Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Gold Country Health Center,	DATE: June 1, 1998
Petitioner,	
- v.-	Docket No. C-96-109
	Decision No. CR533
Health Care Financing Administration.	

DECISION

Below, I reverse the determination made by the Health Care Financing Administration (HCFA) that Gold Country Health Center (Gold Country) was out of compliance[1] with the Medicare participation requirements contained in 42 C.F.R. § 483.10(g)(2) as of the time Gold Country was surveyed by HCFA on November 17, 1995. I do so because HCFA has failed to sustain its burden of presenting a prima facie case of noncompliance under said regulation, 42 C.F.R. § 483.10(g)(2).

My decision is based on my review of the documentary evidence and written arguments submitted by the parties. As explained in my Ruling Denying HCFA's Renewed Motion for Dismissal or for Summary Disposition and Scheduling Order (June 20, 1997), at 9, I made a preliminary determination that the issues concerning Gold Country's compliance with 42 C.F.R. § 483.10(g)(2) may be properly adjudicated without the need for any in-person testimony. In addition, I stated the following in my June 20, 1997 ruling and scheduling order, at page 9:

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[1] Throughout this Decision, I will use the terms "compliance" to mean "substantial compliance" and "noncompliance" to mean the "failure to be in substantial compliance," as indicated by 42 C.F.R. § 488.301.

> However, if I become persuaded (based on a motion from a party or based on my review of the parties' documentary submissions) that this case cannot be fully or expeditiously resolved without my hearing witness testimony, I will so inform the parties and discuss with their counsel an appropriate date and site for an in-person hearing.

To date, HCFA has filed no motion requesting the introduction of live witness testimony nor has HCFA objected to my making a decision based on the written record. Gold Country has consistently maintained that it did not wish to have an in-person hearing to resolve the issues concerning 42 C.F.R. § 483.10(g)(2). My review of the parties' subsequent submissions did not indicate that in-person testimony would be necessary. Accordingly, I have made my decision based on the totality of the documentary evidence and written arguments of record.[2]

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[2] Previous to my issuing the ruling and scheduling order on June 20, 1997, both parties had submitted their proposed exhibits. Those previously submitted exhibits related to the outstanding issues under 42 C.F.R. § 483.10(g)(2), as well as to other disputes which I resolved on June 20, 1997.

In my June 20, 1997 ruling and scheduling order, I provided the parties with another opportunity to submit additional supporting evidence with their briefs on the issue of Petitioner's alleged noncompliance with 42 C.F.R. § 483.10(g)(2). Both parties have made use of this additional opportunity, as I discuss herein. Neither party has moved to withdraw any previously submitted evidence, even though not all of their previously submitted evidence relates to the pending issues under 42 C.F.R. § 483.10(g)(2).

Thus, all of the documentary evidence submitted by the parties to date (HCFA Exs. 1 - 30 and P. Exs. 1 - 14) have been received into evidence. Those documents which related solely to HCFA's determinations under other regulations were considered by me when I denied the motions filed by HCFA and delineated the present parameters of this case. (See discussion in next section of this Decision.) To the extent HCFA has an objection to my receipt of certain new evidence filed by Gold Country under my June 20, 1997 ruling and scheduling order, I have overruled HCFA's objections as discussed

(continued...)

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

1. The matter properly before me for adjudication is HCFA's determination that Gold Country was out of substantial compliance with the requirements of 42 C.F.R § 483.10(g)(2), as a result of a survey it conducted on November 17, 1995. See Sections I-A and VI-C, below.

2. HCFA is incorrect in contending that Gold Country has admitted its noncompliance with program requirements and that, consequently, Gold Country is without any hearing rights. See Section I-A.

3. The following matters are undisputed for the noncompliance determination made by HCFA against Gold Country under 42 C.F.R. § 483.10(g)(2):

A. the relevant findings were made by HCFA during the survey it conducted on November 17, 1995 (HCFA Ex. 9);

B. the ombudsman's office involved in this case, the El Dorado County Department of Community Services, was a client advocacy agency within the meaning of 42 C.F.R. § 483.10(g)(2) (see Section I-A, below);

C. the El Dorado County Department of Community Services is a State governmental agency supported by public funds (HCFA Ex. 26);

D. Kathryne Meyers was assigned to Gold Country as an ombudsman representative of the El Dorado County Department of Community Services (HCFA Exs. 26, 29);

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[2](...continued)
below.

[3] The numbered items in this section constitute summaries of my findings of fact and conclusions of law (FFCLs), which are detailed and explained in the designated portions of this Decision or other cited documents.

E. John Litwinovich was the head of the El Dorado County Department of Community Services and Ms. Meyers' superior (e.g., HCFA Ex. 29 at 2, para. 4; HCFA Ex. 30 at 3, para. 5);

F. William R. Niehoff was an official of the legal entity in Long Beach, California, which operated Gold Country, and, in that capacity, he represented Gold Country as well (see Section II-A, below);

G. Gold Country was a long-term care facility located in Placerville, California, which was participating in the Medicare and Medicaid programs;

H. Gold Country was obligated to be in substantial compliance with the requirements of 42 C.F.R. § 483.10(g)(2);

I. HCFA did not make any finding of deficiency against Gold Country under the other related "resident rights" requirements contained in 42 C.F.R. § 483.10(b)(7)(iii) and (iv), or (f) through (k)(see Section VII-H, below);

J. HCFA did not make any finding of deficiency against Gold Country under the "quality of life" requirements for residents contained in 42 C.F.R. § 483.15(c)(1) - (6)(see Section VII-G(2), below);

K. no evidence introduced by HCFA relates specifically to the examination of survey results by the residents of Gold Country see Section VI-B.

4. The survey conducted by HCFA on November 17, 1995 was supposed to have been a "resurvey" to verify Gold Country's allegations of compliance with requirements unrelated to 42 C.F.R. § 483.10(g)(2). See Section II-A, below.

5. During the November 17, 1995 survey, HCFA surveyors interviewed only Kathryne Meyers, an ombudsman assigned to Gold Country, and reviewed the following six documents (the first four of which were provided by Ms. Meyers to

the HCFA surveyors) in concluding that Gold Country was out of compliance with 42 C.F.R. § 483.10(g)(2):

> A. a copy of Mr. Niehoff's letter dated October 31, 1995, to John Litwinovich (Ms. Meyers' superior);
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> B. two letters from area nursing home administrators complementing Ms. Meyers' professionalism;
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> C. the ombudsman's record concerning Gold Country's report of its residents' complaints
>
> D. the facility's incident/accident log; and
>
> E. the minutes from the Family Council's September 1995 meeting.

See Section II-A, below.

6. In a case of this type, HCFA has the burden of moving forward with the evidence under the following process:

> A. with its notice of matters which give rise to hearing rights under 42 C.F.R. § 498.3(b)(12), HCFA must set forth the basis for its relevant determinations with sufficient specificity for the facility to respond, including its basis for finding that the facility was out of noncompliance;
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> B. the facility must identify the findings or conclusions material to the determination it disputes, as well as any additional facts it is asserting.
>
> C. at hearing (whether or not in-person testimony is also introduced as evidence), HCFA has the burden of coming forward with evidence related to the disputed findings which is sufficient -- when that evidence is viewed together with any undisputed findings and the relevant legal authority -- to establish a prima facie case that HCFA has a legally sufficient basis for having reached the determination(s) in controversy.

See Section I-B, below.

7. HCFA's reasons for finding Gold Country out of compliance with 42 C.F.R. § 483.10(g)(2) were explained in the following two documents included with HCFA's notice letter dated December 8, 1995 to Gold Country:

> A. HCFA's survey report/statement of deficiencies (i.e., HCFA Form 2567) for the November 17, 1995 survey and
>
> B. the "Directed Plan of Correction, Tag F-168" drafted and imposed by HCFA.

See Section II-B, below.

8. The hearing request filed by Gold Country raised legal and factual disputes concerning HCFA's determination of Gold Country's noncompliance with 42 C.F.R. § 483.10(g)(2). See Section III, below.

9. HCFA submitted the declaration of one of its surveyors, Kenneth Simpson, who alleged for the first time that the noncompliance determination at issue was based also on additional facts and analyses. See Section IV, below.

10. After receiving Mr. Simpson's declaration, Gold Country has also submitted additional arguments and counter-declarations. See Section V.

11. I deny HCFA's motion to strike from the record the new arguments and counter-declarations submitted by Gold Country; nor do I find it appropriate or necessary to accept additional filings from HCFA on these matters. See Sections V and VI-A.

12. I reject Gold Country's arguments that, as a matter of law, noncompliance with 42 C.F.R. § 483.10(g)(2) cannot be proved without evidence which relates solely to the residents' examination of survey results. See Section VI-B.

13. In order to establish a prima facie case in these proceedings, HCFA's evidence relating to each disputed issue must be substantially consistent inter se, appear credible on its face, and lead reasonably and logically to the conclusions that as of the November 17, 1995 survey:

> A. Gold Country had acted, or failed to act, in a manner which was deficient (i.e., which constituted a "deficiency" within the meaning of 42 C.F.R. § 488.301) when

measured against the requirements contained in 42 C.F.R. § 483.10(g)(2) and

B. if HCFA's evidence established any deficiency under 42 C.F.R. § 483.10(g)(2), the deficiency has the potential for causing more than minimal harm to the health or safety of Gold Country's residents.

See Section VII-A, below.

14. With respect to HCFA's introduction of Mr. Niehoff's October 31, 1995 letter to Mr. Litwinovich and Mr. Litwinovich's return letter dated November 15, 1995 as part of its prima facie case, the contents and context of said documents are at odds with the interpretations HCFA has provided in support of its determination that Gold Country was out of compliance with 42 C.F.R. § 483.10(g)(2) as of the November 17, 1995 survey. See Section VII-B, below.

15. The rights specified in 42 C.F.R. § 483.10(g)(2) belong to the residents of a facility, and, within the factual context of this case, this regulation meant that Gold Country's residents were entitled to contact and receive information from Ms. Meyers or the ombudsman's office she represented. See Section VII-C.

16. The noncompliance determination at issue was based in significant part upon HCFA's incorrect interpretation of 42 C.F.R. § 483.10(g)(2) as containing requirements that a facility was obligated to engage in "open communications" with the relevant client advocacy agencies and maintain a cooperative or nonadversarial relationship with those agencies which advances these agencies' objectives. See Section VII-C.

17. The HCFA surveyor's opinions concerning Gold Country's adversarial relationship with the ombudsman's office (based upon the inferences the surveyors drew from Mr. Niehoff's October 31, 1995 letter), even if assumed true, do not constitute sufficient or material proof that a deficiency existed under 42 C.F.R. § 483.10(g)(2). See Section VII-B.

18. Even if 42 C.F.R. § 483.10(g)(2) could be interpreted as requiring a facility to communicate openly or cooperate with the Ombudsman's office, HCFA has improperly interpreted and misapplied such requirements to the facts established by its evidence. See Section VII-D.

19. In submitting Mr. Niehoff's October 31, 1995 letter as evidence that Gold Country was out of compliance because it refused to accede to the ombudsman's request to mail out certain materials for her, HCFA has improperly interpreted the requirements of 42 C.F.R. § 483.10(g)(2). See Section VII-E.

20. HCFA's evidence does not show that Gold Country's residents were the recipients of the materials the ombudsman had asked Gold Country to mail; nor that the ombudsman and her office were precluded by Gold Country from mailing the materials directly to Gold Country's residents; nor that Gold Country's residents would be unable to receive information from the ombudsman or her office unless Gold Country were to do the mailings as requested. See Section VII-E.

21. HCFA's evidence shows that it has misinterpreted 42 C.F.R. § 483.10(g)(2) by referring to the transmittal of information concerning the Family Council and to the residents' families, when this regulation does not pertain to the rights of a Family Council and HCFA has made no showing that any family member in this case has acquired the legal standing to exercise a resident's rights under 42 C.F.R. § 483.10(g)(2). See Sections VII-F and G(2)(ii).

22. The information contained in Ms. Meyers' declaration submitted by HCFA is deficient and, even when considered together with other evidence also introduced by HCFA, does not provide valid support for HCFA's conclusions that Gold Country had deficiencies under 42 C.F.R. § 483.10(g)(2), or that the health or safety of Gold Country's residents were placed at more than minimal risk as a result. See Section VII-G.

23. HCFA's evidence on Gold Country's failure to report its residents' allegations to the ombudsman, even when considered together with other evidence also introduced by HCFA, is not adequate for establishing that Gold Country had a deficiency under 42 C.F.R. § 483.10(g)(2). See Section VII-H.

24. HCFA has failed in its obligation to present a prima facie case. See Sections VII-A through H, and all corresponding FFCLs.

DISCUSSION

I. OVERVIEW

A. Gold Country has the right to challenge the finding of noncompliance made by HCFA under 42 C.F.R. § 483.10(g)(2).

The regulation relied upon by HCFA states as follows:

> (g) Examination of survey results. A resident has the right to --
>
> . . .
>
> (2) Receive information from agencies acting as client advocates[4], and be afforded the opportunity to contact these agencies.

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[4] For purposes of 42 C.F.R. § 483.10(g), the relevant client advocacy agencies are: "the State survey and certification agency, the State licensure office (usually synonymous with the survey and certification agency), the ombudsman program established by the State under the Older Americans Act of 1965; the protection and advocacy system for developmentally disabled individuals established under the Developmental Disabilities Assistance and Bill of Rights Act; the protection and advocacy system established under the Protection and Advocacy for Mentally Ill Individuals Act; and the Medicaid fraud control unit established under section 1903(q) of the Act, as amended by the Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977." 56 Fed. Reg. 48,832 (1991).

There is no dispute that the ombudsman program involved in this case, the Long Term Care Ombudsman Program for El Dorado County, California, is a client advocacy agency within the meaning of 42 C.F.R. § 483.10(g)(2). See HCFA Exs. 26, 29.

42 C.F.R. § 483.10(g)(2). In summarizing its noncompliance determination in dispute, HCFA has stated that:

> [a]s a result of the November 17, 1995 follow-up survey, the facility was found to be in violation of the following Federal requirements, at 42 C.F.R. Part 483, to wit: (1) Petitioner failed to ensure that residents and their families had access to information from client advocacy agencies, in violation of 42 C.F.R. § 483.10(g)(2) because they [i.e., Petitioner] were on record as declining to cooperate with the ombudsman program, thus having the potential for affecting all of the residents in the facility, with a scope and severity level of "F" on the Grid (which is attached as HCFA Ex. 27), i.e., a widespread potential for more than minimal harm that is not immediate jeopardy, with no actual harm (F 168) . . . .

HCFA's Motion to Dismiss or Alternatively, for Summary Disposition (HCFA Mot. to Dism.), 1 - 2. HCFA, by its Associate Regional Administrator for the Division of Health Standards and Quality, stated also in her declaration that the deficiency HCFA considered to have been most significant and purposeful was "Gold Country's explicit refusal to cooperate with the State Ombudsman program." Declaration of Janice M. Caldwell at 3, attached to HCFA Renewed Motion for Dismissal or for Summary Disposition.

I had previously detailed some of the background facts and procedural history of this case in my initial ruling dated February 11, 1997, which denied HCFA's Motion for Dismissal or for Summary Disposition, and in my subsequent ruling dated June 20, 1997, which denied HCFA Renewed Motion for Dismissal or for Summary Disposition. I hereby incorporate the findings and conclusions contained in those rulings.[5]

However, I find it necessary to re-emphasize selected portions of my prior rulings due to certain misleading statements contained in HCFA's current brief to me. For example, HCFA contends incorrectly that Gold Country is merely disputing findings of deficiencies in the current

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[5] I will refer to these two rulings as "Feb. 11, 1997 Ruling" and "June 20, 1997 Ruling," respectively.

proceedings. HCFA Br., at 4. HCFA contends that I lack jurisdiction to consider the issues arising from 42 C.F.R. § 483.10(g)(2) because "there is no authority under 42 C.F.R. Part 498 for the review of individual deficiency findings where, as here, such review cannot change the determination that the facility was (or was not) in substantial compliance with applicable participation requirements[,]" and Gold Country has already "conceded that it is not in substantial compliance, and is only contesting a particular deficiency." HCFA Br., at 4 (emphasis added). HCFA has misstated the facts and misconstrued my rulings.

HCFA's representations concerning Gold Country's alleged challenges to mere deficiencies are contrary to the facts of record and the legal basis previously relied upon by HCFA in moving for dismissal or for summary disposition against Gold Country. In fact, HCFA made not one, but three, noncompliance determinations under three unrelated regulations. However, as I had determined in my previous rulings, only one of the three noncompliance determinations resulted in the imposition of an enforcement remedy by HCFA.

A survey conducted by HCFA[6] on November 17, 1995 resulted in the citation of deficiencies under three distinct categories designated by separate "F Tag" identifiers. I noted that the assignment of a "scope and severity" (SS) level of "D" or above to each group of deficiencies by HCFA and its agent resulted in three corresponding noncompliance determinations:

> -- noncompliance under 42 C.F.R. § 483.10(g)(2) "Examination of Survey Results" -- F Tag 168 and SS Level "F";
>
> -- noncompliance under 42 C.F.R. § 483.20(b) "Resident Assessment" -- F Tag 272 and SS Level "E"; and

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[6] In my February 11, 1997 Ruling, I had found as an undisputed fact that the California Department of Health Services, acting as HCFA's agent, had conducted the survey on November 17, 1995 and drafted the survey report/statement of deficiencies adopted by HCFA in its notice letter to Gold Country. Feb. 11, 1997 Ruling, at 2 - 3. However, evidence recently submitted by HCFA shows that HCFA's own surveyors had conducted the November 17 survey. See HCFA Ex. 30.

> -- noncompliance under 42 C.F.R. § 483.25(l)(1) "Quality of Care" -- F Tag 329 and SS Level "D".

Feb. 11, 1997 Ruling, at 3 (# 2); June 20, 1997 Ruling at 1 - 2 (# 1).

In my rulings, I specifically used the term "noncompliance" to describe HCFA's determinations for each of these three categories of deficiencies because, as established by HCFA's evidence, a SS Level of "D" or above is assigned by HCFA to those deficiencies which coincide with the regulatory definitions of "noncompliance."[7] HCFA's memorandum in support of its motion to dismiss especially noted and made arguments based on the assignment of the "D" and above levels to each group of deficiencies identified in this case. Mem. in Supp. of HCFA Mot. to Dis., at 1 - 2.[8] Therefore, even though a "deficiency" means a "failure to meet a participation requirement specified in the Act or in [42 C.F.R.] part 483, subpart B. . . ." (42 C.F.R. § 488.301), deficiencies of the "D" level or above constitute "noncompliance" as a matter of law. For these reasons, I concluded that HCFA had made three separate noncompliance determinations in this case -- and not, as

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[7] A SS Level of D denotes isolated deficiencies which caused no actual harm, but which have the potential for causing more than minimal harm to residents; a SS Level of E denotes a pattern of deficiencies which caused no actual harm, but which have the potential for causing more than minimal harm to residents; a SS Level of "F" denotes widespread deficiencies which caused no actual harm, but which have the potential for causing more than minimal harm to residents. HCFA Ex. 27.

Under the regulations, "substantial compliance" means "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." Id.

[8] These portions of HCFA's brief eliminated any doubt which might have existed as to whether the specific SS levels indicated in the survey report/statement of deficiencies (HCFA Form 2567) had been adopted by HCFA when its notice letter dated December 8, 1995 incorporated by reference said document.

suggested by HCFA in its most recent brief, one single noncompliance determination resulting from the cumulative effect of individual deficiencies identified under separate regulations.

Previously, HCFA had acknowledged the existence of three separate and independent findings of noncompliance under three regulations or F Tags when it filed its initial motion for dismissal or for summary disposition. HCFA's motion was based on the fact that Gold Country had decided to withdraw its challenges to HCFA's findings under F Tag 272 (42 C.F.R. § 483.20(b), "Resident Assessment"). According to HCFA, Gold Country's withdrawal of its challenge to the one set of findings under F Tag 272 constituted an admission that "it was not in substantial compliance during the November 17, 1995 revisit." Mem. in Supp. of HCFA Mot. to Dism., at 3.[9] HCFA argued also that Gold Country's challenges under the remaining two F Tags and regulations (F Tags 168 and 329, or 42 C.F.R. §§ 483.10(g)(2) and 483.25(l)(1)) should be dismissed pursuant to 42 C.F.R. § 498.3(b)(12) and my decisions in Country Club Center, II, DAB CR433 (1996)

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[9] HCFA argued also:

> Petitioner's admission of the validity of deficiency F 272, with a scope and severity level of "E" on the Grid, establishes that it was not in substantial compliance with 42
> C.F.R. Part 483.

Mem. in Supp. of Mot. to Dism. or, Alternatively, for Summ. Disp., at 6.

For reasons that are obvious from the record, my rulings contain no finding that Gold Country had made any "admission of noncompliance." Gold Country informed HCFA's counsel only, "Gold Country will not be contesting the validity of the issuance of deficiencies F272 at the upcoming hearing." HCFA Ex. 28. During a subsequent prehearing conference to establish a briefing schedule for HCFA's motion to dismiss, Gold Country's counsel requested time to evaluate the matter further. Summary of Prehearing Conference and Order Scheduling Case for Briefing (Sept. 17, 1996).

and University Towers Medical Pavilion, DAB CR436 (1996).[10]

I denied HCFA's motion to dismiss or for summary disposition because, according to the evidence of record, the only enforcement remedy imposed by HCFA against Gold Country was the "Directed Plan of Correction, Tag F - 168" (HCFA Ex. 10 at 5), which showed on its face that it was triggered only by the noncompliance finding HCFA made under 42 C.F.R. § 483.10(g)(2) and which contained nothing related to any requirements of 42 C.F.R. §§ 483.20(b) or 483.25(l)(1) (F Tags 272 and 329, respectively). Feb. 11, 1997 Ruling at 8 - 10. Due to the lack of evidentiary support for HCFA's contentions, I had specifically rejected HCFA's efforts to associate the "Directed Plan of Correction , Tag F - 168" as the enforcement remedy which resulted from HCFA's determination of noncompliance under F Tag 272 or 42 C.F.R. § 483.20(b). Feb. 11, 1997 Ruling at 9-10. However, I left HCFA with the option of renewing its motion to dismiss if HCFA were to provide affirmative evidence showing that the "Directed Plan of Correction, Tag F - 168" of record was in fact imposed as a result of the noncompliance determination made by HCFA under F Tag 272. Id. at 10.

HCFA filed its renewed motion to dismiss and reaffirmed that each of the SS levels for the cited deficiencies was at "D" or above. See Mem. in Supp of Renewed Mot. to Dism., at 1 - 2. However, HCFA began to imply also that the findings it made under each of the three regulations and corresponding F Tags were of individual deficiencies

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[10] HCFA correctly interpreted these cases to mean "that an entity cannot challenge a finding of noncompliance (or deficiencies) where no enforcement action is imposed." Mem. in Supp. of Mot. to Dism. or, Alternatively, for Summ. Disp., at 7. However, HCFA misapplied this legal principle in its attempt to preclude my review of Gold Country's challenges to F Tag 168. Unlike Country Club Center II and that line of cases, HCFA did make a finding of noncompliance under F Tag 168 in this case, and that finding of noncompliance under F Tag 168 resulted in HCFA's imposing the "Directed Plan of Correction, Tag F-168" (HCFA Ex. 10) as a remedy against Gold Country. Additionally, HCFA did not rescind the "Directed Plan of Correction, Tag F-168" in this case. There is no dispute that this remedy took effect in 1995, as specified in HCFA's notice letter (HCFA Ex. 10 at 2).

which -- only in the aggregate -- resulted in a single finding of noncompliance.[11] This implication is contrary to the "D," "E," and "F" SS levels separately assigned by HCFA to the three independent groups of alleged violations, and this implication is inconsistent with the legal definition of noncompliance. Therefore, in denying HCFA's renewed motion, I noted once again that three separate noncompliance determinations had been made by HCFA under three regulations or F Tags. June 20, 1997 Ruling at 1 - 2.

As discussed in my earlier rulings, pursuant to 42 C.F.R. § 498.3(b)(12), Gold Country is entitled to a hearing only on HCFA's finding of noncompliance under 42 C.F.R. § 483.10(g)(2) (F Tag 168).[12] By virtue of HCFA's decision to impose only the remedy of the "Directed Plan of Correction, Tag F-168" of record, HCFA's noncompliance determination under 42 C.F.R. § 483.10(g)(2) (F Tag 168) is the only one (out of the three made by HCFA) that satisfies the "results in the imposition of a remedy

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[11] For example, the declaration of HCFA's Associate Regional Administrator states:

> As a result of these three deficiencies, my office determined that the facility was not in substantial compliance with controlling Medicare participation requirements . . . Accordingly, my office made a finding of noncompliance . . . premised on these three deficiencies. Declaration of Janice M. Caldwell at 2, attached to Mem. in Supp. of HCFA's Renewed Mot. to Dism.
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> . . .
>
> It was for these reasons that HCFA considered it appropriate to impose this one remedy for these three deficiencies (which were, in sum, the basis for the certification of noncompliance). Id. at 4.

[12] An affected entity's hearing rights are set forth in 42 C.F.R. Part 498. As relevant to the facts of this case, hearing rights exist for a skilled nursing facility or nursing facility participating in the Medicare or Medicaid program, respectively, if HCFA has made "a finding of noncompliance that results in the imposition of a remedy specified in § 488.406 of this chapter. . . ." 42 C.F.R. § 498.3(b)(12).

. . ." test of 42 C.F.R. § 498.3(b)(12).[13] The other two findings of noncompliance made by HCFA under other regulations did not result in the imposition of any enforcement remedies against Gold Country and are not subject to adjudication.[14] Therefore, I have the authority to decide the merits of the parties' positions with respect to 42 C.F.R. § 483.10(g)(2), even though Gold Country has decided not to contest at least one of the other findings of noncompliance.

B. HCFA bears the burden of moving forward to establish a prima facie case, pursuant to the process explained in the Hillman decision.

In my most recent prehearing order, I adopted the burden of persuasion allocation set forth in Hillman Rehabilitation Center, DAB No. 1611 (1997). See June 20, 1997 Ruling at 9. Subsequently, HCFA acknowledged that under Hillman, it has the obligation to establish a prima facie case as part of its burden of moving forward with

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[13] In my ruling denying HCFA's renewed motion to dismiss, I discussed my reasons for having rejected HCFA's contention that the "results in the imposition of a remedy" requirement of 42 C.F.R. § 498.3(b)(12) has been satisfied for F Tag 272 by its official's intent or hope to bring about Gold Country's voluntary compliance with the unrelated program requirements of F Tags 272 and 329 by using a Directed Plan which was narrowly drafted to mandate only the correction of F Tag 168. June 20, 1997 Ruling at 5 - 7.

[14] By letter dated December 8, 1995, HCFA notified Petitioner that the enclosed "Directed Plan of Correction, Tag F-168" was being imposed "effective 15 days from receipt of this letter," and, additionally, the "Denial of Payment for All New Admissions" remedy would take effect on January 31, 1996 unless Petitioner achieved compliance before then. HCFA Ex. 10 at 2.

Subsequently, by letter dated January 26, 1996, HCFA notified Petitioner that the Denial of Payment for New Admissions remedy would not be imposed because HCFA had decided to accept Petitioner's allegations of compliance with respect to those deficiencies found during the November 17, 1995 survey. HCFA Ex. 13. The "Directed Plan of Correction, Tag F-168" remedy was not rescinded; it had been implemented by Petitioner in accordance with the deadline mandated by HCFA's December 8 notice letter. Id.

the evidence in the present case before me. HCFA Br., at 4 - 5. Gold Country has filed no objection to these matters.

The Hillman decision explains the process which places the burden upon HCFA to present a prima facie case:

> [1] HCFA must set forth the basis for its determination terminating a provider with sufficient specificity for the provider to respond, including the basis for any finding that a condition-level deficiency exists.
>
> [2] The provider must then identify which of the findings material to the determination the provider disputes, and must also identify any additional facts the provider is asserting.
>
> [3] At the hearing, HCFA has the burden of coming forward with evidence related to disputed findings that is sufficient (together with any undisputed findings and relevant legal authority) to establish a prima facie case that HCFA had a legally sufficient basis for termination.

Hillman, at 8. As indicated by the first two steps quoted above, disputed issues of fact or law are created when HCFA sets forth sufficiently clear rationale for having reached the relevant determination, and the petitioner then identifies its disagreement with some or all of HCFA's findings or legal interpretations, together with petitioner's bases for the disagreement. At the third step cited above, HCFA assumes the burden of introducing sufficient evidence to establish, prima facie, the merits of its position with respect to each material finding or conclusion controverted by the petitioner. The evidence submitted by HCFA to establish its prima facie case needs to be material to the correct interpretation of the pertinent legal authorities.[15] If HCFA fails to establish a prima facie case at the third step, the burden of moving forward with the evidence does not shift to the petitioner. Id.

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[15] The process does not preclude the parties from presenting motions before hearing to resolve disagreements over statutory or regulatory interpretations.

In my June 20, 1997 ruling and scheduling order, I determined that the case is "now limited to Petitioner's challenges of F Tag 168." June 20, 1997 Ruling at 9. I authorized Gold Country to file its brief first because its hearing request had raised a threshold legal issue (i.e., the proper interpretation of 42 C.F.R. § 483.10(g)(2)), which could have been dispositive of this action. I reviewed Gold Country's brief first solely for the purpose of deciding this threshold legal issue. Having rejected Gold Country's legal arguments for the reasons stated below, I then proceeded to review HCFA's evidence and arguments to determine if HCFA had established its prima facie case.

C. Organization of remaining discussions

Relying on the above-quoted discussion from Hillman, I have organized my Decision to approximate the steps which lead to and include HCFA's burden to establish a prima facie case on the general issue of whether Gold Country was out of compliance with 42 C.F.R. § 483.10(g)(2).

Accordingly, Sections II through V of this Decision contain a description of those events which gave rise to the issues of fact and law which HCFA is obligated to address as part of its prima facie case. My discussions therein will show also that some additional issues arose during litigation because HCFA introduced new theories and evidence with its brief.[16] Much of the information discussed in these sections, such as the nature and extent of evidence gathered by HCFA when it surveyed Gold

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[16] I have allowed HCFA's new theories and evidence to remain of record for reasons unique to this case. Specifically, when I determined that this case may proceed to adjudication without an in-person hearing, the scheduling order I issued did not restrict the parties to relying upon their previously submitted proposed exhibits. (Previously, the parties had submitted their proposed exhibits for an anticipated in-person hearing and before I had delineated the current issues in response to HCFA's summary judgment motions.) Under my scheduling order, Gold Country also had the opportunity to address any new matter raised by HCFA with its brief. I am not holding that, in all cases, HCFA has a right to introduce new rationale or assertions of fact during litigation as support for its initial determination. In appropriate cases, I may preclude HCFA from introducing matters which cannot be reasonably inferred from the information contained in or referenced by HCFA's formal notice of its initial determination.

Country, has relevancy to the prima facie case HCFA is attempting to establish. Additionally, the information I set forth in Sections II and IV will show the manner in which HCFA has expanded its originally stated bases for the noncompliance determination in dispute: for example, expansions from its surveyors' disagreements with Gold Country's views that the September 1995 Family Council meeting minutes were "inflammatory and confrontational" and that two other nursing home administrators also shared a disrespect for an individual ombudsman (HCFA Ex. 9 at 1 - 2) -- to HCFA's more recently submitted theories in litigation that Gold Country was hostile towards, uncooperative with, and attacking the entire ombudsman program (e.g., HCFA Exs. 29, 30).

Section VI of this Decision contains my rulings on outstanding objections and legal issues.

In the remaining portion of this Decision, I will discuss my conclusion that HCFA has failed to satisfy its burden of establishing a prima facie case of Gold Country's noncompliance with the requirements of 42 C.F.R. § 483.10(g)(2).

II. THE INFORMATION HCFA PROVIDED WITH ITS NOTICE LETTER TO EXPLAIN THE NONCOMPLIANCE DETERMINATION IT MADE UNDER 42 C.F.R. § 483.10(g)(2), AS A RESULT OF THE RESURVEY CONDUCTED ON NOVEMBER 17, 1995

A. The facts of record establish that while HCFA surveyors were conducting a resurvey to ascertain Gold Country's correction of other deficiencies, they received information from a representative of the local ombudsman program, reviewed certain records, and found Gold Country out of compliance with 42 C.F.R. § 483.10(g)(2).

The controversy concerning Gold Country's compliance with 42 C.F.R. § 483.10(g)(2) began with what was supposed to have been a "resurvey" on November 17, 1995 to verify its allegations of compliance with other participation requirements.

Previous to November 17, 1995, a state agency under contract to HCFA had conducted a survey of Gold Country. HCFA Ex. 10. Based on the earlier survey concluded on October 31, 1995, Gold Country was found to have been out of compliance with the requirements of several regulations. HCFA Exs. 1, 10. In response to the findings from that prior survey, Gold Country submitted "a plan of correction and credible allegation of

compliance." HCFA Ex. 10 at 1.[17] Because the October 31 survey team concluded also that Gold Country's noncompliance with one regulation constituted immediate jeopardy to its residents,[18] surveyors could not assume its allegation of compliance to be true and needed to conduct a revisit survey in order "to verify that [Gold Country] had achieved and maintained compliance as alleged." Id.

Gold Country had not been cited for any deficiency under 42 C.F.R. § 483.10(g)(2) as a result of the October 31, 1995 survey. HCFA Ex. 1. There would have been no reason for Gold Country to allege compliance with said regulation in its plan of correction for the October 31 survey. Therefore, no resurvey conducted on November 17, 1995 should have automatically evaluated Gold Country's compliance under 42 C.F.R. § 483.10(g)(2). 42 C.F.R. § 488.20(b)(1).

HCFA's evidence establishes that two of its Nurse Surveyors, Kenneth Simpson and Brian Asay, were sent to conduct the resurvey of Gold Country on November 17, 1995. HCFA Exs. 10, 24, 30. However, the noncompliance determination made under 42 C.F.R. § 483.10(g)(2) did not result from the use of protocols applicable to resurveys. See 42 C.F.R. § 488.20(b)(1). Instead, as discussed below, a complaint by the ombudsman assigned to Gold Country appears to have triggered the surveyors' inquiries into Gold Country's alleged noncompliance with 42 C.F.R. § 483.10(g)(2). The regulations do not mandate a specific protocol for investigating complaints against long-term care facilities. In this case, the evidence introduced by HCFA does not show that the surveyors spoke with any resident concerning the exercise of their rights under 42 C.F.R. § 483.10(g)(2), even though the

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[17] The regulation defines a "plan of correction" as "a plan developed by the facility and approved by HCFA or the survey agency that describes the actions the facility will take to correct deficiencies and specifies the date by which those deficiencies will be corrected." 42 C.F.R. § 488.401.

[18] According to the survey report for October 31, 1995 (HCFA Ex. 1), the surveyors reviewed the records of six recently deceased residents and then found that the records of one deceased resident (Resident # 1) established Gold Country's noncompliance with 42 C.F.R. § 483.10(b)(11) and that its noncompliance was at the "immediate jeopardy" level.

regulation states generally that "surveyors will directly observe the actual provision of care and services to residents." 42 C.F.R. § 488.26(c)(2).

The survey report/statement of deficiencies (HCFA Form 2567) issued by HCFA as a result of the November 17, 1995 survey contains only the following information concerning HCFA's finding of noncompliance under 42 C.F.R. § 483.10(g)(2) :

> 483.10(g)(2) REQUIREMENT: EXAMINATION OF SURVEY RESULTS
>
> A resident has the right to receive information from agencies acting as client advocates, and be afforded the opportunity to contact these agencies.
>
> This REQUIREMENT is not met as evidenced by[:]
>
> Based on interview, review of correspondence between the facility's corporation and the El Dorado County ombudsman program, the ombudsman's contact records, and facility incident/accident logs, the facility failed to ensure that residents and their families have access to information from client advocacy agencies.
>
> The findings include:
>
> 1. Correspondence sent from the facility's parent corporation to the El Dorado County Department of Community Services was reviewed. This letter was dated 10/31/95, which coincides with the ending date of a federal complaint survey of the facility. In this letter the corporation stated, "[w]e will not be a part of nor will we support the Ombudsman program by providing the vehicle whereby they exercise continuing criticism and confrontation." This letter also charged that the minutes of the September Family Council meeting were "inflammatory and confrontational[,]" which the surveyor did not find to be true. The letter also included attacks on the professionalism and character of one ombudsman in particular, alleging the "mutual feelings of disrespect that the three nursing homes in Placerville have

> toward (this ombudsman)" -- letters from the other two nursing facilities in Placerville were examined, and the content and tone of those letters did not support Gold Country's allegations.

HCFA Ex. 9 at 1-2.

Other evidence introduced by HCFA establishes that only Kathryne Meyers, an ombudsman assigned to Gold Country, was interviewed for the survey.[19] The survey report/statement of deficiencies which was issued by HCFA did not disclose the information provided by Ms. Meyers. HCFA Ex. 9. However, according to a later executed declaration from a HCFA surveyor, Ms. Meyers showed the surveyors a copy of a letter dated October 31, 1995,[20] in which William R. Niehoff, Market Rate Operations Director for Retirement Housing Foundation (RHF), criticized Ms. Meyers' activities at Gold Country and represented that other nursing home administrators in the Placerville area also held her in low esteem. HCFA Ex. 30 at 3; HCFA Ex. 2.[21]

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[19] Even though the survey report/statement of deficiencies indicated generally that the survey was based on "interview" (HCFA Ex. 9 at 1), HCFA Surveyor Kenneth Simpson stated in his affidavit for these proceedings that the individual interviewed was Kathryne Meyers, a representative of the area Ombudsman's office. HCFA Ex. 30 at 3.

[20] The HCFA surveyors have repeatedly noted the fact that the letter was written on the last day of Gold Country's prior survey. HCFA Ex. 9 at 1; HCFA Ex. 30 at 3. However, HCFA has not explained why the date might be significant to the issue of Gold Country's alleged noncompliance with 42 C.F.R. § 483.10(g)(2).

[21] For convenience, I will refer to the letter as either the October 31 letter or Mr. Niehoff's letter. In using these abbreviations, I do not suggest that he was writing in his personal capacity. There is no dispute that he is an official for RHF and wrote the October 31 letter in his official capacity on RHF stationary.

I have taken note of Mr. Niehoff's position with RHF only because the proper party in this case is Gold Country, which has its own Medicare provider number and its own Administrator. Gold Country, not RHF, was found out of compliance and subjected to an enforcement remedy.

(continued...)

Mr. Niehoff of RHF, which is located in Long Beach, California, wrote the letter because RHF operates Gold Country, in Placerville, California. P. Br., at 1; HCFA Ex. 2. Mr. Niehoff addressed his letter to John Litwinovich of the El Dorado County Department of Community Services, and provided copies of his letter to Gold Country's Administrator, Keith Berry, and their Corporate Nursing Consultant. HCFA Ex. 2. Other evidence submitted by HCFA establish without dispute that the intended recipient of the October 31 letter, Mr. Litwinovich, was the head of the El Dorado County Department of Community Services and Ms. Meyers' superior.[22] See HCFA Ex. 29 at 2; HCFA Ex. 30 at 3. HCFA's surveyor was aware that Ms. Meyers worked as Mr. Litwinovich's subordinate. HCFA Ex. 30 at 3.

It appears from HCFA's survey report/statement of deficiencies (HCFA Form 2567) that, because Mr. Niehoff's letter described the Family Council meeting minutes as "inflammatory and confrontational" (HCFA Ex. 2 at 2), HCFA surveyors then reviewed the minutes from the September meeting of the Family Council and "did not find [Mr. Niehoff's descriptions] to be true." HCFA Ex. 9 at 2. The evidence from HCFA does not disclose from whom the surveyors had obtained the minutes for the September 1995 Family Council meeting.

It appears also from HCFA's survey report/statement of deficiencies that, because Mr. Niehoff informed Ms. Meyers' boss in the October 31 letter that the two other nursing homes in the Placerville area also shared "mutual feelings of disrespect" for Ms. Meyers (HCFA Ex. 9 at 2), the surveyors then interpreted those words as "attacks on [Ms. Meyers'] professionalism and character" which were

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[21](...continued)
However, neither party has raised any issue concerning RHF's legal relationship to these proceedings. Therefore, in the absence of any contrary assertions by Gold Country, I am assuming that Mr. Niehoff, as an official of RHF, had the authority to assert positions and take actions on behalf of Gold Country as well.

[22] A State of California publication introduced into evidence by HCFA explains that the Ombudsman program is "a public/government/community-supported program," and "[v]olunteers are an integral part of this program." HCFA Ex. 26. The publication states also that the Office of the State Long Term Care Ombudsman "administers the program through thirty-five substate programs contracted through the thirty-three Area Agencies on Aging." Id.

not supported by the letters issued by the other two area nursing home administrators. Id. After the commencement of litigation, HCFA then submitted into evidence copies of the letters which were written by the other two area nursing home administrators and which were reviewed by the surveyors on November 17, 1995. HCFA Exs. 5, 6. The letters from the other two nursing home administrators thanked and complimented Ms. Meyers for her work with them. Id.

Even though the HCFA surveyors did not state that Ms. Meyers was the individual who had provided them with the two letters which complimented her and thanked her for her work (HCFA Exs. 5, 6), the evidence presented by HCFA leads me to believe that Ms. Meyers had indeed done so, after having obtained said letters from the area nursing home administrators.[23]

For example, even though there is no indication that any area nursing home administrators had been provided copies of Mr. Niehoff's October 31 letter by either Mr. Niehoff or Mr. Litwinovich, the letters from the other two area nursing home administrators (dated November 7 and 8 of 1995) were written shortly after Mr. Niehoff's October 31 letter would have been received in Mr. Litwinovich's office. (HCFA's evidence shows that Mr. Litwinovich and Ms. Meyers have the same office address. HCFA Exs. 2, 5.) One of the two letters complimenting Ms. Meyers was specifically addressed to her, with no indication that a copy had been sent to anyone else by its author. HCFA Ex. 5. The other letter complimenting Ms. Meyers was addressed to "To Whom It May Concern" and also contains no indication that a copy had been sent to anyone by its author. HCFA Ex. 6. Additionally, since Ms. Meyers voluntarily showed the surveyors a copy of Mr. Niehoff's letter criticizing her professionalism (see HCFA Ex. 30), it seems only logical that she would have provided also information in her own defense, such as the two favorable letters. These circumstances, added to the fact that the surveyors interviewed only Ms. Meyers, foreclose the likelihood that mere coincidence had caused the two area administrators to write letters contradicting Mr. Niehoff's allegation that there were "mutual feelings of

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[23] My purpose here is to set forth the manner in which the November 17 survey was conducted and the scope of the surveyors' inquiries. I am not deciding the veracity of the information contained in the two letters submitted by the two area nursing home administrators, even though Gold Country has urged me to do so. See P. Reply, 11-12.

disrespect that the three nursing homes in Placerville have toward Kathryn [sic]." HCFA Ex. 2 at 2. Instead, the evidence leads me to believe that Ms. Meyers was the one who had obtained the letters from the other two area nursing home administrators and then provided them to the HCFA surveyors for the specific purpose of refuting Mr. Niehoff's disparagement of her professional reputation.

HCFA's survey report/statement of deficiencies disclosed also that its surveyors had reviewed the Ombudsman's record of contacts concerning incidents involving Gold Country's residents. HCFA Ex. 9 at 1; HCFA Ex. 23; HCFA Ex. 30 at 3-4. Mr. Simpson's declaration, submitted by HCFA during litigation, confirms that the ombudsman's record of contacts was received from Ms. Meyers during the surveyors' interview of her. HCFA Ex. 30 at 3-4. However, the survey report/statement of deficiency does not indicate how the ombudsman's record of contacts was used to reach the noncompliance determination.

HCFA's survey report/statement of deficiencies shows that the surveyors reviewed also Gold Country's incident/accident logs.[24] HCFA Ex. 9 at 1. However, HCFA's survey report/statement of deficiencies does not disclose how the logs were used to reach the noncompliance determination at issue.

Based on the foregoing facts, I conclude that HCFA reached the noncompliance determination at issue after having interviewed only Ms. Meyers for the survey and having reviewed the aforementioned six documents (four of which were provided by Ms. Meyers) on November 17, 1995.

B. With its notice letter dated December 8, 1995, HCFA disclosed certain rationale for having found Gold Country out of compliance with 42 C.F.R. § 483.10(g)(2).

HCFA sent a notice letter to Gold Country dated December 8, 1995. HCFA Ex. 10. HCFA's December 8 notice letter did not set forth any explanation of the noncompliance

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[24] These documents are called by different names in the record. The survey report/statement of deficiencies referred to them as the facility's "incident/accident" logs. HCFA Ex. 9 at 1. HCFA's surveyor called it the facility's "grievance, abuse and change of condition logs" in his declaration. HCFA Ex. 30 at 4. Gold Country placed into evidence a document called "Resident Allegation Log." P. Ex. 4. HCFA has not contended that these are not the same documents reviewed by its surveyors on November 17, 1995.

determination made under 42 C.F.R. § 483.10(g)(2) (Tag F 168). However, HCFA enclosed with its notice letter a copy of the November 17, 1995 survey report/statement of deficiencies (HCFA Ex. 10 at 4[25]) and a document titled "Directed Plan of Correction, Tag F-168" (HCFA Ex. 10 at 5).

As I noted earlier, according to the survey report/statement of deficiencies incorporated by HCFA's December 8, 1995 notice, the surveyors found Gold Country out of compliance with 42 C.F.R. § 483.10(g)(2) due to its failure "to ensure that residents and their families have access to information from client advocacy agencies." HCFA Ex. 9 at 1. The only rationale discernible from the survey report/statement of deficiencies consisted of the surveyors' notation concerning certain sentences from Mr. Niehoff's October 31 letter to Ms. Meyers' superior. The HCFA surveyors specifically noted their conclusion that the minutes from the Family Council's September meeting was not "inflammatory and confrontational" as alleged in the October 31 letter from Mr. Niehoff to Ms. Meyers' boss, and that the other two nursing homes' letters concerning Ms. Meyers did not support the allegation in Mr. Niehoff's October 31 letter concerning her professional status in the area. Id.

The HCFA surveyors noted also Mr. Niehoff's statement in his October 31 letter that "[w]e will not be a part of nor will we support the Ombudsman program by providing the vehicle whereby they exercise continuing criticism and confrontation." HCFA Ex. 9 at 1-2. However, the survey report/statement of deficiencies does not contain an explanation of how the foregoing sentence was interpreted by its surveyors.

The "Directed Plan of Correction, Tag F-168," which was included with HCFA's notice of December 8, 1995, specifically explained that the actions specified by HCFA in the plan were "required in order for the provider to come into compliance with program requirements documented at 42 C.F.R. § 483.10(g)(2)." HCFA Ex. 10 at 5. The contents of the Directed Plan of Correction imposed by HCFA provides relevant information concerning HCFA's legal interpretation of 42 C.F.R. § 483.10(g)(2)'s requirements, as well as the significance HCFA has placed on certain findings of fact made by its surveyors in concluding that Gold Country was out of compliance with

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[25] The survey report is referenced in the notice letter as "Form HCFA - 2567."

the regulatory requirements.[26] The Directed Plan required Gold Country to do as follows by certain deadlines:

> submit a "letter of understanding" to the El Dorado County Department of Community Services for the purpose of "re-establish[ing] open communications and cooperation with the Long Term Care Ombudsman program, El Dorado County Department of Community Services;"

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[26] I am aware that HCFA's choice of remedies is not appealable and that I cannot alter or set aside the "Directed Plan of Correction, Tag F - 168" as drafted by HCFA if Petitioner was in fact out of compliance with 42 C.F.R. § 483.10(g)(2). See 42 C.F.R. § 498.3(d)(11). I have not reviewed the contents of said plan for those purposes.

I have reviewed the contents of the "Directed Plan of Correction, Tag F - 168" because it was drafted by HCFA, because the body of HCFA's December 8, 1995 notice letter sets forth no explanations about the noncompliance at issue, and because the Directed Plan gives meaning to the summary factual conclusions contained in the survey report (Form HCFA 2567). Reviewing the contents of the "Directed Plan of Correction, Tag F-168" is appropriate for understanding HCFA's view of the legal requirements contained in 42 C.F.R. § 483.10(g)(2) and how HCFA has related its surveyors' factual findings to those legal requirements. As explained by the Secretary in proposing the regulation now codified as 42 C.F.R. § 488.424 (the regulation relied upon by HCFA in its notice letter to impose the Directed Plan against Gold Coast (HCFA Ex. 10 at 2)): "[t]he principle behind a PoC is to ensure that the underlying cause of cited deficiencies does not recur." 59 Fed. Reg. 56,195 (1994). Moreover, a Directed Plan of Correction, like any other remedy, is supposed to be imposed to "ensure prompt compliance with program requirements." 42 C.F.R. § 488.402.

> "ensure that complete and accurate minutes of family and resident council[27]meetings are taken;"
>
> immediately resume "mailing Ombudsman materials to families along with billing or other facility mailings;"
>
> and immediately cease "issuing written or other communications which allegedly represent the opinions of other nursing facilities in the Placerville area as far as the Ombudsman program is concerned."

HCFA Ex. 10 at 5. The contents of this Directed Plan appear also to have resulted from the contents of Mr. Niehoff's October 31 letter and the surveyors' having found certain portions of that letter problematic. The Directed Plan warned that Gold Country's failure to abide by these directives "will be cause for further HCFA intervention, which may include decertification for participation in the Medicare/Medi-Cal programs." Id.

III. THE ISSUES OF LAW AND FACT RAISED BY GOLD COUNTRY'S HEARING REQUEST

After having received HCFA's December 8, 1995 notice of noncompliance determination and imposition of the "Directed Plan of Correction, Tag F-168," Gold Country filed a hearing request which challenged HCFA's legal interpretation of 42 C.F.R. § 483.10(g)(2). According to Gold Country, this regulation refers only to the residents' right to contact advocacy agencies concerning the outcome of surveys. HCFA Ex. 14 at 2-3.

Additionally, Gold Country disputed HCFA's use of 42 C.F.R. § 483.10(g)(2) as a basis for requiring "the facility to distribute ombudsman materials in monthly mailings" (HCFA Ex. 14 at 4) and to prohibit Gold Country from "issuing written or other communications which allegedly represent the opinions of other nursing facilities in the Placerville area as far as the Ombudsman program is concerned" (id. at 5, quoting from

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[27] The Directed Plan is the only place which suggests that Gold Country had any deficient practice with respect to a residents' council, residents' council meetings, or residents' council minutes. As discussed elsewhere in this Decision, HCFA's evidence does not even establish that any resident council was in existence at Gold Country.

HCFA's Directed Plan of Correction).[28] Gold Country reasoned that it was without any legal obligation to distribute ombudsman materials in its monthly mailings. Gold Country contended also that HCFA is unlawfully curtailing its representatives' right to freedom of speech by prohibiting the issuance of communications concerning the other area facilities' opinions. Id.

Gold Country challenged also HCFA's interpretation of Mr. Niehoff's October 31, 1995 letter. According to Gold Country, said letter to the El Dorado County Department of Community Services should not have been interpreted as a violation of 42 C.F.R. § 483.10(g)(2) because the letter was "expressing concerns over the relationship between Gold Country Health Center and one ombudsman representative[,]" and that it "has also been taken out of context by the HCFA surveyor" due to the surveyor's unawareness of "previous and continuing communication between the Corporate Office and the Department of Community Services." HCFA Ex. 14 at 3-4.[29]

For similar reasons, Gold Country challenged also HCFA's conclusion that residents had been placed at risk. Gold Country asserted that, even if a violation of 42 C.F.R. § 483.10(g)(2) had occurred because it wrote a letter to Ms. Meyers' supervisor, the violation was isolated and unsupported by any evidence of even potential harm to residents. Id. at 4, 5. According to Gold Country, "[t]he difficulties between the facility and the ombudsman program are, at most, personality problem." Id. at 4.

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[28] Below, I address these disputes in the context of analyzing how HCFA has interpreted 42 C.F.R. § 483.10(g)(2) in making the noncompliance determination at issue. I do not reach the question of whether I have the authority to modify the contents of a directed plan of correction if, unlike this case, HCFA had made a valid noncompliance determination based on a correct interpretation of the regulation.

[29] Gold Country's hearing request also asserted certain additional facts as affirmative defenses. I do not reach those additional assertions of fact, since my conclusion is that HCFA has failed to present a prima facie case.

IV. ADDITIONAL RATIONALE PROVIDED BY HCFA DURING LITIGATION TO EXPLAIN ITS NONCOMPLIANCE DETERMINATION UNDER 42 C.F.R. § 483.10(g)(2)

As noted previously, the survey report/statement of deficiencies merely noted and took issue with certain sentences and phrases from Mr. Niehoff's October 31 letter. Even though the survey report/statement of deficiencies said the surveyors had reviewed also the incident/accident log and Ombudsman's record of contacts, as well as having conducted an interview of Ms. Meyers,[30] the survey report/statement of deficiencies did not disclose how these documents were used by the surveyors, the nature of the information provided by Ms. Meyers, or how these documents and Ms. Meyers' information were used to reach the noncompliance determination See HCFA Ex. 9. Nor did the survey report/statement of deficiencies explain why a sentence from Mr. Niehoff's October 31 letter (i.e., the sentence stating, "[w]e will not be a part of nor will we support the Ombudsman program by providing the vehicle whereby they exercise continuing criticism and confrontation.") was quoted in determining that Gold Country was out of compliance with 42 C.F.R. § 483.10(g)(10). See HCFA Ex. 9 at 1-2.

Explanations for the foregoing matters, as well as other information, were provided by HCFA for the first time in the declaration of HCFA surveyor Kenneth Simpson, which was executed for these proceedings and filed with HCFA's brief.

Mr. Simpson's declaration revealed for the first time the substance of the information provided by Ms. Meyers when she was interviewed by the surveyors on November 17, 1995. According to Mr. Simpson, Ms. Meyers "related that the administration of Gold Country had become increasingly hostile toward her and noncooperative with the Ombudsman's Office in recent weeks." HCFA Ex. 30 at 3.

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[30] HCFA filed also with its brief the declaration of Ms. Meyers, whose name did not appear on the list of potential witnesses for hearing drawn up by HCFA. As discussed in a later section of this Decision, Ms. Meyers' declaration disclosed for the first time the information she provided to the HCFA surveyors on November 17, 1995. HCFA Ex. 29.

Mr. Simpson stated that he interpreted the tone and content of Mr. Niehoff's October 31 letter as indicating Gold Country's lack of cooperation with the Ombudsman's program. HCFA Ex. 30 at 3. He stated further that Mr. Niehoff's statement that Gold Country "will not be a part of nor will we support the Ombudsman program by providing the vehicle whereby they exercise continuing criticism and confrontation" indicated that Gold Country had established:

> an adversarial relationship with the Ombudsman's office that was not conducive to furthering the objectives of the Ombudsman program (i.e., identifying, investigating and resolving complaints made by or on behalf of nursing home residents), and which (at least) threatened to interfere with communications between the Ombudsman's office and the residents of the facility.

HCFA Ex. 30 at 3.

Mr. Simpson explained for the first time in his declaration the manner in which the surveyors used the ombudsman's record of contacts provided by Ms. Meyers. According to Mr. Simpson, the ombudsman's record of contacts showed that, for the period from June 29 through September 13, 1995, Gold Country had referred six incidents to her. HCFA Ex. 30 at 3-4. The surveyors then showed Gold Country's incident/accident log for a later period of time (from October 1 to November 8, 1995) to Ms. Meyers, and Ms. Meyers told the surveyors that not one of the allegations noted in the later dated logs had been referred to her office. Id. According to Mr. Simpson:

> [i]n particular, we were concerned that Gold Country's expressions of hostility toward the Ombudsman and noncooperation with the Ombudsman's office (as evidenced by the failure to report resident allegations of abuse, changes in resident condition and resident grievances[31])

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[31] I construe HCFA to be referring to its interpretation of what is contained in the document which was initially identified in its survey report/statement of deficiencies as the "incident/accident" log (see HCFA Ex. 9 at 1) and which Gold Country has introduced as an

(continued...)

> limited (or certainly had the potential to limit) the residents' access to the Ombudsman and, therefore, their ability to contact and receive information from this official advocacy agency.

HCFA Ex. 30 at 5.[32]

Mr. Simpson asserted also in his declaration that the noncompliance determination at issue did not result only from consideration of the October 31 letter:

> [b]ased on our interview with Ms. Meyers, our reading of the October 31, 1995 letter and the evidence showing that Gold Country failed to report resident allegations to the Ombudsman's office, the survey team concluded that the facility was not complying with the requirement at 42 C.F.R. § 483.10(g)(2) . . . .

HCFA Ex. 30 at 4. As further explained by Mr. Simpson:

> [a]ccordingly, the survey team cited a violation of 42 C.F.R. § 483.10(g)(2) on the Statement of deficiencies prepared following completion of the survey, and assessed this deficiency in the "F" category on the scope and severity matrix (i.e., no actual harm with potential for more than minimal widespread harm that is not immediate jeopardy).

HCFA Ex. 30 at 5.

Using Mr. Simpson's declaration, HCFA asserted also for the first time that Gold Country's Administrator had been

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[31](...continued)
exhibit bearing the title of "Resident Allegation Log" (P. Ex. 4). I believe the parties have merely given different names to the same document, since the dates for the logs specified by Mr. Simpson in his declaration (HCFA Ex. 30 at 4) are the same as those shown on Gold Country's exhibit 4.

[32] HCFA's "Directed Plan of Correction, Tag F-168" (HCFA Ex. 10 at 5) does not contain any information reflecting Mr. Simpson's stated concerns for Gold Country's failure to report its residents' complaints to an ombudsman.

apprised at the survey's exit conference[33] of the surveyors' concerns about the October 31 letter and the failure to report resident complaints. According to Mr. Simpson's declaration, "the administrator did not deny that Gold Country had ceased to cooperate with the Ombudsman's Office." HCFA Ex. 30 at 4. Also according to Mr. Simpson's declaration, "[h]e [the administrator] offered no explanation for the failure to report to the Ombudsman the incidents recorded in the resident allegation logs." Id.

V. ADDITIONAL ISSUES RAISED BY THE PARTIES AFTER HCFA'S SUPPLEMENTATION OF ITS NONCOMPLIANCE DETERMINATION DURING LITIGATION

After receiving and reviewing the declaration of Mr. Simpson submitted by HCFA with its brief, Gold Country raised challenges to his version of the facts. Gold Country asserted, for example, that the HCFA surveyors did not provide Gold Country with an opportunity to respond to Ms. Meyers' accusations during the survey process (P. Reply, at 5); nor had HCFA provided notice or an opportunity for Gold Country to address the newly alleged violation concerning Gold Country's failure to refer the contents of its incident/accident logs to the ombudsman. P. Reply, at 10. To support the foregoing contentions as well as to refute Mr. Simpson's assertions that, during the survey exit conference, the facility did not deny its lack of cooperation with the ombudsman (see HCFA Ex. 30), Gold Country introduced with its Reply Brief the declarations of its Administrator and Director of Nursing Services, who had attended this conference with Mr. Simpson.

Both the Administrator and Director of Nursing Services for Gold Country stated in their declarations that the incident/accident logs were never mentioned by the surveyors during the exit conference on November 17, 1995. P. Exs. 13, 14. Moreover, both described Mr. Simpson as hostile, angry, threatening, and unreasonable on the ombudsman issue during the exit conference. Id. Both stated that, when Gold Country's Administrator asked what F Tag Mr. Niehoff's October 31 letter had violated, Mr. Simpson told them he did not know but would find one. Id. Both of these Gold Country officials expressed the

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[33] An exit conference should be conducted as the final task of the survey protocol. 42 C.F.R. § 488.110(j). The regulation explains how the surveyors should conduct the exit conference, including what information should be gathered or provided. Id.

view that they were not provided with the opportunity to address the ombudsman issue or the incident/accident log issue at the exit conference. Id.

After reviewing the foregoing arguments and evidence from Gold Country, HCFA filed a motion to strike those arguments and evidence. HCFA's letter dated September 29, 1997. In the alternative, HCFA asked for the opportunity to file a responsive brief. Id. at 2.

VI. DISPOSITION OF OUTSTANDING MOTION AND ISSUES OF LAW

A. I deny HCFA's motion to strike or to file an additional brief responsive to Gold Country's due process arguments and to Gold Country's evidence refuting Mr. Simpson's sworn statements.

HCFA does not want me to consider the declarations and arguments filed by Gold Country to refute Mr. Simpson's sworn statements. By letter to me dated September 29, 1997, HCFA argued that Gold Country's denial of "due process" arguments, as well as the supporting evidence submitted by Gold Country, are "new matters" improperly submitted with a reply brief. Therefore, HCFA requested that I either strike or disregard these "new matters" or allow HCFA to file a responsive brief to them.

The subject matters of Gold Country's arguments and supporting declarations were not new to HCFA, since HCFA had raised those very matters by submitting the declaration of Mr. Simpson dated August 20, 1997 with its own brief. When Mr. Simpson's declaration was filed by HCFA, HCFA itself introduced the new and heretofore undisclosed information concerning how Gold Country's incident/accident logs were used in the survey, as well as how Gold Country's administrator had allegedly conducted himself during the exit conference with Mr. Simpson. HCFA should have expected a response by Gold Country when it began to add information which was not contained in its notice letter to Gold Country, the survey report/statement of deficiencies, the Directed Plan of Correction, or in any of the exhibits earlier filed in this case.

I do not find it necessary or appropriate to give HCFA any additional chance to address the foregoing matters.[34] Both HCFA and Mr. Simpson had the opportunity to state what they wanted to, and in as complete a manner as they wished, when they decided to raise these new facts.

Moreover, resolution of disputes concerning these matters would not significantly affect my finding that HCFA has failed to present a prima facie case under 42 C.F.R. § 483.10(g)(2). I note, for example, that Gold Country does not deny that it did not report complaints from its incident/accident logs to Ms. Meyers. Gold Country disagrees only with Mr. Simpson's contention that the issue of the incident/accident log was brought to its attention during the survey's exit conference. For the reasons I will discuss elsewhere in this Decision, I conclude that the reporting of residents' complaints to the ombudsman was not required by 42 C.F.R. § 483.10(g)(2) on the basis of the evidence presented by HCFA.

For similar reasons, I do not find it necessary in this case to reach the question of whether Mr. Simpson had conducted the exit conference with a closed mind and bias against the facility, as suggested by Gold Country's counter-declarations. Even if Gold Country had been denied the opportunity to set forth its position during the exit conference concerning Mr. Niehoff's October 31 letter, for example, Gold Country has set forth its position on this matter in its hearing request and in other documents reviewed by HCFA. HCFA Exs. 14, 11. Since reviewing those documents from Gold Country, HCFA has not altered its determination of noncompliance under 42 C.F.R. § 483.10(g)(2), except to provide additional allegations and explanations in further support of its conclusions. As I discuss below, it is the substance of the evidence presented by HCFA -- without regard for how, when, or why the evidence was gathered -- which fails to sustain HCFA's "burden of coming forward with evidence related to disputed findings that is sufficient (together with any undisputed findings and relevant legal authority) to establish a prima facie case that HCFA had

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[34] I have received HCFA's new evidence into the record, notwithstanding Gold Country's arguments concerning the lack of prior notice and its effect on the facility's due process rights. Therefore, there is no need for me to grant HCFA leave to submit a brief containing its arguments on the due process issue.

a legally sufficient basis" for finding Gold Country out of compliance with 42 C.F.R. § 483.10(g)(2). See Hillman at 8.

B. I reject Gold Country's arguments that, as a matter of law, noncompliance with 42 C.F.R. § 483.10(g)(2) cannot be proven unless HCFA has used evidence relating only to the residents' examination of survey results.

The parties disagree as to how broadly 42 C.F.R. § 483.10(g)(2) should be interpreted, given that HCFA does not allege that Gold Coast was out of compliance with 42 C.F.R. § 483.10(g)(1). As I noted in discussing the contents of its hearing request, Gold Country contends that in order for HCFA to establish noncompliance under 42 C.F.R. § 483.10(g)(2), HCFA's evidence must relate only to the residents' right to examine survey results. In this case, HCFA did not rely on evidence specifically involving the residents' examination of survey results.

The regulation codified as 42 C.F.R. § 483.10(g) states as follows in its entirety:

> (g) Examination of survey results. A resident has the right to --
>
> > (1) Examine the results of the most recent survey of the facility conducted by Federal or State surveyors and any plan of correction in effect with respect to the facility. The facility must make the results available for examination in a place readily accessible to residents, and must post a notice of their availability; and
> >
> > (2) Receive information from agencies acting as client advocates, and be afforded the opportunity to contact these agencies.

42 C.F.R. § 483.10(g).

Gold Country argues that 42 C.F.R. § 483.10(g)(2) should be interpreted consistently with the general subject heading of "Examination of survey results."[35] Therefore, Gold Country interprets 42 C.F.R. §

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[35] Petitioner has also presented facts and alternative arguments by applying HCFA's interpretation of the regulation.

483.10(g)(2) to mean only that a facility's residents have the right to receive information from, and to contact, client advocate agencies concerning the examination of survey results. Under this limiting interpretation, 42 C.F.R. § 483.10(g)(2) would become merely the method by which residents exercise their right under 42 C.F.R. § 483.10(g)(1).

HCFA disagrees. In response to Gold Country's legal arguments,[36] HCFA contends that 42 C.F.R. § 483.10(g)(2) should be interpreted as entitling residents to receive information from, as well as to contact, client advocate agencies even in matters which do not relate to the examination of survey results. HCFA's arguments rely primarily upon the plain language of (g)(2).

I conclude for the following reasons that 42 C.F.R. § 483.10(g)(2) means that the residents' right to contact and receive information from client advocate agencies is not limited to matters relating to their right to examine survey results.

In listing those requirements which skilled nursing facilities must meet in order to participate in the Medicare program, Congress created certain rights for such facilities' residents, and it specified that the facilities must protect and promote those rights. Social Security Act (Act), section 1819(c). The examination of survey results is one such resident right created by Congress. Act, section 1819(c)(1)(A)(ix). Therefore, it follows that the implementing regulations promulgated by the Secretary of Health and Human Services (Secretary) must give effect to this right explicitly created by statute. This statutory right was set forth in the portion of the regulation codified as 42 C.F.R. § 483.10(g)(1).

However, in addition to having created specified rights for residents, Congress conferred broad discretion upon the Secretary to establish "[a]ny other rights" for residents which must also be protected and promoted by the facilities. Act, sections 1819(c)(1)(A)(xi). See

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[36] In this section, I am summarizing only HCFA's arguments in response to Gold Country's interpretation of the regulation. As I discuss below, HCFA's finding of noncompliance in this case reflects a different and improper interpretation of the regulation at issue.

also, Act, sections 1819(d)(4)(B), 1919(d)(4)(B).[37] The Secretary has stated by regulation that the statutory bases for her Part 483 regulations include sections 1819(c) and (d) of the Act. 42 C.F.R. § 483.1(a)(1). Therefore, in promulgating 42 C.F.R. § 483.10(g), the Secretary did not need to confine herself to giving effect only to the residents' right under the Act to examine survey results.

Given its plain meaning, 42 C.F.R. § 483.10(g)(2) is consistent with the Secretary's authority to create other rights for residents and place corresponding obligations upon the facilities participating in the programs. Even if resort to regulatory history were appropriate in the absence of any ambiguous language in the regulation itself, interpreting 42 C.F.R. § 483.10(g)(2) in accordance with its plain meaning is supported by the fact that the Secretary's explanations of her proposed regulation used words which nearly duplicate those of the regulation.[38] 56 Fed. Reg. 48,832 (1991). The Secretary's explanations of her proposed regulation also stated that she was amending section 483.10(b)(7) to require the facility to include in its written notice to residents the name, mailing address, and telephone number of relevant advocacy agencies, in order that residents may exercise their right of contact under section 483.10(g)(2). 56 Fed. Reg. 48,832 (1991). There was no identification of any particular purpose for these contacts.

Without doubt, residents have the right under 42 C.F.R. § 483.10(g)(2) to contact their client advocate agencies and receive information concerning survey results, especially since those agencies are entitled to obtain directly from the surveying entities any report of enforcement remedies imposed against facilities. See 42 C.F.R. § 488.325(f). Therefore, the regulation's general heading of "Examination of survey results" is not inappropriate to the broader interpretation that, under 42 C.F.R. § 483.10(g)(2), residents may contact and receive information from their client advocate agencies concerning any matter -- including the examination of survey results.

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[37] Both of these statutory sections state that such facilities must meet such other requirements relating to the residents' health and safety as the Secretary may find necessary.

[38] In proposing and promulgating the Part 483 regulations, the Secretary was acting through HCFA.

For the foregoing reasons, I reject Gold Country's conclusion that in order for HCFA to establish noncompliance under 42 C.F.R. § 483.10(g)(2), HCFA's evidence must relate only to the residents' right to examine survey results.

C. I dismiss Gold Country's challenge to the noncompliance determination made by HCFA under F Tag 329 or 42 C.F.R. § 483.25(l)(1).

In my earlier rulings, I had noted that Gold Country should withdraw also its challenge to the noncompliance findings HCFA made under F Tag 329 (42 C.F.R. § 483.25(l)(1)) because those findings did not lead to the imposition of any remedy by HCFA against Gold Country. Feb. 11, 1997 Ruling, at 7, n.2, and at 10; June 20, 1997 Ruling, at 4, n.3. Gold Country has not done so formally, even though it has not taken exception to my conclusion that no hearing rights exist under 42 C.F.R. § 498.3(b)(12) with respect to F Tag 329. Therefore, in order to eliminate any ambiguity which may exist at present, I am holding that I have no authority to consider any disputes Gold Country might have wished to raise concerning the noncompliance findings made by HCFA under F Tag 329. My rationale is contained in my prior rulings (Feb. 11, 1997 Ruling and June 20, 1997 Ruling) and is the same as those I discussed in allowing Gold Country to withdraw its challenge to F Tag 272 (42 C.F.R. § 483.20(b)) while maintaining the present action against HCFA on the basis of HCFA's noncompliance determination under 42 C.F.R. § 483.10(g)(2) or F Tag 168. Accordingly, all issues concerning 42 C.F.R. § 483.25(l)(1) are hereby dismissed from this case pursuant to 42 C.F.R. § 498.70(b).

VII. HCFA'S FAILURE TO ESTABLISH A PRIMA FACIE CASE UNDER 42 C.F.R. § 483.10(g)(2)

A. To establish its prima facie case, HCFA's evidence for each of the disputed issues must be material to the requirements of 42 C.F.R. § 483.10(g)(2) and be sufficient to lead reasonably, credibly, and logically to the conclusions that, as of the November 17, 1995 survey, Gold Country had acted, or failed to act, in a manner that was contrary to the requirements of 42 C.F.R. § 483.10(g)(2), and, as a consequence, its residents' health or safety were placed at risk for more than minimal harm.

HCFA must "com[e] forward with evidence related to disputed findings that is sufficient (together with any undisputed findings and relevant legal authority) to

establish a prima facie case that HCFA had a legally sufficient basis" for the sanction it imposed. Hillman at 8. In deciding that HCFA has the burden of coming forward with evidence establishing a prima facie case that Hillman substantially failed to comply with program requirements, the Appellate Panel explained that HCFA's determination to sanction the provider "must be legally sufficient under the statute and regulations." Hillman at 11. I interpret the foregoing requirements, together with the very definition of "prima facie," to mean that the facts on which HCFA relies (assuming that they will not be disproven by the facility) should provide sufficient support for each of the disputed material findings or determinations made by HCFA, and that, moreover, said findings or determinations stem from a proper interpretation of the applicable laws and regulations. See Hillman at 8, 11. At minimum, the body of evidence introduced by HCFA should not contain substantial conflicts inter se or give rise to material questions of fact, the evidence should appear credible on its face, and the evidence should lead reasonably and persuasively to the factual conclusions urged by HCFA. The factual conclusions urged by HCFA must, in turn, establish that the requisite legal and regulatory elements have been satisfied.

For this case, I take notice that, effective on July 1, 1995, the regulations which implemented the Omnibus Budget Reconciliation Act of 1987, as amended in 1988, 1989, and 1990, have made inapplicable to skilled nursing facilities (SNFs) and nursing facilities (NFs) the pre-existing hierarchical scheme of conditions of participation, standards, and elements. 59 Fed. Reg. 56,116; 56,173 (1994). Effective on July 1, 1995, the regulation applicable to SNFs and NFs defines "noncompliance" as "any deficiency that causes a facility to not be in substantial compliance." 42 C.F.R. § 488.301 (emphasis added). "Deficiency" means "a SNF's or NF's failure to meet a participation requirement specified in the Act or in part 483, subpart B of this chapter." Id.[39] (emphasis added). A facility is in "substantial compliance" if it has "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal

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[39] Subpart B of 42 C.F.R. Chapter IV contains Part 483, which is titled "Requirements for Long Term Care Facilities." The regulation relied upon by HCFA in this case, 42 C.F.R. § 483.10(g)(2), is found in subpart B of 42 C.F.R. Chapter IV.

harm." Id. Therefore, I interpret "noncompliance" to mean the existence of one or more deficiencies (i.e., the failure to meet one or more specified participation requirements) which poses greater risk to residents' health or safety than the potential for causing minimal harm.

Moreover, notice of the final rule states in explanation that deficiencies "take on greater or lesser significance depending on the circumstances and resident outcomes in a particular facility." 59 Fed. Reg. 56,173 (1994). The Notice states also, "[w]e . . . are allowing violations of any participation requirement, including resident rights . . ., to be assessed at any degree of seriousness." 59 Fed. Reg. 56,165 (1994). However, a facility would not be required to submit even a plan of correction for approval by HCFA or the state survey agency "when it has deficiencies that are isolated and have a potential for minimal harm, but no actual harm has occurred." 42 C.F.R. § 488.402(d)(2). Enforcement remedies are authorized only if survey findings show that a facility's deficiencies are at the level of "noncompliance." See 42 C.F.R. §§ 488.402(b), 488.408.

For the foregoing reasons, I conclude that, in order to support its "noncompliance" determination, HCFA must first have evidence which establishes that the facility has failed to conduct itself in the manner mandated by the applicable regulation. (A deficiency under a given regulation is, in essence, a deviation by the facility from the duty imposed upon it by that regulation.) Only if a deficiency has been established with adequate evidence that is legally relevant to the elements of the regulation may HCFA then proceed to the question of whether or to what degree residents' health or safety has been placed at risk as a result of the deficiency. By itself, risk to residents' health or safety cannot establish the existence of noncompliance with any given participation requirement.

Below, I will apply these principles to analyze the three categories of evidence HCFA and its surveyor claim to have relied upon to reach the noncompliance determination at issue: (1) the contents of Mr. Niehoff's October 31 letter;[40] (2) the statements provided by Ms. Meyers; (3)

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[40] Mr. Litwinovich's November 15, 1995 letter, which was introduced by HCFA as one of its exhibits for these proceedings, will be considered also to the extent it helps explain the nature and context of Mr. Niehoff's (continued...)

the evidence that Gold Country did not report resident allegations to the Ombudsman's office. See HCFA Ex. 30 at 4-5.

B. HCFA's evidence shows that it has given improper, unreasonable, or unfounded interpretations to Mr. Niehoff's October 31, 1995 letter and Mr. Litwinovich's return letter dated November 15, 1995, as support for its determination that Gold Country was out of compliance with 42 C.F.R. § 483.10(g)(2).

1. HCFA's awareness that its surveyors had failed to evaluate the context in which Mr. Niehoff wrote his letter dated October 31, 1995

As noted above, HCFA's survey report/statement of deficiencies focused on the contents of Mr. Niehoff's October 31, 1995 letter in determining that Gold Country was out of compliance with the requirements of 42 C.F.R. § 483.10(g)(2). Gold Country used its hearing request to contest, inter alia, the use HCFA had made of this letter.

In these proceedings, HCFA does not dispute Gold Country's assertions that other relevant correspondence between Mr. Niehoff and the El Dorado County Department of Community Services were never reviewed by the surveyors when they found Gold Country out of compliance with 42 C.F.R. § 483.10(g)(2). Nor is there any genuine dispute that other relevant correspondence exists. HCFA itself submitted Mr. Niehoff's October 31 letter, which began with the following two sentences:

> [s]ince your letter of September 6, 1995 . . . I have not been able to continue our dialogue with regard to the relationship between the Ombudsman program and Gold Country.
>
> Gold Country and Retirement Housing Foundation continue to have concerns and reservations about the role of the Ombudsman, and specifically, Kathryn [sic] Meyers' attitude and relationship toward Gold Country.

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[40](...continued)
letter to him dated October 31, 1995.

HCFA Ex. 2 at 1. HCFA has not objected to Gold Country's introduction of other letters which were exchanged prior to October 31, 1995 between Mr. Niehoff and Mr. Litwinovich, the Director of the El Dorado County Department of Community Services. See P. Exs. 5, 6, 7.

2. HCFA's inadequately supported and improper interpretations of Mr. Niehoff's October 31, 1995 letter and Mr. Litwinovich's response letter dated November 15, 1995, which were introduced into evidence by HCFA

After Gold Country's hearing request specifically challenged the noncompliance determination on the bases that Mr. Niehoff's October 31 letter related to complaints against only one individual ombudsman and that said letter was interpreted out of context by the surveyors, HCFA then introduced into evidence the letter written by Mr. Litwinovich on November 15, 1995, which responded to Mr. Niehoff's October 31 letter. See HCFA Ex. 8. However, HCFA relies on Mr. Litwinovich's November 15 letter to argue that Mr. Litwinovich "[c]learly . . . read the October 31 [letter] as a broad attack on the Ombudsman's program which threatened to disrupt normal relations between the Ombudsman and the residents -- not simply a narrow objection to mailing notes of Family Council meetings." HCFA Br., at 15 (emphasis added).

This argument is consistent with HCFA's other efforts during these proceedings to interpret Mr. Niehoff's October 31 letter as something significantly more than mere criticisms of one individual ombudsman. For example, HCFA submitted the declaration of Mr. Simpson, who explained that he made the noncompliance determination at issue because the "tone and content" of Mr. Niehoff's October 31 letter "indicated to me that Gold Country was not cooperating with the Ombudsman program." HCFA Ex. 30 at 3 (emphasis added). Additionally, HCFA has decided recently to present the declaration of Ms. Meyers, who stated, "[w]hen I first read this letter [i.e., Mr. Niehoff's October 31 letter] in November 1995[,] I interpreted it as another attempt to discredit me in my capacity as Ombudsman and as an expression of Gold Country's resolve not to cooperate with the work of my office." HCFA Ex. 29 at 2 (emphasis added); HCFA Br., at 8-9.

I do not find the foregoing conclusions urged by HCFA to be adequately supported by its evidence. In later sections of this Decision, I will set forth my analysis

of the relevant regulatory elements and explain why HCFA cannot engraft onto 42 C.F.R. § 483.10(g)(2) the requirement that Gold Country cooperate with, or advance the goals of, the ombudsman program in a manner specified by HCFA. Here, I am focusing on the manner in which HCFA formulated its invalid contentions that Mr. Niehoff's October 31, 1995 letter expressed Gold Country's attack on, and refusal to cooperate with, the ombudsman's program.

There is no evidence that HCFA had interviewed either Mr. Niehoff or Mr. Litwinovich in formulating its opinion that Mr. Niehoff's October 31, 1995 letter was expressing more than Gold Country's criticisms of one individual ombudsman.[41] HCFA's evidence also does not indicate any effort to ascertain from Mr. Litwinovich his views on what would be considered accepted protocol for a facility to follow if it has disagreements with or criticisms of an individual ombudsman. HCFA's evidence does not show that its surveyors who conducted the November 17, 1995 survey of Gold Country had any knowledge of, experience in, or expertise with the methods used by any ombudsman's office for handling complaints concerning its employees. HCFA Ex. 24.

Even more significant is HCFA's reliance on the isolated use of selected phrases and sentences, which are not in accord with the fuller text of the document, in order to support its conclusion that Mr. Niehoff's October 31, 1995 letter was expressing Gold Country's refusal to cooperate with the ombudsman program. I will discuss as

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[41] As noted earlier, HCFA has recently submitted the declaration of Mr. Simpson, who stated that "the administrator did not deny that Gold Country had ceased to cooperate with the Ombudsman's office" during the exit conference on November 17, 1995. HCFA Ex. 30 at 4. Mr. Simpson's version of what occurred during the exit conference has been contested by Gold Country. See P. Reply and attached declarations.

Notwithstanding the foregoing controversy, neither HCFA nor Mr. Simpson contends that Mr. Niehoff and Mr. Litwinovich have been contacted on November 17, 1995 or since then. It is undisputed that neither Mr. Niehoff nor Mr. Litwinovich was at the aforementioned exit conference.

examples the uses made by HCFA of certain sentences from the following three paragraphs of Mr. Niehoff's October 31 letter:

> [l]ast month we sent out the Family Council agenda and minutes with our billing statement. We also enclosed a response to the minutes because we found these documents to be inflammatory and confrontational. We will not be a part of nor will we support the Ombudsman program by providing the vehicle whereby they exercise continuing criticism and confrontation. Therefore, Gold Country withdraws its offer to disseminate Ombudsman material and will not provide mailing addresses, as this information is confidential.
>
> It disappoints us that our relationship with the Ombudsman program has deteriorated to such a low level. While I can appreciate your need to support the Ombudsman program, I'm not sure you fully understand the mutual feelings of disrespect that the three nursing homes in Placerville have toward Kathryn [sic].
>
> El Dorado County's Ombudsman program is not typical of other such programs around the state or in the country for that matter. Most programs work in a cooperative relationship to improve service or to resolve issues in a professional manner. My concern is that it will be a long time before we can re-establish a positive working relationship with your Ombudsman program.

HCFA Ex. 2 at 2.

However, in the survey report/statement of deficiencies, HCFA's surveyors quoted only the sentence stating "[w]e will not be a part of nor will we support the Ombudsman program by providing the vehicle whereby they exercise continuing criticism and confrontation" when they concluded that "the facility failed to ensure that

residents and their families have access to information from client advocacy agencies." HCFA Ex. 9 at 1-2.[42] In the brief HCFA submitted to argue the validity of its noncompliance determination, HCFA has omitted certain key words and context from the above-quoted paragraphs, as well as altered the sequence of Mr. Niehoff's discussions, in order to present the following to me as HCFA's interpretation of what Mr. Niehoff's October 31 letter stated:

> [i]n the letter, petitioner admits that its "relationship with the Ombudsman program has deteriorated to . . . a low level," and that it no longer has a "working relationship" with that program. The letter goes on to express the facility's determination to withdraw its support from the Ombudsman program specifically by refusing to disseminate "Ombudsman material."

HCFA Br., at 8. I do not find HCFA's expurgated and out-of-sequence version of selected sentences to have properly or fairly conveyed the tone and content of Mr. Niehoff's letter.

HCFA does not acknowledge that most of Mr. Niehoff's October 31 letter sets forth complaints about Ms. Meyers' work and attitudes. Nor does HCFA acknowledge that Mr. Niehoff's October 31 letter was regretting the deteriorated relationship between Ms. Meyers and Gold Country which was, according to Mr. Niehoff's letter, caused by Ms. Meyers' work and attitude.

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[42] In later parts of this Decision, I will discuss HCFA's improper placement of an obligation on Gold Country to mail or transmit materials or information from the ombudsman to the residents; the lack of legally cognizable relationship between Family Council meetings and the requirements of 42 C.F.R. § 483.10(g)(2); as well as the absence of any right under 42 C.F.R. § 483.10(g)(2) for family members (who have not been shown to have the requisite legal standing to act on behalf of residents) to receive information from an ombudsman.

The earlier portion of the letter not relied upon by HCFA stated, for example, the following complaints about Ms. Meyers:

> Gold Country and Retirement Housing Foundation continue to have concerns and reservations about the role of the Ombudsman, and specifically, Kathryn [sic] Meyer's attitude and relationship toward Gold Country. Kathryn [sic] does not deal in terms of reality and is confrontational in her approach to problem solution. She tends to "stir up the pot" with the Family Council, which itself is made up of individuals who are influenced by Kathryn's [sic] leadership. When only three or four family representatives show up for these meetings, they hardly speak for the majority, but do create concern because, again, Kathryn [sic] encourages confrontation. This is not the way to resolve issues, and only ends up creating animosity between the staff and the Ombudsman program.
>
> . . .
>
> If we can't provide the training, then we will not have sufficient staff to provide resident services. Ultimately, this scenario leads to inadequate care, loss of occupancy, and bankruptcy. Is this Kathryn's [sic] mission?

HCFA Ex. 2 at 1.

Mr. Niehoff also stated towards the end of his October 31, 1995 letter that "[i]t disappoints us that our relationship with the Ombudsman program has deteriorated to such a low level[,]" and "El Dorado County's Ombudsman program is not typical of other such programs around the state or in the country for that matter [because] [m]ost programs work in a cooperative relationship to improve services or to resolve issues in a professional manner." HCFA Ex. 2 at 2. However, these comments concerning the ombudsman program stemmed directly from the criticisms of Ms. Meyers' allegedly confrontational approaches and the animosity she had allegedly created between Gold Country's staff and the ombudsman's office. By the time Mr. Niehoff was making these statements concerning the ombudsman's program after having provided extensive criticisms of Ms. Meyers' work, Mr. Niehoff was saying,

in essence, that Ms. Meyers' actions and attitudes have eroded the relationship Gold Country used to have with the ombudsman's program, and her actions and attitudes have caused the ombudsman's program she represents to operate atypically -- without extending to Gold Country the cooperation and efforts to resolve issues professionally which were being extended by other ombudsman programs to other facilities.

Mr. Niehoff also asserted in his letter, "[w]e will not be a part of nor will we support the Ombudsman program by providing the vehicle whereby they exercise continuing criticism and confrontation[,]" and "[t]herefore, Gold Country withdraws its offer to disseminate Ombudsman material . . . ." HCFA Ex. 2 at 2. However, these statements are related to the letter's earlier stated complaints that Ms. Meyers "stir[s] up the pot" with the Family Council and encourages confrontation at the Family Council meetings even when only three or four family representatives are in attendance. See HCFA Ex. 2 at 1. In context, the "Ombudsman material" referenced in the letter appear to be those agenda and minutes for the Family Council meetings at which Ms. Meyers was allegedly "stir[ring] the pot" and encouraging confrontation by a minority of individuals.[43] See HCFA Ex. 2.

For these reasons, I conclude that HCFA has given an unreasonable and incomplete reading of Mr. Niehoff's October 31, 1995 letter, in order to contend that Gold Country was refusing to cooperate with the ombudsman's program in a manner alleged to be unlawful by HCFA. While it is regrettable for Gold Country that Mr. Niehoff had used some intemperate phrases in his letter, HCFA acted improperly by focusing on those phrases in isolation.

Similarly, a fair and full reading of all that Mr. Litwinovich said in his response letter dated November 15, 1995 (HCFA Ex. 8) would not lead to HCFA's overbroad conclusion that Mr. Litwinovich also viewed Mr. Niehoff's letter "as a broad attack on the Ombudsman's program which threatened to disrupt normal relations between the

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[43] According to the content of Mr. Niehoff's letter, the Family Council minutes were considered "inflammatory and confrontational" by Mr. Niehoff because he had earlier criticized Ms. Meyers' confrontational approaches in the meetings of the Family Council, which was allegedly made up by individuals under her influence and attended by those who do not speak for the majority. HCFA Ex. 2.

Ombudsman and the residents. . . ." (HCFA Br., at 15).[44] Nor would the fact that Mr. Niehoff addressed his complaints about Ms. Meyers' conduct and motives to Ms. Meyers' boss -- without having provided copies of this

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[44] For example, Mr. Litwinovich began his letter thusly:

> [m]y September 6 letter to you reflected an effort to be conciliatory and responsive to the concerns of Gold Country as you have expressed them, to the degree possible without compromising the obligations of the Long Term Care Ombudsman Office. Therefore, it was very disappointing to receive your letter of October 31, which seemed to reflect a step in the opposite direction.

HCFA Ex. 8 at 1. Elsewhere in the letter, Mr. Litwinovich described as a "rhetorical" question Mr. Niehoff's query as to whether the ombudsman's mission was to produce "inadequate care, loss of occupancy, and bankruptcy." Id. Mr. Litwinovich stated in response, in the event the question was not rhetorical, "no, that is not her mission." Id. (emphasis added). He indicated his agreement in principle with Mr. Niehoff's observation that an Ombudsman's office should work cooperatively and professionally with the facilities. Id. at 2. Therefore, even after disagreeing with the merits of the complaints made against Ms. Meyers in Mr. Niehoff's letter, Mr. Litwinovich noted also that he had discussed with her certain expectations he has concerning the performance of her work as an ombudsman; his expectations were that she "make every reasonable effort to address concerns in a positive, cooperative manner, and that she fulfill her responsibilities as an Ombudsman." Id. at 2. I note also that, previous to submitting its brief arguing that Mr. Niehoff's October 31 letter should be interpreted "as a broad attack on the Ombudsman's program which threatened to disrupt normal relations between the Ombudsman and the residents . . ." together with witness declarations alleging the same conclusions (HCFA Exs. 29, 30), HCFA's relevant position was only that Mr. Niehoff's letter:

> included attacks on the professionalism and character of one ombudsman in particular . . . .

HCFA Ex. 9 at 2.

letter to anyone other than Gold Country's administrator and RHF's Corporate Nursing Consultant (HCFA Ex. 2 at 2) -- lead reasonably to Ms. Meyers' interpreting the letter as another attempt "to discredit me in my capacity as Ombudsman and as an expression of Gold Country's resolve not to cooperate with the work of my office." HCFA Ex. 29 at 2.[45]

Mr. Litwinovich's letter shows that he had considered and investigated the allegations made by Mr. Neihoff. Even though he was in disagreement with the conclusions drawn by Mr. Niehoff concerning Ms. Meyers' conduct, Mr. Litwinovich did not indicate that Mr. Niehoff or his organization was without the right to bring such allegations to the ombudsman's office for inquiry. I note, for example, that Mr. Litwinovich closed his letter with the statement, "[w]e remain available to discuss these or other issues as may be helpful." HCFA Ex. 8 at 2.

3. Additional aspects of Mr. Litwinovich's November 15, 1995 response letter (introduced into evidence by HCFA) which further undercuts HCFA's attempt to establish a prima facie case

In addition to the foregoing problems with HCFA's evidence, its introduction of Mr. Litwinovich's November 15 response letter raises a material factual issue which it has left unaddressed: what did Gold Country do after it received Mr. Litwinovich's response letter? Mr. Litwinovich's response letter dated November 15, 1995 contained specific suggestions for resolving Gold Country's concerns for mailing the Family Council minutes,[46] informed Mr. Niehoff that the other nursing

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[45] I will discuss below the absence of facts in support of Ms. Meyers' contentions that Gold Country was curtailing her communications with residents.

[46] Mr. Litwinovich stated in his letter:

> I can appreciate concerns about that [sic] the mailing of minutes, which list perceived problems, to all families. It would seem entirely appropriate to have a cooperative discussion about the format of the minutes, the scope of distribution, and how best to ensure a positive approach. While minutes should serve to provide

(continued...)

home administrators failed to share his low opinion of Ms. Meyers' professionalism and represented that Ms. Meyers had been advised of Mr. Litwinovich's expectations of her work after he had held a lengthy discussion with her regarding Gold Country's concerns. HCFA Ex. 8.

What Gold Country did after receiving Mr. Litwinovich's November 15, 1995 letter is material and should have been accounted for by HCFA because this issue was raised by the contents of said November 15 letter introduced into evidence by HCFA. What Gold Country did after receiving Mr. Litwinovich's November 15 response letter has bearing on the correctness of HCFA's determination that Gold Country was out of compliance with 42 C.F.R. § 483.10(g)(2) as of the November 17, 1995 survey date. Additionally, the issue of what Gold Country did after receiving the November 15 letter is material also because HCFA's evidence establishes that HCFA considered Gold Country's alleged noncompliance with 42 C.F.R. § 483.10(g)(2) to have been ongoing even after the survey of November 17, 1995; otherwise, HCFA would not have found it necessary to impose the "Directed Plan of Correction, Tag F-168" as a remedy with its notice letter of December 8, 1995. Moreover, Gold Country's hearing request challenged HCFA's determination that the matters relating to or contained in Mr. Niehoff's October 31 letter were not isolated deficiencies with a potential for only minimal harm to residents.[47] HCFA Ex. 14, at 4.

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[46](...continued)
understanding and continuity to the process of addressing concerns, and should reflect the Family Council meeting business, they should not unintentionally become a negative public relations device, either for the Family Council or for Gold Country. This is in the best interest of neither party. If it is a concern that this is happening, I would recommend a meeting to resolve this issue.

HCFA Ex. 8 at 1.

In a later section of this Decision, I will discuss also my conclusions that the evidence submitted by HCFA does not establish that Gold Country was legally obligated to mail out Family Council minutes under 42 C.F.R. § 483.10(g)(2).

[47] As I noted previously, all deficiencies do not
(continued...)

As explained by HCFA surveyor, Kenneth Simpson, Gold Country's violation was cited at the Scope and Severity level of F which meant, "no actual harm with potential for more than minimal widespread harm that is not immediate jeopardy." HCFA Ex. 30 at 5.

However, after introducing Mr. Litwinovich's November 15, 1995 letter into evidence, HCFA has presented nothing to indicate that Gold Country continued to take any of the actions which HCFA's surveyors had found to be objectionable or improper from Mr. Niehoff's October 31, 1995 letter. For example, HCFA has not attempted to show that Gold Country had continued to complain of Ms. Meyers' attitude and professionalism after it was apprised by Mr. Litwinovich's letter that Mr. Litwinovich and other area nursing home administrators did not share in the criticisms of Ms. Meyers' work. There is also no evidence from HCFA showing that after Mr. Litwinovich's letter was received, Gold Country or Mr. Niehoff was unwilling to meet with the Ombudsman's Office as suggested by Mr. Litwinovich in order to resolve concerns that the Family Council minutes were becoming a "negative public relations device . . . ." HCFA Ex. 8 at 1. HCFA's evidence indicates that no consideration had been given to such matters when it determined that Gold Country was out of compliance with 42 C.F.R. § 483.10(g)(2) as of the November 17, 1995 survey date.

Of course HCFA was within its discretion to commence a resurvey of Gold Country on November 17, 1995. See 42 C.F.R. § 488.20(b)(1). During the resurvey, HCFA had the authority to investigate also an unrelated complaint brought to its attention. However, there exists no regulation which required HCFA to complete any type of survey on the same day that it was begun. Nor do the regulations prohibit the surveyors from interviewing more than one witness during a complaint survey, or limit the number of documents they may review. Here, HCFA has submitted no evidence to show that the quantity or quality of evidence it gathered for 42 C.F.R. § 483.10(g)(2) on the single day of survey resulted from its surveyors' adherence to established protocols for investigating complaints of this type. In the absence of such evidence from HCFA, it is reasonable to expect its

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[47](...continued)
arise to the level of noncompliance, and the existence of isolated deficiencies with a potential for only minimal harm do not provided HCFA with the requisite basis for finding noncompliance or for imposing an enforcement remedy. See, e.g., 42 C.F.R. § 488.402(d)(2).

surveyors to have conducted a more comprehensive survey of greater depth (e.g., interviewed more than one witness (Ms. Meyers), interpreted Mr. Niehoff's letter in context, considered the response letter of Mr. Litwinovich, and inquired into Gold Country's subsequent course of action) before concluding that noncompliance of a widespread scope was continuing to exist at Gold Country as of November 17, 1995. Even though I cannot direct the manner in which HCFA chooses to conduct its surveys, I note that the choices made by HCFA when it surveyed Gold Country on November 17, 1995 have impacted adversely on the amount and quality of evidence it is able to present. The limitations in HCFA's evidence have, in turn, detracted from the soundness or reasonableness of its conclusions.

C. HCFA has given an improper legal interpretation of 42 C.F.R. § 483.10(g)(2) in its use of Mr. Niehoff's October 31, 1995 letter as evidence of Gold Country's noncompliance due to its lack of cooperation, lack of open communication, or development of an adversarial relationship with the ombudsman's office.

The Directed Plan of Correction introduced into evidence by HCFA shows that HCFA is requiring "open communications" and "cooperation" between Gold Country and the ombudsman program in order for Gold Country to come into compliance with 42 C.F.R. § 483.10(g)(2). HCFA Ex. 10 at 5, para. 1. For the reasons discussed previously, I view the contents of the Directed Plan of Correction as relevant evidence of the legal interpretation HCFA has given to 42 C.F.R. § 483.10(g)(2).

Additionally, the evidence and arguments presented by HCFA also lead to the conclusion that HCFA interprets 42 C.F.R. § 483.10(g)(2) as including those requirements for "open communications" and "cooperation" reflected by the "Directed Plan of Correction, Tag F-168." Mr. Simpson, the HCFA surveyor, explained in his declaration that he was particularly concerned with Mr. Niehoff's statement that Gold Country "will not be a part of nor will we support the Ombudsman program by providing the vehicle whereby they exercise continuing criticism and confrontation" (HCFA Ex. 2 at 2) because "[t]his statement indicated to me that Gold Country had established an adversarial relationship with the Ombudsman's office that was not conducive to furthering the objectives of the Ombudsman's program . . . ." HCFA Ex. 30 at 3. With its brief, HCFA also submitted the declaration of Ms. Meyers, who alleged also that Mr. Niehoff's October 31, 1995 letter was an "attempt to

rationalize Gold Country's noncooperation with the Ombudsman program . . . ." HCFA Ex. 29 at 2. In an earlier filed motion, HCFA explained that the facility was found out of compliance with 42 C.F.R. § 483.10(g)(2):

> because they were on record as declining to cooperate with the ombudsman program, thus having the potential for affecting all of the residents in the facility, with a scope and severity level of "F" on the Grid (which is attached as HCFA Ex. 27), i.e., a widespread potential for more than minimal harm that is not immediate jeopardy, with no actual harm (F 168) . . . .

HCFA Mot. to Dism., at 1-2. HCFA, by its Associate Regional Administrator for the Division of Health Standards and Quality, stated also in her declaration that the deficiency HCFA considered to have been most significant and purposeful was "Gold Country's explicit refusal to cooperate with the State Ombudsman program." Declaration of Janice M. Caldwell at 3, attached to HCFA Renewed Mot. to Dism.

I find that no deviation from (or deficiencies under) the requirements of 42 C.F.R. § 483.10(g)(2) was established by HCFA's evidence concerning Gold Country's allegedly adversarial relationship with the ombudsman's office, by Gold Country's alleged failure to advance the objectives of the ombudsman's program, or by Gold Country's alleged failure to cooperate or communicate openly with the ombudsman's office.

The relevant words of this regulation make clear that the residents -- and not the ombudsman or the ombudsman's office -- are the ones who hold the rights specified therein:

> A resident has the right to:
>
> > Receive information from agencies acting as client advocates, and be afforded the opportunity to contact these agencies.

42 C.F.R. § 483.10(g)(2)(emphasis added).

Additionally, any open communication guaranteed by this regulation is between the ombudsman's office (or the ombudsman) and the residents of a facility. This particular regulation does not mandate communication of

any type between the facility and the ombudsman's office (or the ombudsman).[48]

Additionally, this regulation does not specify that the facility must also advance any objective of the ombudsman's program while the facility is allowing its residents to receive information from or contact the ombudsman's office. As my ruling in section VI-B indicated, the residents are entitled to contact an ombudsman for any reason and receive information from an ombudsman concerning any matter under 42 C.F.R. § 483.10(g)(2). These protected exchanges or contacts need not relate to any official function of a client advocacy agency. See HCFA Ex. 26 (explanation of the California Long Term Care Ombudsman Program). Therefore, Gold Country's alleged development of an "adversarial relationship" which was not "conducive to furthering the objectives of the Ombudsman's program," even if true, does not adequately establish that Gold Country was deficient in its adherence to the regulation's requirement to allow its residents to "[r]eceive information from agencies acting as client advocates," and to afford its residents "the opportunity to contact these agencies." 42 C.F.R. § 483.10(g)(2).

If, for example, there were proof that Gold Country was failing to advance or cooperate with the goals of the ombudsman program and, additionally, its residents have experienced limitations in their contacts of or receipt of information from the ombudsman's office concerning matters that are properly included within an ombudsman's

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[48] Here, I am not addressing the facility's obligations in situations where residents, in exercising their rights as residents under 42 C.F.R. § 483.10(g)(1) or other relevant regulations, have requested the assistance or intervention of an ombudsman in the residents' dealings with the facility. I do not do so because there is no allegation or evidence in this case that the noncompliance determination at issue was reached pursuant to any resident's request for the assistance or intervention of an ombudsman. Nor has HCFA found any noncompliance with respect to the residents' exercise of their regulatory rights at Gold Country. See sections VII-G(2), VII(H).

In a separate section of this Decision, I will discuss HCFA's contention that Gold Country was out of compliance with 42 C.F.R. § 483.10(g)(2) because it had failed to communicate or report its residents' grievances to the ombudsman.

official duties (see HCFA Ex. 29), it may be reasonable to conclude that Gold Country was out of compliance with 42 C.F.R. § 483.10(g)(2) due to its adverse attitude towards the ombudsman's program or its lack of cooperation with the objectives of the program. However, such is not the situation as established by HCFA's evidence in this case. As I discuss also elsewhere in this Decision, no resident was interviewed during or since the November 17, 1995 survey,[49] and HCFA has erroneously found a widespread violation of 42 C.F.R. § 483.10(g)(2) on the basis of Gold Country's alleged lack of cooperation in areas where no cooperation was required by this regulation (see e.g., sections VII-D and G below). The evidence introduced by HCFA does not contain proof which provides credible support for the conclusion that Gold Country had deviated from its regulatory obligation to allow its residents to receive information from or contact the Ombudsman's office.

D. Even if 42 C.F.R. § 483.10(g)(2) could be interpreted to require Gold Country to engage in a cooperative, open, or non-adversarial relationship with the ombudsman's office, HCFA has applied these implied requirements inappropriately to the facts shown by its own evidence.

Even by interpreting broadly the general requirement that the facility must "protect and promote" its residents' rights (42 C.F.R. § 483.10), I cannot conclude that a prima facie case of noncompliance with 42 C.F.R. § 483.10(g)(2) has been established by HCFA with the use of Mr. Neihoff's October 31 letter. Any cooperation and communication requirement imposed by the regulation (if such a requirement exists), cannot be construed in derogation of a facility's right to seek redress for its perceived grievances in a legitimate manner and with the appropriate individuals. As I noted earlier, Gold Country's hearing request disputed HCFA's interpretation of 42 C.F.R. § 483.10(g)(2) because, in Gold Country's view, it was being sanctioned because its representative had expressed the facility's views forthrightly to Ms. Meyers' superior.

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[49] In subsection VII-G(4) below, I reject HCFA's evidence suggesting that Gold Country's residents were discouraged from exercising their rights under 42 C.F.R. § 483.10(g)(2) by the contents of Mr. Niehoff's October 31, 1995 letter.

HCFA's evidence suggests nothing improper in Mr. Niehoff's continuing an ongoing dialogue with Ms. Meyers' superior concerning those matters troubling Mr. Niehoff and Gold Country. See HCFA Exs. 2, 8. The ombudsman's office in this case is a California governmental agency supported by public funds. HCFA Ex. 26. The program relies upon volunteers. Id. Volunteers are trained to be ombudsmen, and the work of these volunteer ombudsmen are supervised by various program officials. Id. In the state of California, 35 substate programs work under contract for 33 Area Agencies on Aging. Id. There is, of course, oversight provided by the program for the work being performed by those individuals representing the 33 Area Agencies on Aging and 35 substate programs. Id. The evidence introduced by HCFA shows that Mr. Litwinovich, as Ms. Meyers' superior, was the proper person to receive and address the complaints set forth in Mr. Niehoff's letter. Mr. Niehoff made those complaints pursuant to RHF's right to do so. Unlike Ms. Meyers, who had the option of expressing her complaints against Mr. Niehoff and Gold Country and thereby trigger a survey of Gold Country, Mr. Niehoff and his organization had no place to seek redress for their complaints against her conduct except by taking them to her superior and the head of the area ombudsman program, Mr. Litwinovich.

Yet, HCFA's evidence shows also that its surveyors made their finding of noncompliance under 42 C.F.R. § 483.10(g)(2) based in significant part upon their disagreement with the merits of certain opinions and complaints expressed in Mr. Niehoff's October 31 letter to Mr. Litwinovich concerning the manner in which Ms. Meyers was performing her work.[50] To date, HCFA has not

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[50] For example, HCFA's surveyors stated in their report/statement of deficiencies:

> [t]his letter also charged that the minutes of the September Family Council meeting were "inflammatory and confrontational," which the surveyor did not find to be true. The letter also included attacks on the professionalism and character of one ombudsman in particular . . . . - letters from the other two nursing facilities . . . did not support Gold Country's allegations.

HCFA Ex. 9 at 2.

(continued...)

shown how 42 C.F.R. § 483.10(g)(2) may be interpreted as prohibiting a facility from expressing complaints or criticisms concerning an ombudsman's work to her superior.

I find that, instead of supporting the interpretation of noncompliance reached by HCFA, Mr. Niehoff's October 31 letter is an example of Gold Country's "open communication" and "cooperation" with the individual who has oversight of the relevant ombudsman program in order to discuss certain problems perceived by Gold Country concerning one ombudsman. It is a simple fact of logic that "open communication" and "cooperation" do not denote abstinence from criticisms, nor the conveyance of only compliments. Nor do those terms or 42 C.F.R. § 483.10(g)(2) indicate, as suggested by HCFA's evidence and arguments, that "cooperation" and "open communication" operate only in one direction: from the facility to the ombudsman's office.[51] Therefore, even if

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[50](...continued)
Even if the merits of Mr. Niehoff's complaints against Ms. Meyers were material to the regulatory elements of 42 C.F.R. § 483.10(g)(2) (they are not material), the evidence presented by HCFA is inadequate to support its conclusion that those complaints were non-meritorious. As I found previously, the two nursing home administrators who complimented Ms. Meyers' work wrote their letters at her request. HCFA's surveyors never interviewed either Mr. Niehoff or Mr. Litwinovich to ascertain the factual bases of their respective opinions concerning Ms. Meyers. No resident was interviewed regarding his or her interaction with Ms. Meyers. Nor did the surveyors interview any neutral observer of any relevant event. The surveyors solicited information from only Ms. Meyers, whom they knew was being accused of unprofessional conduct by Mr. Niehoff.

[51] In earlier sections, I have discussed the failure of HCFA's surveyors to review Mr. Litwinovich's response letter dated November 15, 1995, HCFA's failure to properly interpret the contents of said letter from Mr. Litwinovich and HCFA's reliance upon the information contained in Mr. Niehoff's October 31, 1995 letter as proof of Gold Country's refusal to cooperate. These actions by HCFA indicate that it views the concept of "cooperation" as extending only from the facility to the ombudsman program, and not vice versa.

This view is also mirrored in the "Directed Plan of
(continued...)

"open communication" and "cooperation" could be inferred from 42 C.F.R. § 483.10(g)(2), these requirements cannot be interpreted as HCFA has done here.

E. In submitting Mr. Niehoff's October 31, 1995 letter as evidence that Gold Country was out of compliance because it refused to accede to the ombudsman's request to mail out certain materials for her, HCFA has improperly interpreted the requirements of 42 C.F.R. § 483.10(g)(2).

On the basis of the evidence introduced by HCFA, I conclude also that HCFA erred in finding Gold Country out of compliance with 42 C.F.R. § 483.10(g)(2) because Mr. Niehoff's October 31 letter indicated that the facility would not mail certain materials, such as the minutes or agenda of Family Council meetings, at the ombudsman's request.

As shown by HCFA's evidence, the finding of noncompliance was based in large part upon its surveyors' interpretation of Mr. Niehoff's statements in his October 31 letter concerning Gold Country's reluctant mailing of the Family Council agenda and minutes which the facility considered "inflammatory and confrontational" and that the facility has "withdraw[n] its offer to disseminate Ombudsman material. . . ."[52] HCFA Ex. 2 at 2. These statements were considered by the HCFA surveyors in concluding that "residents and their families" have been

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[51](...continued)
Correction, Tag F-168" imposed by HCFA. That plan states that HCFA's determination of Gold Country's ongoing compliance with the plan's requirements for re-establishing "open communication" and "cooperation" with the ombudsman program will be "based on communication between the ombudsman program and HCFA." HCFA Ex. 10 at 5. HCFA does not indicate it will be considering Gold Country's views as to how the ombudsman program will be "cooperating" or "openly communicating" with Gold Country.

[52] I do not address Mr. Niehoff's additional representation in the same sentence that Gold Country "will not provide mailing addresses, as this information is confidential." HCFA Ex. 2 at 2. HCFA has not contended that the information is nonconfidential, or that Gold Country should have made available the addresses of families in order for the Ombudsman's office to do its own mailings.

denied access to information from the Ombudsman's office. HCFA Ex. 9 at 1. Therefore, the resultant Directed Plan of Correction imposed by HCFA requires Gold Country to "resume mailing Ombudsman materials to families along with billing or other facility mailings," as well as to "ensure that complete and accurate minutes of family and resident council meetings are taken." HCFA Ex. 10 at 5. As I explained previously, I consider the Directed Plan of Correction to reflect HCFA's legal interpretation of what compliance with 42 C.F.R. § 483.10(g)(2) requires.[53]

The regulation relied upon by HCFA, 42 C.F.R. § 483.10(g)(2), guarantees communication[54] between the ombudsman and Gold Country's residents. Under this regulation, Gold Country's residents are entitled to receive anything sent to them by the ombudsman or her office, and the residents are entitled to contact the ombudsman or her office to request any information. The ombudsman and her office are at liberty to distribute or mail any document of their choice to Gold Country's residents.

Within 42 C.F.R. § 483.10(g)(2), there exists no requirement for the facility to mail or distribute ombudsman materials to its residents. The evidence from HCFA does not suggest the existence of any circumstances which have rendered the ombudsman and her office unable to mail the documents of their choice to any resident of Gold Country. Nor does any evidence from HCFA suggest that residents of Gold Country would be unable to obtain information directly from the ombudsman or her office.[55]

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[53] HCFA also submitted an exhibit in which Gold Country disputed HCFA's legal authority to require Gold Country to distribute Family Council minutes or agenda via the mail the facility sends out each month. HCFA Ex. 11 at 3.

[54] In this decision, I use "communication" as an abbreviation to denote the residents' right to receive information from the ombudsman or the ombudsman's office, as well as the residents' opportunity to contact the ombudsman and the ombudsman's office, as guaranteed by 42 C.F.R. § 483.10(g)(2).

[55] As I note also elsewhere in this Decision, HCFA has not alleged nor found that Gold Country has failed in its obligations to provide the residents with requisite notice of their rights (see 42 C.F.R. § 483.10(b)(1)), to post for its residents' information the names, addresses,

(continued...)

For obvious reasons, the fact that HCFA's surveyors did not view the Family Council minutes as inflammatory or confrontational (HCFA Ex. 9 at 2) does not establish a valid nexus between Gold Country's refusal to mail those Family Council minutes and HCFA's allegation that the residents' right to "[r]eceive information from agencies acting as client advocates, and be afforded the opportunity to contact these agencies" has been violated. 42 C.F.R. § 483.10(g)(2). Therefore, HCFA's evidence indicates that it has unlawfully and inappropriately inserted into 42 C.F.R. § 483.10(g)(2) a requirement that the facility distribute or mail at the facility's expense the materials designated by the ombudsman.

Given that 42 C.F.R. § 483.10(g)(2) pertains to the residents' right to communicate with and have access to client advocacy agencies, it is significant also that HCFA has introduced no evidence showing that any resident was receiving Gold Country's billing statements, which were supposed to contain also the ombudsman's materials such as the Family Council minutes and agenda. See HCFA Ex. 10 at 5. In fact, HCFA's evidence showing that Gold Country was using the mail to send out billing statements (with enclosures) implied that those individuals residing at the facility were not the recipients of such mailed materials. Therefore, HCFA's evidence does not even show that Gold Country's unwillingness or refusal to mail out materials designated by the ombudsman has any bearing on the residents' exercise of their rights under 42 C.F.R. § 483.10(g)(2).

F. HCFA's evidence shows that it has misinterpreted 42 C.F.R. § 483.10(g)(2) by referring to the residents' family members and the transmittal of information concerning the Family Council, when this regulation does not pertain to the rights of a Family Council and HCFA has made no showing that any family member in this case has acquired the legal standing to exercise a resident's rights under 42 C.F.R. § 483.10(g)(2).

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[55](...continued)
and telephone numbers of all pertinent client advocacy agencies (see 42 C.F.R. § 483.10(b)(7)(iii)), to allow its residents privacy in their written and telephonic communications with any entity of their choice (see 42 C.F.R. § 483.10(i), (k)), and to allow an ombudsman to have immediate access to the facility's residents (see 42 C.F.R. § 483.10(j)(iv)).

I re-emphasize that 42 C.F.R. § 483.10(g)(2) states on its face that it is a facility's residents who have the right to receive information from the ombudsman.[56] Yet, HCFA has consistently included references to the residents' families as if they have the same rights as residents under 42 C.F.R. § 483.10(g)(2).

For example, because Gold Country was withdrawing its offer to disseminate "Ombudsman material" and would not provide confidential mailing addresses to the ombudsman's office (HCFA Ex. 2 at 2), HCFA's noncompliance determination contains the rationale that "residents and their families" have been denied access to information from the Ombudsman's office. HCFA Ex. 9 at 1 (emphasis added). Additionally, because Gold Country characterized the September 1995 Family Council meeting minutes as "inflammatory and confrontational" (HCFA Ex. 2 at 2), HCFA is requiring Gold Country to "ensure that complete and accurate minutes of family and resident council meetings are taken"[57] in order to come into compliance with 42 C.F.R. § 483.10(g)(2). HCFA Ex. 10 at 5 (emphasis added).

Families do not have the same rights as residents under 42 C.F.R. § 483.10(g)(2). The regulation provides specifically in relevant parts:

> (3) In the case of a resident adjudged incompetent under the laws of a State by a court of competent jurisdiction, the rights of the resident are exercised by the person appointed under State law to act on the resident's behalf.
>
> (4) In the case of a resident who has not been adjudged incompetent by the State court, any legal-surrogate designated in accordance with State law may exercise the resident's rights to the extent provided by State law.

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[56] The other portion of this regulation, that the residents "be afforded the opportunity to contact these agencies," is not relevant to my discussions in this section.

[57] The evidence does not establish the existence of a resident council at Gold Country.

42 C.F.R. § 483.10(a)(3), (4) (emphasis added). Similarly, a different regulation provides the residents with the right to form "resident groups" in the facility, while their families also have the right to meet with other families in the facility. 42 C.F.R. § 483.15(c). As I note elsewhere in this Decision, HCFA has not alleged or found noncompliance pertaining to the residents' or their families' right to form groups, to meet, or to obtain the assistance of Gold Country's staff under 42 C.F.R. § 483.15(c).

The evidence presented by HCFA in this case does not establish that any of the resident's family members has acquired the right under State law to act on behalf of any resident living at Gold Country. Contrary to what is implied by the Directed Plan of Correction, 42 C.F.R. § 483.10(g)(2) does not require Gold Country to ensure the taking of accurate minutes at meetings where an ombudsman is in attendance. Additionally, as I noted above, there is no evidence that billing statements containing "ombudsman materials" or Family Council minutes were being mailed by Gold Country to residents of the facility. There is no evidence that any piece of information sent by the Ombudsman's office or the ombudsman to a resident had failed to reach that resident, or vice versa. There is also no evidence that Gold Country prevented the ombudsman or her office from mailing the materials of their choice to any resident of their choice. What HCFA did in this case was make a determination of noncompliance under 42 C.F.R. § 483.10(g)(2) based upon legally and factually unsupported intimations that the families of residents have the same rights as the residents of Gold Country and that, somehow, those rights extended to the families' receipt of the ombudsman's materials, such as the Family Council minutes sent in mailings paid for by Gold Country.

G. The information contained in Ms. Meyers' declaration is legally deficient and, even if considered in combination with other evidence also presented by HCFA, fails to provide valid support for HCFA's conclusions that Gold Country had deficiencies under 42 C.F.R. § 483.10(g)(2), or that the health or safety of Gold Country's residents were placed at more than minimal risk as a result.

1. The generalized nature of Ms. Meyers' statements

Even though HCFA had not listed Ms. Meyers as a potential witness when it thought it might have the opportunity to present in-person testimony, HCFA has filed with its

brief a declaration executed by Ms. Meyers in August of 1997.

Ms. Meyers' declaration contains a paragraph which sets forth her interpretation of Mr. Niehoff's letter to her superior.[58] In addition, her declaration contains only one paragraph referring to the events which allegedly took place during the relevant time period. In referring to those events, Ms. Meyers has provided only generalizations:

> [d]uring the summer of 1995 and continuing through at least November of that year, Gold Country resisted working cooperatively with the Ombudsman program. This resistance was manifested in several ways, most notably in attempts to restrict communications and minimize my presence in the facility. Staff of the facility had difficulty speaking to me directly and referred all my questions to the administration. Attempts were made by the Gold Country administration to undermine my

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[58] Ms. Meyers states in her declaration:

> I have reviewed the October 31, 1995 letter from William R. Niehoff to John Litwinovich, the head of the El Dorado County Department of Community Services. I understand that this letter has been designated as HCFA Exhibit 2 in these proceedings. When I first read this letter in November 1995 I interpreted it as another attempt to discredit me in my capacity as Ombudsman and as an expression of Gold Country's resolve not to cooperate with the work of my office. The attempt to rationalize Gold Country's noncooperation with the Ombudsman program on the basis of allegations that I was not performing the responsibilities of my office in a professional manner and that other nursing homes in Placerville lacked respect for my work were and are untrue, as evidenced, in part, by the contemporaneous correspondence from the administrators of those nursing homes, which have been designated herein as HCFA Exhibits 5 and 6.

HCFA Ex. 29 at 2-3, para. 4.

> authority and credibility with residents and their families through unfounded attacks on my competence and motivation. The facility administration took actions to disrupt and disband the regular Family Council meetings -- during which resident family members come together to exchange information and discuss matters of mutual interest and concern. These actions by Gold Country made it difficult for me to interact and communicate with residents of the facility and their family members.

HCFA Ex. 29 at 1-2, para. 3.

Ms. Meyers' assertions lack factual foundation. She has not adequately identified any event which can be objectively viewed as providing credible support for the conclusion that Gold Country had curtailed any right of communication under 42 C.F.R. § 483.10(g)(2). What Ms. Meyers has given are her summary impressions or opinions concerning events she does not describe in detail. As noted by Gold Country, general conclusions, allegations, and opinions do not prove the existence of any underlying facts. See P. Reply, at 5.

The absence of details is significant also because, as I discussed above, HCFA cannot reach a noncompliance determination based solely on the existence of isolated deficiencies which have caused no actual harm to any resident. Thus, generalized statements made by Ms. Meyers, who did not describe the degree, frequency, or specifics of any alleged action by Gold Country, do not help satisfy HCFA's obligation to prove that its noncompliance determination was made on the basis of identified deficiencies which were not isolated, and which posed more than minimal risk to the residents' health or safety. See 42 C.F.R. §§ 488.301, 488.26(c)(2).[59] Moreover, HCFA is seeking to support its surveyors' conclusion that Gold Country's deficiencies under 42 C.F.R. § 483.10(g)(2) constituted not only

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[59] 42 C.F.R. § 488.26(c)(2) states in relevant part:

> (2) The survey process uses resident outcomes as the primary means to establish the compliance status of facilities.

According to HCFA's evidence, there was no resident interviewed in this case.

noncompliance, but were properly assigned the "F" level on the scope and severity matrix "(i.e., no actual harm with potential for more than minimal widespread harm that is not immediate jeopardy)." HCFA Ex. 30 at 5. Therefore, absent the necessary factual foundation, Ms. Meyers' declaration does not establish the reasonableness of the conclusions she has expressed therein. For the same reason, her declaration fails to provide legally sufficient support for the noncompliance determination made by HCFA.

2. HCFA's misinterpretation of the regulatory requirements as also reflected in Ms. Meyers' declaration

i. Ms. Meyers' contention that Gold Country attempted to restrict her communications with unspecified persons

Some of Ms. Meyers' statements do not appear to correspond to any element of 42 C.F.R. § 483.10(g)(2). For example, Ms. Meyers referred to "attempts to restrict communications" without specifying with whom or what type of people she was endeavoring to communicate with at the times Gold Country made its "attempts to restrict communications." In fact, she went on to state that Gold Country's staff "had difficulty speaking to [her] directly" -- thereby suggesting a restriction of communication between her and Gold Country's staff.

If this was her meaning, then this allegation, even if assumed true, does not establish even a deficiency under 42 C.F.R. § 483.10(g)(2). The regulation relied upon by HCFA does not require the facility's staff to communicate directly with the ombudsman; nor does the regulation impose any duty on the facility to ensure unrestricted or direct communication between its staff and the ombudsman. The regulation guarantees only that the ombudsman and the residents are able to communicate between themselves when they wish to do so.

ii. Ms. Meyers' contention that Gold Country had attempted to disrupt and disband Family Council meetings and thereby made difficult her ability to communicate with residents and their family members

I have similar problems with Ms. Meyers' assertion that Gold Country had attempted to disrupt and disband the Family Council meetings and thereby made it difficult for her "to interact and communicate with residents of the facility and their family members." HCFA Ex. 29 at 2.

Even if I were to overlook the unsupported generality of the foregoing assertion and conclusion by Ms. Meyers, the evidence submitted by HCFA is still not sufficient for establishing that Gold Country was out of compliance with the requirements of 42 C.F.R. § 483.10(g)(2). Neither Ms. Meyers' declaration nor other evidence submitted by HCFA establishes that 42 C.F.R. § 483.10(g)(2) protects the Family Council meetings which Gold Country had allegedly attempted to disrupt or disband. Neither Ms. Meyers' declaration nor other evidence introduced by HCFA establishes that any of Gold Country's residents was using Family Council meetings to "[r]eceive information from agencies acting as client advocates" or to "contact these agencies." 42 C.F.R. § 483.10(g)(2).

The evidence introduced by HCFA does not establish that Gold Country's residents attended these Family Council meetings. For example, Mr. Niehoff's October 31 letter asserted only that Ms. Meyers "tends to `stir up the pot' with the Family Council," as when "only three or four family representatives show up for these meetings. . . ." HCFA Ex. 2 at 1 (emphasis added). Similarly, Mr. Litwinovich's November 15, 1995 response letter indicated only that Ms. Meyers was "encouraging involvement and dialogue among family members and active participation in Family Council meetings . . . ." HCFA Ex. 8 at 1 (emphasis added).[60] The family members' attendance at

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[60] I have noted the following sentence in Ms. Meyers' affidavit:

> [t]he facility administration took actions to disrupt and disband the regular Family Council meetings -- during which resident family members come together to exchange information and discuss matters of mutual interest and concern.

HCFA Ex. 29 at 2 (emphasis added). HCFA has not contended that "resident family members" means residents and family members, as opposed to residents' family members, for example. It is not possible to determine the meaning of this phrase, as composed by Ms. Meyers.

(continued...)

Family Council meetings cannot be construed as the residents' attendance because, as I noted earlier, there is no evidence that any family member in this case has been delegated the legal authority pursuant to 42 C.F.R. § 483.10(a)(3) and (4) to exercise the residents' rights under 42 C.F.R. § 483.10(g)(2).

Additionally, if HCFA had found true Ms. Meyers' allegation that Gold Country has disrupted and attempted to disband the Family Council meetings, HCFA should have determined Gold Country to be at least deficient under the requirements of 42 C.F.R. § 483.15(c). This regulation entitles the families of residents to meet in the facility and requires the facility to provide the family group with private space for its meetings. 42 C.F.R. § 483.15(c)(2), (3). In fact, HCFA has made no finding of deficiency against Gold Country under any of the following provisions of 42 C.F.R. § 483.15(c):

> -- A facility must care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life.
>
> . . .
>
> (c) Participation in resident and family groups.
>
> (1) A resident has the right to organize and participate in resident groups in the facility;
>
> (2) A resident's family has the right to meet in the facility with the families of other residents in the facility;

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[60](...continued)
However, even if I considered Ms. Meyers to have meant to say in the above-quoted sentence that Gold Country was attempting to disrupt and disband Family Council meetings, which were being used by residents and their family members to "come together to exchange information and discuss matters of mutual interest and concern" (HCFA Ex. 29 at 2), the regulation at issue, 42 C.F.R. § 483.10(g)(2), does not provide a right of communication between residents and their families and does not concern the residents' and family members' right to hold meetings between themselves.

> (3) The facility must provide a resident or family group, if one exists, with private space;
>
> (4) Staff or visitors may attend meetings at the group's invitation;
>
> (5) The facility must provide a designated staff person responsible for providing assistance and responding to written requests that result from group meetings;
>
> (6) When a resident or family group exists, the facility must listen to the views and act upon the grievances and recommendations of residents and families concerning proposed policy and operational decisions affecting resident care and life in the facility.

42 C.F.R. § 483.15(c).

HCFA has not made any finding against Gold Country under 42 C.F.R. § 483.15(c). See HCFA Ex. 9. Instead, HCFA's arguments and evidence, such as Ms. Meyers' declaration, create the unfounded impression that the Family Council has something to do with the residents' rights under 42 C.F.R. § 483.10(g)(2), and therefore unspecified efforts by Gold Country to interfere with Family Council meetings constitute proof that Gold Country has failed to comply with 42 C.F.R. § 483.10(g)(2)'s requirements concerning the rights of residents to contact and receive information from the ombudsman or her office.

> iii. Ms. Meyers' contention that Gold Country had made attempts to undermine her authority and credibility with the residents and their families through unfounded attacks on her competence and motivation, and thereby made difficult her ability to communicate with residents and their family members

Ms. Meyers appears to base her conclusion that "[t]hese actions by Gold Country made it difficult for me to interact and communicate with residents of the facility and their family members" also in part on her assertion that "[a]ttempts were made by the Gold Country administration to undermine my authority and credibility

with residents and their families through unfounded attacks on my competence and motivation." HCFA Ex. 29 at 2. Her declaration does not identify these alleged attempts by Gold Country. Therefore, for the reasons already discussed above, I cannot accept her generalized, unsupported assertion as true. Such an assertion does not help establish the validity of her conclusion that Gold Country had made it difficult for her to communicate with residents and their family members.[61]

The only relevant evidence provided by HCFA concerning any alleged attempt by Gold Country to undermine her authority and credibility through "unfounded attacks" on her competency and motivation appears to be the contents of Mr. Niehoff's October 31 letter to Ms. Meyers' superior. However, this letter was not addressed to any resident or family member; nor is there any indication that Gold Country had shared the contents of said letter criticizing Ms. Meyers' professionalism with any resident or family member. Instead, HCFA's evidence shows only that Ms. Meyers provided a copy of Mr. Niehoff's letter to HCFA's surveyors, who then summarized its contents (including the criticisms of Ms. Meyers' professionalism and motivation) in their survey report/statement of deficiencies. As a consequence of the actions Ms. Meyers and HCFA's surveyors took during the survey of November 17, 1995, Gold Country's residents were entitled to read of Gold Country's criticisms of Ms. Meyers' conduct and professionalism if they exercised their right to review survey results under 42 C.F.R. § 483.10(g).

For these reasons, Ms. Meyers' declaration, even when considered in combination with the other evidence introduced by HCFA, is not sufficient for showing that Gold Country had made Ms. Meyers' ability to interact and communicate with residents difficult through the alleged use of unfounded attacks on her competency and motivation during the time preceding HCFA's November 17, 1995 survey.

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[61] I will not summarize again my previous conclusions that, given the state of HCFA's evidence, Ms. Meyers' communications with family members are immaterial.

H. HCFA's evidence on Gold Country's failure to report its residents' allegations to the ombudsman, even when considered together with other evidence also introduced by HCFA, is not adequate for establishing that Gold Country had a deficiency under 42 C.F.R. § 483.10(g)(2).

The declaration of HCFA surveyor Kenneth Simpson, which was submitted by HCFA in support of its determination at issue, contains the following relevant information:

> [d]uring her interview, Ms. Meyers provided the survey team with a list of six incidents involving Gold Country residents that the facility had reported to the Ombudsman's office for her involvement during the period from June 29, 1995 through September 13, 1995. [See HCFA Ex. 23.] A review by the survey team of the facility's grievance, abuse and change of condition logs found that a number of complaints had been entered in these logs during the period October 1, 1995 to November 8, 1995. When we brought these log entries to Ms. Meyers attention, she observed that none of these allegations had been reported to her office. Gold Country's failure to notify the Ombudsman's office of these incidents indicated to me that Gold Country was interfering with the ability of its residents to receive critical information and assistance from the Ombudsman's office and to contact the Ombudsman.

HCFA Ex. 30 at 3-4.

HCFA's use of the resident complaint logs was further explained as follows by Mr. Simpson:

> [i]n particular, we [the surveyors] were concerned that Gold Country's expressions of hostility toward the Ombudsman and noncooperation with the Ombudsman's office (as evidenced by the failure to report resident allegations of abuse, changes in resident condition and resident grievances) limited (or certainly had the potential to limit) the residents' access to the Ombudsman and, therefore, their ability to contact and receive information from this official advocacy agency. Accordingly, the survey team cited a violation of 42 C.F.R.

> § 483.10(g)(2) on the Statement of Deficiencies we prepared following completion of the survey and assessed this deficiency in the "F" category on the scope and severity matrix (i.e., no actual harm with potential for more than minimal widespread harm that is not immediate jeopardy).

HCFA Ex. 30 at 5.

The foregoing rationale submitted by HCFA is another example of HCFA's having improperly reached the issue of whether residents have been placed at risk, when there is not sufficient evidence establishing that any mandate or prohibition of 42 C.F.R. § 483.10(g)(2) has been violated by Gold Country. As I discussed previously, unless the evidence first establishes the existence of a deficiency under the specified regulation, it is not appropriate to consider whether or to what extent a facility's residents have been placed at risk. The absence or presence of a deficiency must be determined with reference to what is specified by the regulation cited by HCFA, as applied to the facts introduced by HCFA.

The regulation codified at 42 C.F.R. § 483.10(g)(2) does not require a facility to report its residents' allegations to the ombudsman. Nor does this regulation state that an ombudsman has a right to become involved in all complaints filed by residents with the facility itself. This regulation relates only to the residents' right to contact and receive information from the ombudsman's office. It would follow that the residents should have a right of choice under 42 C.F.R. § 483.10(g)(2) even when they have complaints to voice concerning the facility. Additionally, the regulations do not compel residents to contact or receive assistance from any ombudsman if they do not wish to do so.[62]

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[62] This conclusion is also consistent with and supported by a separate regulation which specifically requires facilities to provide its residents with a "statement that the resident may file a complaint with the State survey and certification agency concerning resident abuse, neglect, misappropriation of resident property in the facility . . . ." 42 C.F.R. § 483.10(b)(7)(iv) (emphasis added). HCFA has not alleged or found any deficiency under 42 C.F.R. § 483.10(b)(7)(iv) in this case.

(continued...)

However, if they wish to contact or receive information from an ombudsman concerning any complaint they have, they have the right to do so under 42 C.F.R. § 483.10(g)(2). Nothing in 42 C.F.R. § 483.10(g)(2) suggests the existence of a legal presumption that each resident who files a complaint with the facility would want to also contact, receive information from, or obtain the assistance of an ombudsman with respect to that complaint.

In order to support its conclusion that Gold Country had wrongfully withheld its residents' complaints from the ombudsman's office, HCFA has identified in its brief various state and federal statutes concerning the type of work an ombudsman's office is authorized to perform. HCFA Br., 5-6. Without doubt, those state and federal statutes provide ombudsmen with the authority to receive, investigate, and resolve residents' complaints. But none of the legal citations provided by HCFA indicates that a facility must turn over all of the complaints it has received from residents to an ombudsman for investigation and resolution. None of the legal citations provided by HCFA indicates that the facility is under an obligation to provide the ombudsman with a copy of, or information concerning, all complaints it has received from its residents. None of the legal authorities relied upon by HCFA shows that all residents must request or receive the assistance of an ombudsman to resolve all complaints they may have concerning the care and services they are receiving from a facility.

Additionally, HCFA has not alleged that Gold Country has deviated from its obligation to:

> -- provide its residents with a written description of their legal rights and services by posting the "names, addresses, and telephone numbers of all pertinent State client advocacy groups such as the State survey and certification agency, the State licensure office, the State ombudsman program, the protection and advocacy

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[62](...continued)
Additionally, there is no regulation or statute which prohibits a resident from filing a complaint only with the facility itself. The regulations require only that the facility undertake "[p]rompt efforts . . . to resolve grievances the resident may have . . . ." 42 C.F.R. § 483.10(f)(2).

network, and the Medicaid fraud control unit . . . ." (42 C.F.R. § 483.10(b)(7)(iii));[63]

-- notify its residents of their legal rights and services by providing them with a "statement that the resident may file a complaint with the State survey and certification agency concerning resident abuse, neglect, misappropriation of resident property in the facility, and noncompliance with the advance directives requirements" (42 C.F.R. § 483.10(b)(7)(iv));

-- allow its residents to "[v]oice grievances without discrimination or reprisal." 42 C.F.R. § 483.10(f)(1);

-- undertake "[p]rompt efforts . . . to resolve grievances the residents may have . . . ." (42 C.F.R. § 483.10(f)(2));

-- allow its residents their right to privacy in their written communications (42 C.F.R. § 483.10(i));

-- provide its residents with reasonable access to "the use of a telephone where calls can be made without being overheard" (42 C.F.R. § 483.10(k));

-- allow "immediate access" to its residents by any State long term care ombudsman (42 C.F.R. § 483.10(j)(iv)).

In the foregoing context, HCFA's proof that resident complaints appeared in logs kept by Gold Country from October 1 to November 8, 1995 (but these complaints were not known to the ombudsman until HCFA surveyors disclosed

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[63] HCFA evidence shows also that, under California law, Gold Country must post similar information. HCFA Ex. 26. The information posted pursuant to California law must include not only the phone number of the area ombudsman office, but also the number of the state-wide "CRISISline," which is available 24 hours a day, seven days a week, to receive complaints from residents. Id. There is no indication from HCFA's evidence that the "CRISISline" number was not posted by Gold Country as required.

them to her during the November 17, 1995 survey) establishes only that Gold Country has received those complaints from its residents. The residents were entitled to submit their complaints to Gold Country under 42 C.F.R. § 483.10(f)(1). No evidence from HCFA shows that any of those residents had asked Gold Country to provide copies of their complaints to the ombudsman, or to report the existence of their complaints to the ombudsman. The fact that Ms. Meyers was unaware of those complaints noted in Gold Country's logs for October 1 - November 8, 1995, indicates also that those residents have never asked Ms. Meyers or her office to become involved in their complaints.

The absence of such evidence renders invalid HCFA's reasoning that "Gold Country's failure to notify the Ombudsman's office of these incidents indicated . . . that Gold Country was interfering with the ability of its residents to receive critical information and assistance from the Ombudsman's office and to contact the Ombudsman." HCFA Ex. 30 at 4. The absence of such evidence also renders invalid HCFA's conclusion that Gold Country's alleged "expressions of hostility . . . and noncooperation with the Ombudsman's office" constituted noncompliance with 42 C.F.R. § 483.10(g)(2), because Gold Country's "failure to report resident allegations . . . limited (or certainly had the potential to limit) the residents' access to the Ombudsman and, therefore, their ability to contact and receive information from this official advocacy agency." HCFA Ex. 30 at 5. The evidence submitted by HCFA is not sufficient for establishing that Gold Country had a legal obligation to convey the residents' complaints to the ombudsman. Therefore, Gold Country's withholding of such information from the ombudsman's office under the facts of this case as presented by HCFA cannot be viewed as wrongful or as material proof that Gold Country had deviated from the requirements of 42 C.F.R. § 483.10(g)(2) to allow its residents to have access to, and to receive information from, the ombudsman's office.

CONCLUSION

For all of the foregoing reasons, I set aside HCFA's finding that Gold Country was out of compliance with 42 C.F.R. § 483.10(g)(2). All proceedings before me have been concluded. There remains no outstanding motions or issues for disposition by me.

/s/

Mimi Hwang Leahy

Administrative Law Judge