effective "at the close of" June 1, 1994. See P. Ex. 4, 7.[2] The law is clear that HCFA is authorized to terminate a provider agreement when the provider fails substantially to meet the applicable provisions of section 1861 of the Act. Section 1866(b)(2)(B) of the Act. Section 1861 of the Act is equally clear that, for a facility to participate as a rural health clinic in the Medicare program, it must employ a nurse practitioner, a physician assistant, or a certified nurse-midwife who is available to furnish patient care services not less than 50 percent of the time it operates. Section 1861(aa)(2)(J) of the Act. Under the regulations applicable to rural health clinics, HCFA is authorized to terminate a provider agreement if the clinic fails to meet the conditions of participation specified by the

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[2] For the sake of convenience, I will refer to the termination date as June 1, 1994.

regulations or is not in substantial compliance with provisions of the provider agreement, other relevant regulations, or any applicable provisions of the Medicare laws. 42 C.F.R. § 405.2404(b). In its effort to meet its burden of proof under this issue, HCFA has sought to establish that its termination action resulted from Petitioner's failure substantially to meet the staffing requirements set forth at section 1861(aa)(2)(J) of the Act through Petitioner's use of a nurse practitioner. HCFA Br. at 5 - 6.[3]

Until June 2, 1994, Petitioner was participating in the Medicare program as a rural health clinic. There is no material dispute concerning the central events that took place in this case between April of 1993, when HCFA granted Petitioner a staffing waiver, and May 4, 1994, when HCFA notified Petitioner that its provider agreement would end at the close of June 1, 1994. Findings 12 - 34.

The evidence submitted by both parties establishes that, during the period between March 1993 and January 3, 1994, Petitioner did not employ the staff required by law (i.e., a nurse practitioner, certified nurse-midwife, or physician assistant). See section 1861(aa)(2)(J) of the Act. After Petitioner obtained a one year staffing waiver in April of 1993, Petitioner employed a nurse practitioner from January 3 until March 3, 1994 to work alternate weeks at Petitioner's facility. After March 3, 1994, Petitioner continued to participate in the Medicare program without the staff specified by law. Petitioner had no nurse practitioner on staff between March 3, 1994 and May 18, 1994.[4] HCFA took no action against

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[3] There is no evidence that, during any relevant period, Petitioner utilized a nurse-midwife or physician assistant in an effort to satisfy the staffing requirements of section 1861(aa)(2)(J) of the Act.

[4] In its notice of termination dated May 4, 1994, HCFA stated that there was a telephone call on April 28, 1994, between the Missouri Department of Health and Petitioner, which confirmed that Petitioner had not yet hired a nurse practitioner or equivalent personnel since the survey of March 23, 1994. P. Ex. 4. HCFA has submitted no other evidence of this April 28th telephone call. However, the facts allegedly confirmed by the telephone call are not in dispute. After Ms. Collrin's resignation, effective March 3, 1994, Petitioner said it next hired a nurse practitioner on May 18, 1994. See P. Ex. 6.

Petitioner until after April 7, 1994, when HCFA considered the waiver to have expired.

After Petitioner was notified by HCFA on May 4, 1994, that its provider agreement would terminate at the close of June 1, 1994, due to Petitioner's failure to meet the staffing requirements mandated by law, Petitioner hired a nurse practitioner on May 18, 1994, and argued that it had come into compliance as of that date. P. Ex. 6. However, a survey conducted on May 27, 1994, disclosed that the newly hired nurse practitioner was working fewer than 50 percent of the hours that Petitioner was in operation. Therefore, on June 2, 1994, HCFA reaffirmed its earlier determination to end Petitioner's provider agreement effective "at the close of" June 1, 1994, because HCFA concluded that Petitioner was not in compliance with the staffing requirements of section 1861(aa)(2)(J) of the Act.

Petitioner objects to HCFA's evidence concerning the May 27, 1994 survey by claiming that the findings and conclusions of the surveyor are vague and ambiguous. P. Resp. at 3 (referring to HCFA Ex. 10). I disagree. The findings and conclusions of the surveyor are clear in the context of the laws and regulations applicable to a rural health clinic and the purpose for which the survey was being conducted. Even though the surveyor did not specifically articulate a conclusion as to the 50 percent requirement, the surveyor listed Petitioner's hours of operation and the hours worked by the nurse practitioner. HCFA Ex. 10. Application of simple arithmetic to the two categories of hours listed by the surveyor compels the conclusion that HCFA correctly determined that Petitioner's nurse practitioner was not available 50 percent of Petitioner's hours of operation. See HCFA Ex. 10, 11.

Petitioner has offered no proof in support of its statement that it "disputes ... it was not in compliance with the RHC requirements as of May 27, 1994." P. Resp. at 3. As already discussed above, an adverse party cannot defeat a properly supported summary judgment motion with bald denials or pleadings. Petitioner has created no genuine issue as to any material fact concerning whether it was in compliance with the staffing requirements of law when HCFA decided to terminate its provider agreement.

For the foregoing reasons, I have concluded that HCFA has satisfactorily established that Petitioner was substantially out of compliance with the staffing requirements for a rural health clinic between April 8

and June 1, 1994. On the basis of the uncontroverted facts identified above, HCFA has proven that its termination action was valid prima facie. The burden of moving forward therefore shifts to Petitioner to demonstrate why I should not enter judgment in HCFA's favor.

III. Petitioner's Affirmative Arguments

Petitioner has advanced several interrelated affirmative arguments to show that HCFA's termination of the provider agreement at the close of June 1, 1994 was improper or barred. Such affirmative arguments relate to the expiration date of the staffing waiver granted by HCFA in April of 1993[5] and the date on which Petitioner would have become eligible to apply for or obtain another waiver. As already noted, Petitioner bears the burden of proof on these affirmative arguments.

In reviewing the merits of the arguments on waivers, I do not imply that I have authority to grant or deny waiver requests from rural health clinics. I have made clear in my findings that I do not have such authority. Finding 79. I analyze the waiver issues presented by Petitioner for the limited purpose of deciding whether HCFA was prohibited from terminating Petitioner's provider agreement as of June 1, 1994 due to Petitioner's legal status or rights (if any) under the laws governing waivers for rural health clinics. According to Petitioner, "[t]he salient issue ... is not one of compliance, but whether Petitioner's original waiver was still in effect when the agreement was terminated, and if it was not, whether Petitioner was entitled to seek and obtain a new waiver." P. Resp. at 7.

Under the Act, HCFA cannot grant a waiver for more than one year. Finding 6. In granting a waiver to Petitioner during April of 1993, HCFA specified an expiration date of April 7, 1994. Findings 12, 39. The undisputed facts

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[5] As discussed herein, Petitioner seeks to draw a distinction between a waiver's "expiration" and "termination." I use the term "expiration" throughout the decision because it is the only one used in the Act and neither the regulations or HCFA's policy statements refer to the "termination" of the staffing waiver. However it was caused, the expiration date of a waiver still denotes the point in time at which the waiver changed from being in effect to being no longer in effect.

noted above show that Petitioner enjoyed the benefits of the waiver until after April 7, 1994: Petitioner had remained in the Medicare program until June 1, 1994, even though, by Petitioner's own admission and under its own theories, it did not satisfy the staffing requirements of the law from March 3 until May 18, 1994. Nevertheless, Petitioner argues that HCFA's setting the expiration date of the waiver in this case at April 7, 1994, is arbitrary and capricious, inconsistent with the statutory mandate, and frustrates the congressional purpose underlying the Act. P. Resp. at 4.

A. Petitioner's Tolling Theory

Under one of Petitioner's alternative theories, Petitioner asks me to construe the waiver granted by HCFA in April of 1993 as having been tolled for the two months (January 3, 1994 to March 3, 1994) that Petitioner employed Ms. Collrin, a nurse practitioner. E.g., P. Br. at 10, 14. Thus, the waiver originally scheduled to expire on April 7, 1994, would have remained in effect until June 7, 1994, and precluded HCFA from terminating the provider agreement on June 1, 1994. P. Br. at 14. In support of its tolling theory, Petitioner contends that it was in compliance with the staffing requirements during the two months that it employed Ms. Collrin, a nurse practitioner. P. Br. at 11.

I reject Petitioner's tolling theory. Neither the Act nor the regulations authorize the tolling of a staffing waiver. Moreover, HCFA has offered a substantial amount of evidence that Petitioner was not properly utilizing Ms. Collrin as a nurse practitioner and that Ms. Collrin was not available to provide patient care services for the amount of time specified by law. E.g., Findings 50 - 55.

A rural clinic does not satisfy the staffing requirements of the law merely by hiring someone with the credentials of a nurse practitioner. Such an individual also must provide services appropriate to a nurse practitioner and be available to render patient care services at least 50 percent of the time that the clinic is in operation. Sections 1861(aa)(2)(J), 1861(aa)(6) of the Act; 42 C.F.R. § 491.8(c). Therefore, the fact that Ms. Collrin was licensed as a nurse practitioner and employed by Petitioner from January 3 to March 3, 1994 is not sufficient for proving Petitioner's allegation that it was in compliance with the law.

I have considered the evidence concerning the number of hours Ms. Collrin worked at Petitioner's facility. During the relevant period, Ms. Collrin worked at Petitioner's facility every other week. During the alternate weeks, she worked at the Van Buren Medical Clinic. I infer from the available evidence that Petitioner was open for business every week. Petitioner has not introduced any evidence to the contrary. Therefore, even assuming that Ms. Collrin was being properly utilized as a nurse practitioner by Petitioner during the alternate weeks she worked at Petitioner's clinic, I would agree with HCFA that Petitioner was not in substantial compliance with the requirements of the Act. This is because I conclude that a rural health clinic is not in compliance with the Act when it has no nurse practitioner or similar personnel providing patient care services during every second week that its clinic is open. Findings 53, 54. Similarly, the 50 percent requirement would not be satisfied if a clinic employed a nurse practitioner only during the first six months of every year that it was open for business, or if the nurse practitioner worked only during every other month that the clinic was open for business.

I have reviewed also the evidence concerning whether Ms. Collrin was being utilized appropriately. HCFA offered a memorandum dated March 28, 1994 in which the Missouri Department of Health opined that Petitioner had not properly utilized the nurse practitioner. HCFA Ex. 5. Given that Petitioner has the burden to prove its affirmative defenses, Petitioner cannot succeed in establishing compliance during Ms. Collrin's employment by objecting to HCFA's evidence and conclusion.

Petitioner objects to HCFA Ex. 5 and the conclusion it contains as irrelevant. According to Petitioner, the evidence is irrelevant because the Missouri Department of Health visited only the Van Buren Medical Clinic and concluded that the Van Buren Medical Clinic was not properly utilizing the services of the nurse practitioner. P. Resp. at 2.

I find no merit in the objection or the arguments. The survey was triggered by a complaint involving the under-utilization and improper utilization of a nurse practitioner (Barbara Collrin) filed against Petitioner as well as the Van Buren Medical Clinic by an individual claiming to be Barbara Collrin. HCFA Ex. 4, 5. The charges were identical against both facilities. Id. The investigative report at issue is clearly denoted with "Subject: Piedmont and Van Buren RHC -- Unfair Practice." HCFA Ex. 5 at 1.

At the Van Buren Medical Clinic, the surveyor spoke to Warren N. Kerber, who represented Petitioner, the Van Buren Medical Clinic, and their parent entity, Lucy Lee Hospital. E.g., Finding 14; HCFA Ex. 5 at 1 - 2. Mr. Kerber told the surveyor that Petitioner's doctor(s) refused to sign a collaboration practice agreement with Ms. Collrin, and Ms. Collrin was heard to say that she did not wish to work in the presence of a physician 100 percent of the time. HCFA Ex. 5 at 1.

The surveyor identified various problems after she reviewed patient records at the Van Buren Medical Clinic. Id. However, the evidence of record does not suggest that Ms. Collrin performed her work differently at the Van Buren Medical Clinic and Petitioner's clinic. Petitioner has introduced no evidence to show that, after hiring Ms. Collrin because she was a nurse practitioner, Petitioner properly utilized her services as a nurse practitioner. I therefore conclude that Petitioner has failed to meet its burden of proving its affirmative argument that it was in compliance with the staffing requirements during Ms. Collrin's employment. No tolling of the expiration date is appropriate even if tolling were permitted by the Act or the regulations. Finding 58.

B. Petitioner's Using January 3, 1994 as an Expiration Date and its Related Alternative Interpretations of Section 1861(aa)(7)(B)

1. Petitioner's theories and arguments

Petitioner asked me also to construe the waiver as having expired on January 3, 1994, the date on which it hired Ms. Collrin. Petitioner makes this request for several reasons having to do with its asserted eligibility to seek a subsequent waiver from HCFA. As I have noted earlier, section 1861(aa)(7)(B) of the Act states, "The Secretary may not grant such a waiver under subparagraph (A) to a facility if the request for the waiver is made less than 6 months after the date of the expiration of any previous such waiver for the facility."

By contending that its waiver expired on January 3, 1994, Petitioner argues that, under section 1861(aa)(7)(B) of the Act, it became eligible to apply for a subsequent waiver on July 3, 1994. P. Br. at 11.

Under its alternative reading of section 1861(aa)(7)(B), Petitioner argues that the clause "[t]he Secretary may not grant such a waiver" means that HCFA has discretion either to grant or deny a waiver request filed less than

six months after the date the original waiver expired. Pursuant to its interpretation of the Secretary's discretion under the "may not grant such a waiver" provision of section 1861(aa)(7)(B), Petitioner alleges that HCFA improperly terminated the provider agreement without providing Petitioner any opportunity to demonstrate its continuous reasonable efforts to comply with the staffing requirements. P. Br. at 7 - 9. Petitioner alleges also that it "made good faith efforts to, and in fact did, achieve compliance with the RHC staffing requirements notwithstanding the initial waiver it received." P. Br. at 9. Under this line of reasoning, Petitioner's conclusion is that HCFA acted arbitrarily, capriciously, contrary to the language and intent of the Act, and without authority "in terminating Petitioner's provider agreement and predetermining that Petitioner could not seek a subsequent waiver before October 7, 1994 [i.e., six months after the waiver's expiration date as set by HCFA]." P. Br. at 9.

Another of Petitioner's alternative readings of section 1861(aa)(7)(B) is that the provisions contained therein are inapplicable to this case. P. Br. at 10 - 11. Petitioner theorizes that the waiver granted by HCFA in April of 1993 did not "expire"; it "terminated" or "ended" on January 3, 1994. P. Br. at 10. Petitioner defines "expiration" as "termination which occurs merely due to the lapse of time," while it contends its waiver "terminated" or "ended" when Petitioner "hired a nurse practitioner on January 3, 1994." P. Br. at 10. Because Petitioner alleges that the waiver granted in April of 1993 never "expired," Petitioner concludes that it was also free of the six month waiting period referenced by section 1861(aa)(7)(B) of the Act. P. Br. at 10 - 11.

On the basis of its argument that the waiver granted in April of 1993 had never "expired" within the meaning of section 1861(aa)(7)(B) of the Act, Petitioner concludes further that HCFA was required to accept a request for waiver from Petitioner under section 1861(aa)(7)(A), which directs the Secretary to grant a waiver for a period of one year when a rural health clinic demonstrates that it has been unable to satisfy the staffing requirements during the preceding 90 days. P. Br. at 11. According to Petitioner, HCFA's improper refusal to accept a waiver request from Petitioner under section 1861(aa)(7)(A) of the Act resulted in HCFA's improperly terminating Petitioner's provider agreement. P. Br. at 11.

In a related theory advanced by Petitioner before the termination of its provider agreement took effect, Petitioner contended that it was entitled to apply for another waiver on June 1, 1994, 90 days after Ms. Collrin's resignation. See P. Ex. 5. Petitioner appears to have been relying on section 1861(aa)(7)(A) of the Act and its requirement that the applicant demonstrate inability to hire the requisite staff member after due diligence exercised during the preceding 90 days.

2. Merits of Petitioner's theories and arguments

I find no merit in any of Petitioner's arguments for construing the waiver as having expired on January 3, 1994. Petitioner chose the January 3, 1994 date only because it contends that it came into compliance with the law on that date by hiring Ms. Collrin. I have already discussed my conclusion that Petitioner failed to prove its affirmative argument that it was in compliance with the staffing requirements between January 3 and March 3, 1994. For the same reasons, I reject as factually untenable the use of January 3, 1994 as the expiration date of the waiver under any of Petitioner's alternate theories of law.

Nor do HCFA's interpretations of its policy on the expiration date issue validate Petitioner's use of the January 3, 1994 date. As indicated in my Findings 41 - 46, the evidence of record does not establish that HCFA had a substantively different policy on the matter prior to July 14, 1994. Neither the Act nor HCFA's policy statements of record (dated November 8, 1991 and July 14, 1994) countenance automatically ending a waiver whenever the provider succeeds in hiring a nurse practitioner, nurse-midwife, or physician assistant. Id. On the facts of this case, the waiver granted to Petitioner during April of 1993 did not end and could not have ended until April 7, 1994. At most, HCFA's Region VII Office committed harmless error in failing to inform Petitioner that, under a different set of facts, the waiver could have expired before April 7, 1994.

As for Petitioner's legal arguments concerning the alleged January 3, 1994 expiration date and its relationship to section 1861(aa)(7)(B) of the Act, I find them strained and unpersuasive. For example, I am not persuaded by Petitioner's arguments that, when an entity of greater authority (Congress) instructs its delegate (the Secretary) that she "may not grant" a waiver of the type described in section 1861(aa)(7)(B), what Congress meant was that the Secretary may grant such waivers. Nothing in section 1861(aa) implies that rural health

clinics have a legitimate right to expect approval of those requests the Secretary "may not approve" under subsection (7)(B). Nor is there merit to Petitioner's argument that section 1861(aa)(7)(B) is inapplicable because the waiver granted in April of 1993 "ended" instead of "expired." Under Petitioner's legal interpretations, there would be no incentive for any rural health clinic to achieve and maintain compliance with the staffing requirements of the law.

HCFA is authorized to terminate provider agreements when the provider fails substantially to meet the applicable provisions of section 1861. Section 1861(b)(2)(B) of the Act; 42 C.F.R. § 405.2404(b). The staffing requirements discussed herein are contained in section 1861 and help define what is a rural health clinic for purposes of participation in the Medicare program. Finding 4. The evidence establishes that, from at least April of 1993 until at least May 27, 1994, Petitioner did not meet the staffing requirements for participation in the Medicare program. E.g., Findings 12, 23, 32, 54, 58. Such prolonged noncompliance with critical requirements of participation is evidence that Petitioner failed substantially to meet an applicable provision of section 1861. The waiver in effect until April 7, 1994, precluded HCFA from attaching legal consequences to Petitioner's noncompliance until after its expiration. However, the pendency of the waiver did not negate the requirement that Petitioner come into substantial compliance with this critical element of program participation after April 7, 1994. Petitioner's failure to do so provided the basis for HCFA's termination action. Findings 82 - 89.

Without doubt, Petitioner made attempts to come into compliance during the waived period. However, Petitioner's attempts at compliance during the 12 months do not negate or excuse its noncompliance after April 7, 1994. Petitioner was given the 12-month waiver to bring itself into compliance. Petitioner's lack of success in its endeavors before and after April 7, 1994 does not render invalid HCFA's termination action.

Nor do Petitioner's attempts at compliance mitigate the seriousness of its noncompliance after April 7, 1994. I note as an example that, by May 14, 1994, Petitioner had hired a nurse practitioner named Sondra Reese. However, Petitioner remained out of compliance with the requirement that the nurse practitioner be available to render patient care services for at least 50 percent of the time that Petitioner was in operation. Petitioner failed to satisfy this requirement even after HCFA

specifically explained it to Petitioner. E.g., HCFA Ex. 2 at 2; HCFA Ex. 10; P. Ex. 7. Before HCFA terminated the provider agreement, Petitioner had the means for complying with the 50 percent requirement. When Petitioner hired Ms. Reese on May 14, 1994, to work 18.5 hours a week, Petitioner could have reduced its hours of operation correspondingly (i.e., from its 49 hours a week to, for example, 37 hours a week). See HCFA Ex. 10; Findings 32, 37. However, it was not until after its provider agreement was terminated on June 1, 1994, that Petitioner reduced its hours of operation to 35.5 hours a week and thereby came into compliance. HCFA Ex. 11.[6] Especially in the context of these facts, Petitioner's arguments do not prove that HCFA acted contrary to law.

C. The Absence of any Subsequent Request for Waiver and HCFA's Representations to Petitioner concerning any Waiver Request filed before October 7, 1994

I have issued no formal finding on the meaning of section 1861(aa)(7)(B) because I do not find it necessary to do so. Petitioner's failure to apply for another waiver, Petitioner's efforts to prove its compliance with Medicare's staffing requirements since May 18, 1994, and its success at proving compliance since at least June 10, 1994, have rendered moot the legal question of whether, under section 1861(aa)(7)(B), HCFA may grant a waiver if it is requested less than six months after the expiration of a previous waiver. Findings 60 - 76. For the same reasons, I have not issued any formal finding on whether Petitioner was eligible to request a second waiver under section 1861(aa)(7)(A) between January 3 and August 9, 1994.

Because Petitioner appears to argue that it filed no request for a subsequent waiver due to HCFA's notice that such a request would be rejected if filed before October 7, 1994, I issued formal findings on the merits of such arguments by Petitioner. I reached those findings after having considered Petitioner's burden of proof. If Petitioner wishes to avail itself of an affirmative argument based on a reliance theory, Petitioner bears the burden of proving the truth of all facts necessary for supporting the theory. Petitioner has merely pointed to HCFA's letters stating that no subsequent waiver would be granted until six months after April 7, 1994.

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[6] Some time after June 1, 1994, Petitioner also hired a second nurse practitioner to share the 18.5 hours previously worked by Ms. Reese.

The contents of HCFA's letters provide very little support for a reliance theory, especially viewed in light of other evidence of record. At least by May 18, 1994, Petitioner had formulated its own legal theory under which it would not be eligible to seek another waiver until June 1, 1994. However, by May 19, Petitioner had represented to HCFA that it had come into compliance with the law and would not need a waiver. Findings 29, 31. Good faith allegations are required for waiver requests and assertions of compliance. As a matter of law, a facility cannot assert in good faith that it believes itself in compliance while it simultaneously asserts, also in good faith, that it does not believe itself in compliance and therefore needs a waiver. There is no evidence contradicting the inference that, in making the assertions of its compliance to HCFA on May 19, 1994, Petitioner believed in the truth of its statements. Moreover, the evidence shows that, after May 19, 1994, Petitioner again represented to HCFA that it was in compliance. P. Ex. 8. At no time on or after June 1, 1994, did Petitioner request a waiver from HCFA by stating that Petitioner believed itself out of compliance with the staffing requirements.

Petitioner requested no waiver from HCFA on or after June 1, 1994, even after having asserted a right to do so in its request for hearing. Finding 29. After Petitioner took the initiative to challenge HCFA's position on the six month waiting period, I do not find it credible that HCFA's advance warning of denial would have caused Petitioner to forebear preserving its rights by filing such a waiver request with HCFA. It is not possible that Petitioner thought it should send its waiver request to me after filing its request for hearing. I have received no such request, and Petitioner has not asked me to approve any waiver request. Petitioner knew and should have known that HCFA is the only entity authorized to approve or disapprove a waiver request.

IV. Petitioner's Requested Relief

The relief sought by Petitioner is for me to reinstate its provider agreement retroactively to June 1, 1994 and to permit Petitioner to request a waiver for any period since June 1, 1994 during which it has been unable to meet the staffing requirements despite reasonable efforts to do so. P. Br. at 14. As discussed above, the relief sought by Petitioner is based on its contention that it was entitled to submit a subsequent request for waiver to HCFA, even though it has submitted no such request to date. I have stated in my formal findings that HCFA

properly terminated Petitioner's provider agreement effective at the close of June 1, 1994. Findings 88, 89.

The limitations on Petitioner's hearing rights, the correctness of HCFA's termination action, Petitioner's failure to file a waiver request before the close of June 1, 1994, as well as the authority vested in HCFA for approving (or disapproving) all requests for waivers, preclude my altering the June 1, 1994 termination date. In this case, Petitioner was a provider at the time it requested a hearing. Therefore, my jurisdiction is limited to the question of whether the provider agreement was properly terminated.

Because both parties made allegations concerning events that occurred after the close of June 1, 1994, I analyzed them to the extent they were relevant to the termination issue before me. I examined them also for the purpose of determining whether Petitioner should have the opportunity to seek relief from HCFA at this juncture. In my formal findings, I rejected the possibility of remanding the case to HCFA and denied Petitioner's request that I allow it to seek a waiver from HCFA "for any period since June 1, 1994 ...." P. Br. at 14; Finding 80.

Under 42 C.F.R. § 498.78, if no new issues are present, I may remand a case to HCFA only if HCFA requests a remand, the affected party concurs in writing or on the record, and the remand is for a determination by HCFA "satisfactory to the affected party." In these proceedings, HCFA has not requested a remand of the pending case, and HCFA has expressed no agreement with Petitioner's arguments for a waiver after June 1, 1994. Even if HCFA were willing to grant Petitioner the opportunity to submit a new waiver request, HCFA's longstanding policies would preclude HCFA from assigning a retroactive approval date to the waiver, as requested by Petitioner. See Findings 64, 65. Therefore, a remand is not appropriate under 42 C.F.R. § 498.78.

I have decided also against remanding the case to HCFA for consideration of Petitioner's new arguments on the waiver issue. Under 42 C.F.R. § 498.56(d), I have the discretion to remand a new issue for consideration and determination by HCFA at the request of either party or on my own motion. However, the parties have had long and detailed dealings with one another on the staffing issues. If Petitioner had truly believed itself in need of a waiver and entitled to HCFA's approval of it after April 7, 1994, Petitioner had the opportunity to file such a request with HCFA long before now.

More importantly, there is no legal merit to Petitioner's arguments concerning its right to receive a waiver to cover "any period since June 1, 1994." Findings 60 - 78. HCFA has considered these arguments in the course of the proceedings before me and has refused to accept them. For all these reasons, I have concluded that there is no legitimate interest to be served by remanding the case to HCFA under 42 C.F.R. § 498.56(d).

Finally, I make clear that I have not adjudicated the merits of HCFA's decision to recertify Petitioner as a Medicare provider effective August 10, 1994. I have looked at the events after June 1, 1994 in the context of evaluating Petitioner's waiver theories. However, as noted in my formal findings, Petitioner cannot dispute in this proceeding the correctness of HCFA's recertification determination or HCFA's setting the effective date of recertification at August 10, 1994. Findings 90 - 93.

CONCLUSION

For the foregoing reasons, I uphold HCFA's determination to terminate the provider agreement with Petitioner, effective June 1, 1994.

/s/

Mimi Hwang Leahy
Administrative Law Judge