DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	)	
	)	
Northfield Place,	)	DATE: September 23, 1998
	)	
Petitioner,	)	
	)	
v.	)	Docket No. C-98-052
	)	Decision No. CR549
Health Care Financing Administration.	)	
	)	

DECISION

I am authorized to dismiss a request for hearing which is not timely filed and for which the filing period has not been extended by me. 42 C.F.R. § 498.70(c). There is no dispute that Petitioner has failed to file a timely request for hearing in this case. Petitioner also admits that it has not yet filed any request for hearing, as that document is defined by regulation. For the reasons which follow, I have decided to dismiss this case pursuant to 42 C.F.R. § 498.70(c) by granting the motion to dismiss submitted by the Health Care Financing Administration (HCFA) and by denying Petitioner's request that I extend its deadline for requesting a hearing by finding that the delay was due to good cause.

I. RULINGS ON THE ADMISSION AND EXCLUSION OF DOCUMENTS

The parties have submitted the following documents for my review:

-- Petitioner's letter dated November 13, 1997, addressed to the Departmental Appeals Board (DAB) and HCFA;

-- HCFA's motion to dismiss the hearing request under 42 C.F.R. § 498.70(c)(HCFA Mot. for Dism.);

-- HCFA's "Memorandum in Support of the Motion . . . to Dismiss . . . under 42 C.F.R. § 498.70(c)" (HCFA Br. for Dism.);

-- "Petitioner's Motion to Extend Time . . . ." (P. Mot. for Exten.);

-- "Petitioner's Brief in Support of Motion to Extend Time . . . ." (P. Br. for Exten.);

-- "Petitioner's Response to [HCFA] Memorandum in Support of the Motion . . . to Dismiss . . . ." (P. Resp. Mem.);

-- HCFA's "Memorandum . . . in Response to Petitioner's Motion to Extend Time and In Support of the Motion to Dismiss . . . ." (HCFA Resp. Mem.);

-- "Petitioner's Sur-Reply Memorandum in Response to the Motion of Health Care Financing Administration to Dismiss. . . ." (P. Sur-Reply);

-- HCFA's "Reply . . . to Petitioner's May 12, 1998 Sur-Reply Memorandum" (HCFA Sur-Reply);

-- HCFA's Exhibits (HCFA Ex.) 1 through 6;

-- Petitioner's Exhibits (P. Ex.) 1 through 15;

-- the affidavit of John D. Stuber (Stuber Affidavit) submitted by Petitioner, to which document are attached Petitioner's "Exhibit A," "Exhibit B.1," "Exhibit B.2," "Exhibit C," and "Exhibit D."

With the exception of Petitioner's Exhibits 13 through 15, I have accepted the remainder of the above-described documents into the record.

Petitioner's Exhibit 15 is a duplicate of HCFA's Exhibit 4. HCFA filed its Exhibit 4 with its initial motion to dismiss. Consequently, there was no need for Petitioner to tender another copy of the same document with its sur-reply to HCFA's motion to dismiss.

I am excluding Petitioner's Exhibits 13 and 14 from the record because Petitioner has not established by affidavit or other evidence that those documents, issued by HCFA to two other facilities in May 1996, September 1997, and November 1997, were read or relied upon by anyone acting on Petitioner's behalf during the period of time relevant to this case. As I will explain below in greater detail, Petitioner is attempting to show that it had good cause for having failed to file any document concerning HCFA's July 2, 1997 determinations until November 13, 1997. Therefore, I will not admit Petitioner's Exhibits 13 and 14 merely because they show, on their face, that they were issued by HCFA. Additionally, I am excluding Petitioner's Exhibits 13 and 14 for containing information that is cumulative,[1] and because whatever probative value they might have is far outweighed by the confusion and unnecessary interpretational difficulties they are likely to generate in this case because they were issued to providers who are not before me, and the circumstances of their issuance cannot and should not be explored fully during these proceedings.

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[1] As previously indicated, I have received into the record Petitioner's Exhibits A, B-1, B-2, C, and D, which were also issued to other providers. I have admitted those exhibits because they were at least cited by John Stuber, the official responsible for making appeals decisions for Petitioner, in his affidavit explaining why nothing was filed until November 13, 1997.

II. UNDISPUTED FACTS AND LAW

HCFA filed its motion to dismiss pursuant to 42 C.F.R. § 498.70(c). HCFA's motion relies upon the following undisputed facts and law:

A. Petitioner is a long-term care facility participating in the Medicare and Medicaid programs. P. Br. for Exten., 2.

B. On March 21, 1997, a survey was conducted by the Michigan Department of Consumer and Industry Services (MDCIS), acting as agent for HCFA, to determine whether Petitioner was in compliance with the federal requirements for participation in the Medicare and Medicaid programs. HCFA Ex. 2.

C. As a result of the March 21, 1997 survey, MDCIS found that Petitioner was out of substantial compliance with federal participation requirements and recommended that HCFA impose certain enforcement remedies against Petitioner. HCFA Ex. 2.

D. On July 2, 1997, HCFA issued a letter titled "Notice of Imposition of Remedies" to Petitioner, which contained the following information concerning the March 21, 1997 survey results:

   i. that, in accordance with the information MDCIS had previously provided to Petitioner concerning the March 21, 1997 survey findings, a determination of noncompliance had been made on the basis of isolated deficiencies which have caused actual harm to Petitioner's residents;

   ii. that Petitioner had not yet established that it had attained substantial compliance with program requirements since the March 21, 1997 survey;

   iii. that HCFA had decided to impose the remedy of denial of payment for new Medicare and Medicaid admissions (DPNA), which would

commence on July 23, 1997, if Petitioner did not attain substantial compliance by that date;

iv. that HCFA had decided to impose a civil money penalty of $500 per day, which had commenced on March 21, 1997 and would continue to accrue at the same rate (unless the noncompliance worsened) until such time as Petitioner either achieved substantial compliance or until its participation in the Medicare and Medicaid programs was terminated;

v. that Petitioner's participation in the Medicare and Medicaid programs would be terminated on September 21, 1997, as required by sections 1819(h)(2)(C) and 1919(h)(3)(D) of the Social Security Act and 42 C.F.R. § 488.456(b), unless Petitioner attained substantial compliance by said date;

vi. that Petitioner could challenge HCFA's determinations before an administrative law judge of the Departmental Appeals Board (DAB) by filing a written request for hearing at one of the two specified locations within 60 days of its having received this notice letter;

vii. that a request for hearing should identify the specific issues and the findings of fact and conclusions of law with which Petitioner disagreed, as well as set forth the bases for contending that the findings and conclusions are incorrect;

viii. that the CMP would not be collected by HCFA until after it had stopped accruing and a final administrative decision upholding its imposition had been made, if a hearing should be requested;

ix. that Petitioner could waive its right to a hearing within 60 days from receipt of the

notice letter and thereby receive a reduction of 35 percent in the CMP amount.

HCFA Ex. 1.

E. HCFA's July 2, 1997 letter concerning the March 21, 1997 survey constituted a notice of initial determination which entitled Petitioner, as a provider of services under the Medicare and Medicaid programs, to exercise its hearing rights by filing a request for hearing. 42 C.F.R. §§ 498.3(b)(12), 498.5(b), 498.20(a), 498.40.

F. A request for hearing must be filed in writing within 60 days from an affected entity's receipt of HCFA's notice of an initial determination (42 C.F.R. § 498.40(a)(2)), unless that filing period is extended by an administrative law judge upon the request of a petitioner and for good cause shown. 42 C.F.R. § 498.40(a)(2) and (c)).

G. A request for hearing must identify the specific issues and the findings of fact and conclusions of law with which a petitioner disagrees, and must also specify the basis for contending that the findings and conclusions are incorrect. 42 C.F.R. § 498.40(b).

H. HCFA's notice of initial determination is presumed to have been received five days after the date shown on the notice, unless it is shown that the notice was received earlier or later. 42 C.F.R. § 498.22(b)(3) (as incorporated by 42 C.F.R. § 498.40(a)(2).

I. Using the presumed date of receipt provided by the regulations, Petitioner's 60-day period for filing a hearing request to challenge HCFA's July 2, 1997 determinations concerning the March 21, 1997 survey expired on September 5, 1997.

J. In its letter to the DAB and HCFA, dated November 13, 1997, Petitioner acknowledged that it has filed

no timely request for hearing concerning the March 21, 1997 survey.

K. Petitioner's November 13, 1997 letter does not contain the information which must be included in a request for hearing. See 42 C.F.R. § 498.40(b).

Petitioner seeks to establish the good cause necessary for obtaining an extension of time pursuant to 42 C.F.R. § 498.40(c). See ¶ II.F., above. Petitioner relies upon the following undisputed facts:

L. Petitioner received two notice letters dated July 2, 1997 from HCFA: one concerning the March 21, 1997 survey which Petitioner contests here, and another concerning certain 1996 surveys whose results do not form a part of this case. P. Br. for Exten., 3-4.

M. In its July 2, 1997 notice letter concerning the 1996 surveys of Petitioner, HCFA set out, inter alia, its determinations of: 1) when Petitioner was found to have resumed substantial compliance with program requirements; and 2) of the total amount of CMP HCFA considered owing during the period of alleged noncompliance. P. Ex. 6.

N. In its July 2, 1997 notice letter concerning the March 21, 1997 survey of Petitioner, HCFA made no determination that Petitioner had resumed compliance, nor did HCFA provide a total amount for the CMP HCFA intended to collect. P. Ex. 10.

O. Petitioner forwarded both of HCFA's notice letters dated July 2, 1997, to John D. Stuber, the Vice President Corporate Counsel of the company managing Petitioner, for his review and decision on whether and when to file a request for hearing before an administrative law judge. P. Br. for Exten., 4; Stuber Affidavit, ¶¶ 5 - 7.

P. Mr. Stuber's official responsibilities included keeping current on statutes and regulations that affect long-term care facilities participating in

the Medicare and Medicaid programs. Stuber Affidavit, ¶ 5.

Q. Mr. Stuber's official responsibilities also included receiving from facilities owned or managed by his employer all notices or revised notices of imposition of remedies issued to those facilities by HCFA. Stuber Affidavit, ¶ 7.

R. Within 60 days of Petitioner's receipt of the July 2, 1997 letter concerning the 1996 surveys, Mr. Stuber filed a request for hearing which resulted in another case before me, separately docketed as Northfield Place v. HCFA, Docket No. C-97-558.

S. Mr. Stuber has reviewed at least five letters issued by HCFA during mid-1996 to another facility also managed by Mr. Stuber's employer, which concerned HCFA's determination to impose a CMP against that other facility. Stuber Affidavit, ¶ 13; P. Ex. A, B.1, B.2, C, and D.

T. Prior to issuing its July 2, 1997 notice to Petitioner, HCFA did not send any letter informing Petitioner that a CMP might be imposed due to the findings of noncompliance from the March 21, 1997 survey.

U. When Petitioner sent its letter dated November 13, 1997, in an effort to request a hearing concerning HCFA's July 2, 1997 determination to impose a CMP for the March 21, 1997 survey findings, HCFA had not yet issued another letter stating the specific date on which the CMP had ended or the total amount Petitioner should pay.

V. HCFA's July 2, 1997 notice letter imposing the CMP for the March 21, 1997 survey results stated that another survey might be conducted pursuant to Petitioner's filing of an allegation of compliance and a plan of correction.

W. Whenever HCFA decides to impose a CMP against a long-term care facility participating in the Medicare and Medicaid programs, such a facility is entitled to waive its right to a hearing in writing within 60 days of HCFA's notice letter and thereby receive a reduction of the CMP amount by 35%. 42 C.F.R. § 488.436.

X. In this case, HCFA did not send a letter containing its calculation of the total CMP amount until December 3, 1997. HCFA Ex. 4.

Relevant also to Petitioner's motion for an extension of time is the fact that its letter dated November 13, 1997, requested that I extend the time for filing a request for hearing only until November 13, 1997, so that very same letter could be used as its request for hearing to challenge the results of the March 21, 1997 survey.[2] Thereafter, Petitioner reiterated the same request in two additional filings. P. Mot. for Exten., 3; P. Br. for Exten., 13. However, after it reviewed HCFA's memorandum in support of the motion to dismiss, Petitioner amended its prayer for relief by requesting that I "order an extension of ten (10) days from the date of this order for Petitioner to file its request for hearing . . . ." P. Resp. Mem., 9. Petitioner further represented that "[s]uch a request for a hearing will contain information specified by 42 C.F.R. § 498.40(b)." P. Resp. Mem., 9. For these reasons, I adopt also the following conclusions as undisputed facts:

Y. Petitioner acknowledges that its November 13, 1997 letter to the DAB and HCFA does not constitute a request for hearing within the meaning of 42 C.F.R. § 498.40(b).

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[2] Petitioner's letter of November 13, 1997 stated, "Therefore, we respectfully request that the decisions of noncompliance in the 1997 survey process which led to the civil money penalty (which still has not been computed) be appealed at this time."

Z. Aside from Petitioner's letter dated November 13, 1997, there is no other document of record which is being used by Petitioner as a request for hearing to contest matters stemming from or relating to the March 21, 1997 survey.

III. ISSUE

The issue before me is whether Petitioner, after having received HCFA's notice letter dated July 2, 1997 concerning the consequences of a survey conducted on March 21, 1997,[3] should now be granted an extension of time until some date in the future to draft and submit a request for hearing challenging the July 2, 1997 determinations issued by HCFA. Petitioner acknowledges that it must show "good cause" to obtain the extension of time. See 42 C.F.R. § 498.40(c). According to Petitioner, "The facts in this case establish that circumstances beyond Northfield Place's ability to control prevented it from making a timely hearing request." P. Br. for Exten., 12. Its arguments are based primarily on its alleged reliance upon certain practices and procedures it attributes to HCFA, because HCFA apparently allowed another facility to file a request for hearing timely after that facility received multiple CMP notices issued by HCFA during 1996.

HCFA disagrees with Petitioner's interpretation of the facts and Petitioner's arguments concerning the existence of "good cause" for extending the hearing request period.

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[3] Due to the arguments interposed by Petitioner, I will find it necessary to discuss below another notice letter also issued by HCFA on July 2, 1997, concerning other surveys conducted during 1996, which underlie a separate case before me styled as Northfield Place v. HCFA, Docket No. C-97-558. However, unless I specify otherwise, all my references to a HCFA notice letter dated July 2, 1997, will relate to the notice letter concerning the March 21, 1997 survey, which has resulted in the pending motions in this case.

IV. RESOLUTION OF DISPUTES RELATING TO PETITIONER'S ATTEMPT TO ESTABLISH "GOOD CAUSE" ON THE BASIS OF THOSE PRACTICES OR PROCEDURES IT HAS ATTRIBUTED TO HCFA

Petitioner asks me to find that "HCFA's course of dealing, which is beyond Northfield Place's ability to control, prevented it from making a timely hearing request." P. Sur-Reply, 3.

According to Petitioner, it missed the deadline for requesting a hearing because it expected HCFA to continue an alleged previous practice of sending facilities multiple notice letters including hearing rights. P. Br. for Exten., 5, 12; Stuber Affidavit, ¶ 19. Mr. Stuber represented that, in reliance upon his perceptions of HCFA's policy or practice for 1996, he believed that HCFA would issue a second letter after the completion of the "1997 survey cycle,"[4] and that such a second letter "would trigger consideration . . . of either waiving the hearing and taking a 35% reduction in the amount of the CMP or filing a request for hearing." Stuber Affidavit, ¶¶ 16 and 17. Instead, in this case, HCFA issued to Petitioner only a single notice letter which set forth Petitioner's right to request a hearing without identifying the total CMP amount HCFA would seek to collect should Petitioner exercise its hearing rights. See ¶ II.N., above; Stuber Affidavit, ¶¶ 16 - 19. Petitioner contends that HCFA should have distributed a booklet of tips on "What's new for 1997?" before it allegedly changed policies and issued the July 2, 1997 notice of initial determination that, in Petitioner's view, limited Petitioner's time period for requesting a hearing. See P. Resp. Mem., 5.

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[4] As I noted in ¶ II.V., above, HCFA's July 2, 1997 notice letter indicated that, if Petitioner chose to submit a credible allegation of compliance and a plan to correct the deficiencies found during the March 21, 1997 survey, then another survey might be conducted to verify Petitioner's compliance with program requirements.

I agree with HCFA's position that Petitioner could have filed a request for hearing timely if it had simply followed the instructions correctly, as explicitly provided for in HCFA's notice of initial determination dated July 2, 1997. See, e.g., HCFA Br. for Dism., 2. However, having either overlooked or ignored the explicit instructions contained in HCFA's July 2, 1997 notice until November 13, 1997, Petitioner has attempted to create confusion, in disregard of the regulations its counsel claims familiarity with, by positing incorrect and unsupported conclusions concerning the alleged changes HCFA has made in its notice issuance practices of 1996. I do not find Petitioner's contentions to be credible. I further find that these contentions lack adequate legal and factual support. Therefore, to resolve the disputes created by Petitioner's attribution of certain "changes" to HCFA's policies or practices, I am issuing the following Findings of Fact and Conclusions of Law (FFCLs), which will be explained in the ensuing subsections of this Decision:

1. Petitioner has overlooked or ignored the notice of hearing rights HCFA provided in its July 2, 1997 notice letter.

2. Mr. Stuber knew or should have known from his knowledge of the relevant regulations that a hearing request must be filed within 60 days of Petitioner's receipt of the July 2, 1997 notice letter, which imposed the CMP as well as the DPNA and termination remedies against Petitioner on the basis of the March 21, 1997 survey findings.

3. The evidence of record fails to prove the existence of the policy or practice Petitioner attributes to HCFA for 1996.

4. Petitioner's description of the policy or practice it attributes to HCFA for 1996 and 1997 is misleading and incorrect as a matter of law.

5. Petitioner's evidence shows that HCFA provided different information in different notices depending

on the facts of each situation and consistent with the applicable regulations.

6. Petitioner's evidence does not establish that HCFA's policy or practice for issuing notices during 1997 was at variance with, or changed from, the policy or practice used during 1996 pursuant to the regulations in effect during both those years.

7. HCFA's July 2, 1997 notice letter concerning the consequences of the March 21, 1997 survey contains all of the information required by 42 C.F.R. § 488.434(a).

8. HCFA's December 3, 1997 notice letter was sent in accordance with 42 C.F.R. § 488.440(d) and contains all of the information required by said regulation.

9. The evidence does not adequately support or render credible Petitioner's contention that it missed the deadline for filing a request for hearing in this case due to reasonable reliance upon the actions it expected HCFA to take.

A. Petitioner's disregard of the instructions provided by HCFA's July 2, 1997 notice letter and the relevant regulations concerning the right to request a hearing

HCFA's July 2, 1997 letter stated very plainly that it was a "Notice of imposition of remedies." The letter explained that the remedies were being imposed because Petitioner had been found out of compliance with program requirements during the survey of March 21, 1997. In addition to notifying Petitioner of its decision to impose the termination and DPNA remedies for effectuation at a later date, HCFA stated also in said letter that the CMP remedy it had decided to impose had already become effective on March 21, 1997. Accordingly, HCFA's July 2, 1997 letter informed Petitioner of its right to file a request for hearing within 60 days of its receiving that letter. HCFA's notice letter satisfied the relevant regulatory requirements. See 42 C.F.R. §§ 488.434(a), 498.3(b)(12) and (13), 498.20.

Petitioner's evidence shows that, when Petitioner received HCFA's July 2, 1996 notice letter, Mr. Stuber was an attorney working for Petitioner's management company as its chief in-house counsel with responsibilities for keeping current on relevant statues and regulations and for filing requests for hearings. See Stuber Affidavit, ¶¶ 2, 5-7. Mr. Stuber knew or should have known that the contents of HCFA's July 2, 1997 letter made it a notice of initial determination within the meaning of 42 C.F.R. § 498.20. He should have been aware that the letter contained all of the information which HCFA is required to provide under 42 C.F.R. § 488.434(a) whenever it imposes a CMP remedy either separately or, as in this case, together with the other enforcement remedies of DPNA and termination. Mr. Stuber knew or should have known also that the regulations do not require the issuance of any revised determinations by HCFA. Finally, he knew or should have known that, even if a facility achieves substantial compliance and ends its CMP liability in this manner, the notice letter HCFA must issue under 42 C.F.R. § 488.440(d) does not renew the facility's 60-day appeal period.

Petitioner does not suggest that the information provided by HCFA's July 2, 1997 letter explaining the requirements for filing a hearing request timely is contrary to the requirements of 42 C.F.R. §§ 488.434(a), 498.20, or 498.40(a). Nor does Petitioner suggest that Mr. Stuber was unaware of those regulations. As applied to the facts of this case, the regulations permitted Petitioner to challenge, in a request for hearing, any finding of noncompliance which resulted in HCFA's determination to impose any one of several enforcement remedies, including the remedies of DPNA, termination, and CMP (42 C.F.R. §§ 498.3(b)(12), 488.406); but Petitioner could not challenge HCFA's choice of which alternative remedy to impose (42 C.F.R. § 498.3(d)(11)). Even though HCFA did later rescind the termination and DPNA remedies against Petitioner, by notice dated December 3, 1997 (HCFA Ex. 4), there is no evidence showing that Petitioner knew of those rescission determinations during the 60-day period at issue or when it filed its November 13, 1997 letter.

Therefore, whatever their expectations might have been concerning the receipt of additional information from HCFA on the CMP determination, Petitioner and Mr. Stuber knew or should have known between July 2, 1997 and September 5, 1997 (65 days after receipt of HCFA's notice letter) of the need to file a request for hearing in order to challenge the March 21, 1997 survey results which had resulted in HCFA's determination to impose also the DPNA and termination remedies against Petitioner.

B. Petitioner's failure to provide a sufficient foundation to support its asserted conclusions

Petitioner asserts as a fact that "[s]ometime between the 1996 and 1997 survey cycle, HCFA changed its policy or procedure with regard to sending notices." P. Br. for Exten., 5. That assertion of fact is based, in turn, on Mr. Stuber's opinion that, during 1996, there had existed an "established procedure of HCFA, which became a course of dealing . . . ." Stuber Affidavit, ¶ 8; see also, P. Br. for Exten., 12. Petitioner's evidence is insufficient to support those assertions.

I take notice that HCFA did not even acquire the delegation from the Secretary of Health and Human Services to impose intermediate remedies like the CMP against long term care facilities until the regulations issued by the Secretary became effective on July 1, 1995. 59 Fed. Reg. 56116 (Nov. 10, 1994). Yet, Petitioner and Mr. Stuber have attempted to show HCFA's "established procedure" with the use of five letters issued to another facility during May and June of 1996 (P. Ex. A, B.1, B.2, C, D), less than one year after the effective date of the relevant federal regulations. Moreover, Petitioner's evidence does not indicate whether those five letters were among the first ones issued by HCFA to impose the intermediate remedies specified therein, or whether the issuance of those letters was preceded by many others issued by HCFA after July 1, 1995.

Additionally, Mr. Stuber suggests that he is familiar with HCFA's notice procedures because his employer owns or manages a total of 84 long-term care facilities which

participate in the Medicare and Medicaid programs (Stuber Affidavit, ¶ 4) and because he has responsibility for reviewing HCFA's letters to those facilities (id. at ¶ 7). However, the evidence of record does not establish the requisite nexus between his work and the familiarity he claims. For example, Mr. Stuber does not indicate how many, if any, of those 84 facilities received from HCFA notices of findings of noncompliance and resultant imposition of enforcement remedies since HCFA acquired its enforcement authority on July 1, 1995. Nor does any information of record indicate whether the 84 facilities operated by his employer represent a significant percentage of the total number of Medicare and Medicaid certified nursing homes in the United States.

The evidence introduced by Petitioner is also insufficient for establishing any true "course of dealing" between HCFA and Mr. Stuber (Stuber Affidavit, ¶ 8) which would give weight to Mr. Stuber's opinions concerning HCFA's relevant notification practices during 1996. Even though Mr. Stuber has identified his official duties as Vice President and Corporate Counsel for Petitioner's management company, nothing in his affidavit shows the length of time he has held that position or performed responsibilities such as reviewing the HCFA notification letters transmitted by other facilities owned or managed by his employer. No doubt, Mr. Stuber has reviewed, on unspecified dates, at least five letters which were issued by HCFA during 1996 to another long-term care facility also managed by his employer. See Stuber Affidavit; P. Ex. A, B.1, B.2, C, D. However, there is no evidence that he or anyone else acting on behalf of his employer took action in response to those or any other notice letters HCFA issued in 1996 in accordance with the conclusions set forth in his affidavit. See Stuber Affidavit, ¶¶ 8 - 13. Thus, the best that can be said for the alleged "course of dealing" is that it represents opinions which were formed unilaterally by Mr. Stuber without input from HCFA concerning their correctness.

C. Petitioner's misuse of the five letters issued by HCFA to another facility during 1996 to posit unreasonably drawn conclusions

Petitioner relies on the affidavit of Mr. Stuber and its attachments--five letters issued by HCFA to another facility during mid-1996--to establish that a practice can be discerned in Mr. Stuber's dealings with HCFA. Stuber Affidavit, ¶ 13. The five letters relied upon by Mr. Stuber do not support the propositions for which they were offered. On the basis of the letters, Petitioner imputes to HCFA a policy or practice consisting of the following: (a) issuing a first notice which would set forth the remedies HCFA "might impose based on deficiencies formed by a state survey agency" and the facility's right to request a hearing within 60 days (Stuber Affidavit, ¶¶ 8 and 9); (b) "sometimes" sending out a "revised notice of the imposition of remedies" and repeating the facility's hearing rights (id. at ¶ 10); (c) sending out a "second notice" that would state HCFA was proceeding with imposition of the CMP, which would "normally" set forth the amount of the CMP and the total dollar amount of the CMP were the provider to waive its request for hearing, and which would contain a repetition of the notice that a request for hearing may be filed within 60 days of receiving said "second notice" (id. at ¶ 11); and (d) "sometimes" sending out a "third notice" before the expiration of the 60-day period setting forth the total CMP amount which would be due and payable 15 days after the provider failed to request a hearing (id. at ¶ 12). Mr. Stuber incorrectly contends that Petitioner's Exhibits A, B.1, B.2, C, and D form "[a]n example of HCFA's procedure of sending a first, second, third and fourth notice of the imposition of remedies . . . ." Id. at ¶ 13.

Three of the five letters to another facility relied upon by Mr. Stuber were issued by HCFA in May 1996, and concerned HCFA's decisions to impose the DPNA and termination remedies. P. Ex. A, B-1, B-2. The earliest dated letter is titled "Notice of Imposition of Remedies" and does in fact impose the DPNA and termination remedies. P. Ex. A. It is very obviously a notice of

initial determination concerning HCFA's imposition of those two remedies, and, for that reason, it sets forth the affected facility's hearing rights in accordance with 42 C.F.R. §§ 498.3(b)(12) and 498.20.

Each of the two letters later issued in May 1996 is titled "Revised Notice of Imposition of Remedies." The two "revised notices" contain changes made by HCFA concerning the DPNA and termination remedies it had previously imposed. P. Ex. B.1., B.2. A notice of hearing rights was set forth in each of those two letters because the affected entity was entitled to challenge the modified findings of noncompliance underlying the DPNA and termination remedies imposed by HCFA. See 42 C.F.R. §§ 498.3(b)(12); 498.40(a).

In addition to imposing the remedies of DPNA and termination, the May 1996 letters also informed the facility that HCFA might, at a later date, determine to impose a CMP. The letters stated very clearly that, if HCFA decided to impose a CMP, there would be a separate notice letter containing the CMP determination and the facility's hearing rights. P. Ex. A, B.1, B.2. The statement in the May 1996 letters that HCFA might later impose a CMP did not give rise to any right to a hearing. No hearing right exists for a CMP remedy that has not yet been imposed. 42 C.F.R. § 498.3(b)(12).

Only the fourth letter, which was issued in June 1996, and plainly titled "Imposition of Civil Money Penalty," sets forth HCFA's determination to impose the CMP as of a date in the past, as well as the facility's hearing rights concerning the CMP determination. P. Ex. C. Contrary to Mr. Stuber's suggestions, this letter is not his so-called "second notice" of the CMP determination containing a repetition of the affected entity's previous hearing rights. See Stuber Affidavit, ¶ 11. This is the first notice HCFA issued to impose the CMP, as required by 42 C.F.R. § 488.434(a). The notice of hearing rights

is provided in this letter because only when a CMP is imposed may the affected entity challenge also the level of noncompliance found by HCFA. 42 C.F.R. § 498.3(b)(13).[5]

The fifth letter to the other provider was issued by HCFA in July 1996, in order to notify the facility that it had been found in compliance with program requirements, that the remedies of termination and DPNA had been rescinded, and that the CMP remedy had ended on the date on which the facility had been certified to be in compliance. P. Ex. D. The July 1996 letter contains no statement of hearing rights.

In their attempt to establish the policy or practice they allege, Petitioner and Mr. Stuber have assigned numbers to these letters in disregard of the legally significant information contained therein. They use only parts of the five letters in order to mix together the different time periods available to the other facility for requesting hearings on the different appealable determinations issued by HCFA at different times. For example, instead of correlating the notice of hearing rights in each of the three letters issued by HCFA in May 1996, with HCFA's initial and revised determinations concerning the DPNA and termination remedies imposed therein (P. Ex. A, B.1, B.2), Petitioner chooses to attribute improper legal significance to the fact that HCFA mentioned also the possibility that it might later impose a CMP via a separate notice letter setting forth that determination and corresponding hearing rights.

In his capacity as legal counsel to Petitioner with responsibility for keeping current on the relevant regulations (Stuber Affidavit, ¶ 5), Mr. Stuber knew or should have known that HCFA has the authority to impose a CMP for any day of past noncompliance or continuing noncompliance, without regard for whether the facility

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[5] The level of noncompliance may be challenged if it can change the range of the CMP amounts HCFA may collect.

will likely come into compliance pursuant to warning. See 42 C.F.R. § 488.430. Therefore, contrary to what has been suggested by Mr. Stuber (see Stuber Affidavit, ¶¶ 8 and 9), he knew or should have known that nothing of legal significance was conveyed or implied by another facility's receipt of letters mentioning the possibility that a CMP might be imposed by later notice from HCFA. Mr. Stuber's knowledge of those other letters to another facility, even if acquired before the expiration of Petitioner's appeals period herein, could not reasonably have led to his alleged conclusion that Petitioner did not need to file a hearing request within 60 days of receiving HCFA's July 2, 1996 notice imposing various enforcement remedies as a result of the March 21, 1997 survey.

HCFA's issuance of one initial and two revised determination notices to another facility containing statements of its hearing rights (P. Ex. A, B.1, B.2) also could not have induced any reasonable expectation that HCFA would also issue a revised notice of its CMP determination to Petitioner and thereby extend Petitioner's time for requesting a hearing. Petitioner and Mr. Stuber were placed on notice by the regulations that HCFA has the discretion to issue, or not issue, revised determinations. 42 C.F.R. Part 498, subpart C. Only if HCFA exercises its discretion by issuing a revised determination on matters which are subject to challenge in this forum would the affected entity's time for filing a request for hearing to contest those newly revised determinations begin to run for 60 days following its receipt of the revised notice letter. 42 C.F.R. §§ 498.40(a); 498.3(b).

Petitioner also makes the incorrect suggestion that nothing of substance was contained in those May, 1996 letters titled "Revised Notice of Imposition of Remedies." See Stuber Affidavit, ¶ 10. Petitioner does so in order to create the impression that HCFA was routinely sending out multiple and duplicative notice letters for no valid reason, and, therefore, Petitioner acted reasonably by having counted the number of letters sent to it by HCFA instead of having paid attention to

their contents. However, the evidence is to the contrary. Petitioner has placed into evidence HCFA's notices of revised determinations to another provider which show that HCFA was making material changes in its previously issued appealable determinations; for that reason, HCFA was notifying that provider of its right to request a hearing within 60 days of receiving the revised determination letters. P. Ex. B.1., B.2.[6] Moreover, nothing supports the intimation that, merely because HCFA issues a notice of revised determination, the affected entity is therefore given 120 days or more from its receipt of HCFA's notice of initial determination to challenge findings which have remained unchanged by HCFA. When HCFA issues a notice of revised determination, a new 60-day filing period is provided to allow challenges to

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[6] In the first notice of revised determination introduced by Petitioner, the new information provided by HCFA was that the informal dispute resolution process used by the other facility had resulted in changes to the survey findings and survey report, as well as in changes by the MDCIS in its CMP recommendations. P. Ex. B.1. In the second notice of revised determination introduced by Petitioner, HCFA provided additional information concerning the changes in the survey reports and recommendations of the CMP remedy which resulted from the informal dispute resolution process. P. Ex. B.2. Moreover, HCFA set forth an effective date of June 1, 1996, for the DPNA (P. Ex. B.2), which differs from the May 22, 1996 effective date mentioned in HCFA's earlier issued notice of initial determination and first notice of revised determination (P. Ex. A, B.1).

Providers are entitled to file requests for hearing to challenge initial or revised survey findings which result in HCFA's imposition of a DPNA remedy by a specified date. See 42 C.F.R. § 498.3(b)(12).

only those newly revised determinations which are subject to administrative review under 42 C.F.R. § 498.3(b).[7]

Also contrary to what has been implied by Petitioner and Mr. Stuber, the evidence does not show that either of them could have reasonably concluded that HCFA had a pre-existing policy or practice of issuing, within the affected entity's 60-day appeals period, either a "second notice" or a "third notice" like Petitioner's Exhibit D. See Stuber Affidavit, ¶¶ 11 and 12. The letter marked as Petitioner's Exhibit D shows that HCFA sent it because the affected facility had attained compliance within the 60-day period, and HCFA was able to make the determination, within the 60-day period, that compliance had been attained. For those reasons, the letter admitted as Petitioner's Exhibit D specified the end date of the CMP period together with the total amount of the CMP owed by the affected facility for the specified CMP period.

The regulations do not require the issuance of a letter like Petitioner's Exhibit D by any particular date. See

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[7] Petitioner contends that the letters it introduced as Petitioner's Exhibits A, B.1, B.2, and C, allowed the affected entity to file a request for hearing "for the same survey cycle" on July 5, July 15, July 21, and August 24, 1996. P. Resp. Mem., 4. This contention inaccurately suggests that HCFA's issuance of a revised determination concerning only certain findings of noncompliance (those which have led to its imposition of an enforcement remedy) would thereby enable the affected entity to challenge all such findings of noncompliance made during the same survey cycle within 60 days after its receipt of the revised determination notice.

42 C.F.R. § 488.440(d).[8] Obviously, such a letter may be issued during the affected provider's 60-day appeals period only if the circumstances are appropriate for HCFA to do so. Since there exists no basis for believing that every provider with a CMP imposed against it by HCFA would attain compliance within its 60-day appeal period, or that HCFA would be able to issue notices of such determinations to all sanctioned providers within their appeals period, Petitioner and Mr. Stuber could not have reasonably perceived a HCFA policy or practice of issuing letters containing the total CMP amount for a closed period of noncompliance in all cases.

Nor does HCFA's failure to issue a letter like Petitioner's Exhibit D to Petitioner until December 3, 1997 prove that HCFA had "changed" its "policy" of providing the total CMP amount during the pendency of an affected entity's appeals period, as is alleged by Petitioner. P. Resp. Mem., 4-5. HCFA's letter dated December 3, 1997, notified Petitioner of HCFA's determination that compliance had been attained as of July 8, 1997, and, therefore, the total CMP amount owed by Petitioner is $54,500 for the period from March 21 through July 7, 1997. HCFA Ex. 4. It is a notice containing the information HCFA is required to provide Petitioner pursuant to 42 C.F.R. § 488.440(d). However, there is no evidence that HCFA intentionally delayed

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[8] Like HCFA, I glean from Petitioner's arguments the additional contention that HCFA's issuance of such a letter as its "second" or "third" CMP notice meant that the affected entity would have 60 days after receipt of this notice to request a hearing. See HCFA Resp. Mem., 5. This contention is legally unfounded and unproven by Petitioner's evidence. Petitioner's Exhibit D does not contain any notice of hearing rights. The regulation which directs the issuance of such a notice, 42 C.F.R. § 488.440(d), does not create hearing rights. HCFA has explained why it does not and has not issued notices of hearing rights in a letter like Petitioner's Exhibit D, which is tantamount to a collection notice. See HCFA Resp. Mem., 5.

making the determination concerning Petitioner's attainment of compliance (or delayed issuing the corresponding notification letter dated December 3, 1997) in order to send out the information after Petitioner's appeal period had expired.

V. RESOLUTION OF DISPUTES RELATING TO PETITIONER'S ATTEMPT TO ESTABLISH "GOOD CAUSE" ON THE BASIS OF ITS ALLEGED EXERCISE OF DUE DILIGENCE

Petitioner denies that the hearing request deadline was missed in this case because Petitioner had ignored the July 2, 1997 notice letter concerning the March 21, 1997 survey. P. Resp. Mem., 5. Petitioner argues, inter alia, that "[t]he seriousness Petitioner places on the July 2, 1997 notice letter [in this case] is exemplified by the timely filing of a request for hearing for the 1996 survey cycle, which is the subject of Docket No. C-97-558." P. Resp. Mem., 5. Mr. Stuber stated in his affidavit that he filed a request for hearing in this case on November 13, 1997, as soon as he realized that HCFA's previous practices or procedures for issuing a "second notice" had been changed. Stuber Affidavit, ¶ 19.

I reject these and related arguments. Instead, I issue the following FFCLs, for the reasons explained in greater detail below:

10. The evidence does not establish that Petitioner's failure to file a request for hearing timely in this case reasonably resulted from Mr. Stuber's alleged perceptions of HCFA's practices for 1996 to include the total CMP amount in a "second notice."

11. The evidence does not show that a request for hearing was filed timely in another case (Docket No. C-97-558) because Petitioner had received an expected "second notice" from HCFA.

12. The evidence does not establish November 13, 1997 as the earliest date on which Petitioner was able to take action in this case.

13. Petitioner's evidence and arguments on who filed its November 13, 1997 request letter, and for what reasons, are equivocal at best.

14. Due diligence has not been established by Petitioner.

A. Discrepancies between Mr. Stuber's descriptions of HCFA's practices for 1996 and his alleged expectation of a "second notice" from HCFA in this case

One of the explanations provided by Mr. Stuber for having allowed the hearing request period to elapse is that he had developed a practice of not filing a request for hearing until HCFA issues the "second notice" he had come to expect. Stuber Affidavit, ¶ 14. Specifically, he asserted:

> [¶ 14] In carrying out my duties, I would file a written request for hearing within 60 days from HCFA's second notice that informed the facility of the imposition of a CMP.
>
> [¶ 17] This second notice would set forth the total amount of the CMP, which would trigger consideration by me of either waiving the hearing and taking a 35% reduction in the amount of the CMP or filing a request for hearing.

Stuber Affidavit, ¶¶ 14 and 17.

The evidence does not show that this practice of Mr. Stuber's was reasonably derived from the notification procedures he attributed to HCFA for 1996, or that Petitioner's inaction at issue had resulted reasonably from the application of that alleged practice adopted by Mr. Stuber.

Even according to Mr. Stuber's perceptions, there were instances in 1996 where HCFA would send out only one

notice letter which would set forth a provider's hearing rights as prescribed in 42 C.F.R. § 498.40. Stuber Affidavit, ¶¶ 8 and 9. He noted only that "[s]ometimes HCFA would send a revised notice of the imposition of remedies" containing also the 60-day appeals period. Stuber Affidavit, ¶ 10 (emphasis added). Also according to Mr. Stuber, in 1996, HCFA was in the practice of sending out something he denotes as HCFA's "second notice," which would "normally set forth the amount of the CMP and calculate the amount of the CMP if discounted by 35%[,]" together with notification that "a written request for a hearing must be filed no later than 60 days from the date of receipt of the letter." Stuber Affidavit, ¶ 11 (emphasis added). Mr. Stuber then asserts that, if the total CMP amount was not set out in the so-called second notice, "many times a third notice will be sent that would set out the amount of the CMP and state when the CMP was payable . . . . during the 60 day period of time within which to request a hearing." Stuber Affidavit, ¶ 12 (emphasis added).

For the reasons discussed previously in this Decision, Petitioner's designation of HCFA's letters as simply its "first," "second," or "third" notice is misleading and without legal significance in the context of the relevant regulations under which HCFA is authorized to issue such notices. Despite having attributed incorrect significance to HCFA's letters based on the sequence of their issuance instead of their content, Mr. Stuber's use of terms such as "normally" and "many times" reflects his awareness that the total CMP amount due and the 35% reduction are not always included in the letters he has identified. The use of those modifiers also reflect his awareness that such information is not always contained in a HCFA letter sent to begin an entity's 60-day appeals period, nor in one sent thereafter during the pendency of the 60-day appeals period.

Thus, Mr. Stuber knew to expect exceptions to HCFA's alleged procedure of issuing second or third letters, and of including the CMP amount in those letters. The existence of such exceptions, as well as Mr. Stuber's awareness of them, is consistent with my above-discussed

observation that the contents of HCFA's letters are determined by the situation instead of by the number of preceding letters.

Additionally, Mr. Stuber was able to ascertain on and before the expiration of the 60-day filing period following the July 2, 1997 notice that HCFA had not provided a total of the CMP amount with a calculation of the 35% reduction and that this case was an exception to what HCFA "normally" did or did "many times." Yet, no action was taken on Petitioner's behalf in this case until November 13, 1997, 69 days after Petitioner's appeals period had expired. Petitioner's failure to take action timely cannot be blamed on HCFA, as Mr. Stuber has tried to do despite his awareness that even those procedures he attributed to HCFA had exceptions.

B. Petitioner's unsupported contentions concerning Petitioner's receipt of a "second notice" in Docket No. C-97-558 and Mr. Stuber's exercise of due diligence

Mr. Stuber stated in his affidavit, "I received a second notice of imposition of remedy for the 1996 survey cycle in a letter from HCFA dated July 2, 1997[,]" and "[b]ecause this was the second notice, I refiled [sic?[9]]a written request for hearing on the 1996 survey cycle 57 days after the date of the July 2, 1997 notice of imposition of remedy."[10] Stuber Affidavit, ¶ 15. As for

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[9] There is no evidence that between July 2, 1997 and 57 days thereafter, Mr. Stuber or the facility had made more than one attempt to file a hearing request concerning the outcome of the 1996 surveys. See P. Ex. 7.

[10] It appears that, in order to place HCFA's July 2, 1997 letter concerning the 1996 surveys within the procedures it has attributed to HCFA for 1996, Petitioner is contending that HCFA was continuing to send out the so-called "second notices" during 1997 if the surveys had been conducted during 1996, but that HCFA was not sending

(continued...)

HCFA's other July 2, 1997 notice letter imposing a CMP as a result of the March 21, 1997 survey findings, Mr. Stuber stated, "Once I realized that the established policy or procedures of HCFA had changed, which to me had become a course of dealing, I immediately filed a written request for hearing, however, this request was 69 days beyond the 60 day notice requirement [sic.]." Stuber Affidavit, ¶ 19; see also P. Br. for Exten., 5 - 6.[11]

Mr. Stuber's sworn statements and Petitioner's resultant arguments are unsupported.

Nothing before me in this case, or in the case separately docketed as Docket No. C-97-558 shows that HCFA had issued to Petitioner any so-called "first" notice regarding the 1996 "survey cycle."[12] HCFA's July 2, 1997 letter does not indicate that it had previously written to Petitioner concerning the 1996 surveys. P. Ex. 6. HCFA also denies having sent out any earlier "first" notice" concerning the CMP imposed for the 1996 survey findings. HCFA Resp. Mem., 10. There is no basis for accepting Mr. Stuber's conclusion that HCFA's July 2, 1997 letter concerning the 1996 surveys constituted a "second notice" on the CMP remedy.

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[10](...continued)
out those "second notices" in 1997 if the surveys were conducted in 1997.

[11] "Once Northfield Place realized that the July 2, 1997 notice of imposition of remedy for the 1997 survey cycle was the final notice, it filed a written request for hearing on November 13, 1997."

[12] Because Mr. Stuber does not describe what he means by the "first" notice and I have seen only one notice concerning the 1996 survey, I do not know to which step of the "established procedures" described by Mr. Stuber this alleged "first notice" is purported to correspond. See Stuber Affidavit, ¶¶ 8 - 12.

There is also nothing to support Mr. Stuber's additional assertion that he filed a written request for hearing 69 days late concerning the March 21, 1997 survey results because it was not until then that he realized the changes in what he alleges to be HCFA's established policy or procedures. See, Stuber Affidavit, ¶ 19. First, the evidence before me does not show any written request for hearing which was filed by Mr. Stuber on Petitioner's behalf. Nor does any evidence before me indicate the occurrence of any external event on or about November 13, 1997 (69 days after Petitioner's presumed receipt of HCFA's July 2, 1997 letter) which could have caused Mr. Stuber to realize for the first time that a hearing request should be filed immediately to contest the CMP imposed for the March 21, 1997 survey results.

C. Petitioner's failure to show that due diligence was exercised by the outside counsel it retained after the expiration of its 60-day filing period

After having had Mr. Stuber submit a sworn statement affirmatively claiming to have personally filed the November 13, 1997 request for hearing upon having personally come to the realization that HCFA's alleged established policy or procedure had changed,[13] Petitioner changed its approach. It chose to acknowledge that the November 13, 1997 request was submitted by Petitioner's outside counsel, who was not retained until after the 60-day period for appealing the case. P. Resp. Mem., 6. However, this new approach also does not show that Petitioner had acted reasonably in allowing the 60-day filing period to expire before referring the matter to outside counsel.

Nor does Petitioner's new approach explain why its outside counsel took until November 13, 1997, to submit a

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[13] "Once I realized that the established policy or procedures of HCFA had changed, which to me had become a course of dealing, I immediately filed a written request for hearing, however, the request was 69 days beyond the 60 day notice requirement." Stuber Affidavit, ¶ 19.

letter which was then portrayed repeatedly by both Mr. Stuber and its outside counsel as a request for hearing already filed. Stuber Affidavit, ¶ 19; P. Mot. for Exten., 3; P. Br. for Exten., 13. Nor does Petitioner's altered position explain why it was unable to realize before preparing its April 15, 1997 brief that no request for hearing, as required by 42 C.F.R. § 498.40, has been filed yet. P. Resp. Mem., 7 - 8. Under these circumstances, it cannot even be said that Petitioner, by its outside counsel, had filed a request for hearing 69 days after expiration of its 60-day appeals period. See ¶ II.Z., above.

The evidence before me shows an obvious lack of due diligence to date, whether Petitioner was acting through Mr. Stuber or its outside counsel.

VI. RESOLUTION OF DISPUTES RELATING TO PETITIONER'S ATTEMPT TO ESTABLISH "GOOD CAUSE" ON THE BASIS OF INFORMATION NOT CONTAINED IN HCFA'S JULY 2, 1997 LETTER

Petitioner criticizes HCFA's inclusion of Petitioner's hearing rights in its July 2, 1997 notice letter, which does not set forth the total amount of the CMP or HCFA's calculation of the 35 percent reduction if Petitioner were to waive its hearing rights. Petitioner complains that HCFA's failure to provide such information in its July 2, 1997 letter was forcing Petitioner to make a Hobson's choice concerning the exercise of its hearing rights while the 1997 survey cycle was still ongoing. See P. Br. for Exten., 11 - 13; P. Resp. Mem., 4. According to Petitioner, HCFA used to permit a facility surveyed on different dates during the 1996 survey cycle to file a timely request for hearing on several different dates. P. Resp. Mem., 4 (citing P. Ex. A, B.1, B.2, C).

To the extent the foregoing arguments have resulted from Petitioner's misinterpretations of other notice letters or its reliance on unproven facts, I reject them for the reasons previously discussed. Additionally, I issue the following FFCLs, for the reasons explained below, in which I reject Petitioner's new complaints concerning HCFA's inclusion of Petitioner's hearing rights in the

July 2, 1997 notice letter while the survey cycle was on-going:

15. At the time HCFA issued its July 2, 1997 notice letter, the survey cycle cannot be considered on-going.

16. Petitioner took certain actions to continue the 1997 survey cycle after having received HCFA's July 2, 1997 notice letter.

17. Whether or not Petitioner considered the 1997 survey cycle as on-going, Petitioner had sufficient information within 60 days after receipt of HCFA's July 2, 1997 notice of initial determination to make an informed decision on whether to waive its right to a hearing in order to receive the 35 percent reduction of the CMP amount.

18. As a matter of law, the notice of initial determination issued by HCFA to Petitioner on July 2, 1997, properly included a statement of Petitioner's hearing rights.

A. Petitioner's unsupported argument and allegations concerning the timing of HCFA's notice in the 1997 survey cycle

There is no legal basis for concluding that HCFA's July 2, 1997 notice letter should have omitted mention of Petitioner's hearing rights. The letter obviously contains certain initial determinations which Petitioner was entitled to challenge at a hearing. See 42 C.F.R. § 498.3(b)(12). Therefore, as a matter of law, HCFA's notice of those initial determinations (i.e., the July 2, 1997 letter) must set forth Petitioner's hearing rights. 42 C.F.R. §§ 488.434(a), 498.20(a).

However, Petitioner has changed the chronology of events in order to allege that HCFA should not have issued its notice of initial determination containing Petitioner's hearing rights on July 2, 1997, during the pendency of the 1997 survey cycle, because Petitioner was thereby

deprived of the opportunity to make an informed decision on whether to avail itself of its hearing rights. The evidence before me establishes without dispute that the CMP and other remedies were imposed by HCFA on the basis of the March 21, 1997 survey. However, HCFA's July 2, 1997 notice letter stated that resurveys might be conducted thereafter if, following Petitioner's receipt of that July 2, 1997 notice letter, Petitioner were to follow the letter's instructions on submitting a plan of correction and a credible allegation of compliance, and if HCFA were to find such a plan and allegation of compliance acceptable. HCFA Ex. 1 at 3. If Petitioner did not submit such a plan and allegation of compliance, Petitioner's provider agreement would end as of the date specified in the July 2, 1997 letter. See ¶ II.D.v., above.

Nothing said by HCFA required Petitioner to submit such a plan or allegation. Nor did HCFA intimate that additional surveys would be conducted were Petitioner to forego such actions. In fact, HCFA did not even guarantee that a resurvey would be conducted even if Petitioner were to submit a plan of correction and an allegation of compliance. A re-survey would be conducted only if Petitioner were to submit a plan of correction with an allegation of compliance, and HCFA were to find them acceptable. HCFA Ex. 1 at 3.

The evidence indicates that, following its receipt of HCFA's July 2, 1997 letter, Petitioner chose the course of action which resulted in a resurvey's being conducted on July 8, 1997. P. Ex. 12. Thereafter, Petitioner knew from its receipt of the MDCIS letter dated July 17, 1997 that the noncompliance found during the March 21, 1997 survey was determined to have been corrected as of July 8, 1997. P. Ex. 12. Petitioner's right to request a hearing to contest the March 21, 1997 survey findings did not expire until more than a month later, on September 5, 1997.

As for Petitioner's argument that "[w]hen a survey is on-going, such as the survey pertaining to the . . . July 2, 1997 determination, a revised determination will be

forthcoming" (P. Sur-Reply, 17 (emphasis in original)), I find it to be unreasonable. If Petitioner had submitted a valid plan of correction with a credible allegation of compliance for HCFA's acceptance in order to obtain a follow-up survey for verification of the improvements it had made, I fail to understand why Petitioner would then expect HCFA to issue additional appealable determinations in a document Petitioner calls "revised determination." Any reasonable provider in Petitioner's situation would have expected HCFA or its agent to conduct a follow-up survey and then find that the provider had resumed compliance as alleged in the documents it had previously filed. Since a timely hearing request may be filed only to challenge a finding of noncompliance that has resulted in the imposition of an enforcement remedy, a finding that Petitioner had shown its resumption of compliance at the time of a re-survey does not entitle a provider to request a hearing. See 42 C.F.R. § 498.3(b)(12). The finding of compliance is not subject to challenge even if HCFA were to place it in a document Petitioner chooses to call "revised determination."

For these reasons, I conclude that there is no merit to Petitioner's contention that HCFA's July 2, 1997 notice letter was issued while the 1997 survey cycle was continuing. Moreover, whether or not the 1997 survey cycle should be considered continuing when HCFA issued its July 2, 1997 letter does not provide a reasonable explanation for Petitioner's failure to timely file a request for hearing after its successful completion of the July 8, 1997 re-survey. Petitioner has created this non-issue concerning the 1997 survey cycle in disregard of the chronology of events, its own actions, and the state of its own knowledge, in order to create the erroneous impression that HCFA unfairly included a premature notice of Petitioner's hearing rights in the July 2, 1997 letter.

B. Petitioner's unsupported contention that it was unable to make an informed decision on whether to request a hearing, or waive its hearing rights, within 60 days of having received HCFA's July 2, 1997 notice letter

Even though HCFA's July 2, 1997 notice letter did not specify the total amount of the CMP assessed by HCFA, and informed Petitioner that it could request another re-survey, Petitioner had sufficient information to make an informed decision concerning the feasibility of requesting a hearing, as opposed to waiving that right, before its right to request a hearing expired on September 5, 1997. The July 2, 1997 notice letter states that HCFA had imposed a CMP of $500 per day, effective on March 21, 1997. Other portions of the letter provide the information that the CMP would continue to accrue at the same rate (unless the noncompliance was found to have worsened) until the date Petitioner was found to have attained compliance pursuant to a resurvey triggered by Petitioner's allegations of compliance, or Petitioner's provider agreement was terminated on September 21, 1997.

Even based on the foregoing information provided by HCFA in its July 2, 1997 notice letter, Petitioner should have known that the maximum extent of its CMP liability would be for the period from March 21 until September 21, 1997, calculated at the rate of at least $500 per day.

Moreover, Petitioner had come into possession of additional relevant information concerning the CMP amount before September 5, 1997. Petitioner's own evidence establishes its receipt of a letter dated June 19, 1997, from MDCIS, which found that Petitioner was still out of compliance at the time of the June 13, 1997 resurvey, but indicated no worsening of the deficiencies. P. Ex. 11. Petitioner's evidence establishes also its receipt of MDCIS's letter dated July 17, 1997, which contains the finding that Petitioner was in compliance with program requirements as of the date of the second resurvey conducted on July 8, 1997. P. Ex. 12. Even though HCFA did not immediately adopt the findings contained in MDCIS's letters of June 19 and July 17, 1997, Petitioner knew from those letters that, under the circumstances

most favorable to Petitioner, HCFA would attempt to collect a CMP for the period from March 21, 1997 till July 8, 1998 (the date of compliance found by MDCIS), at HCFA's previously stated rate of $500 per day throughout this period, because no worsening of the deficiencies had been found during the first resurvey of June 13, 1997.

VII. RESOLUTION OF DISPUTES RELATING TO PETITIONER'S ATTEMPT TO ESTABLISH "GOOD CAUSE" BY INTERPRETING HCFA'S DECEMBER 3, 1997 LETTER AS A "REVISED DETERMINATION"

In its most recently filed brief, dated May 12, 1998, Petitioner contends for the first time that HCFA's December 3, 1997 letter was in fact a "revised determination" entitling Petitioner to file of a request for hearing within the 60 days provided by 42 C.F.R. § 498.40(a). P. Sur-Reply, 4 - 7. Petitioner contends that HCFA's failure to advise it of its hearing rights in the December 3, 1997 letter constitutes good cause for Petitioner's failure to file a request for hearing to date. P. Sur-Reply, 5. Without withdrawing any of its previously articulated allegations of good cause, Petitioner contends that the December 3, 1997 letter's status as a "revised determination" is "the larger picture" and "dispositive of the issue." P. Sur-Reply, 5.

I find no merit in Petitioner's arguments concerning the legal status of HCFA's December 3, 1997 letter or in Petitioner's use of it as "good cause" for its failure to file a hearing request to date. I issue the following FFCLs for the reasons set forth below, to reject such arguments by Petitioner:

19. Petitioner has not credibly established that its failure to file a hearing request to date resulted from its receipt of HCFA's December 3, 1997 letter.

20. HCFA's December 3, 1997 letter is not a notice of revised determination which would entitle Petitioner to file any request for hearing within 60 days of receiving it.

21. Instructions on filing hearing requests were properly omitted from HCFA's December 3, 1997 letter.

A. The lack of lack of support for Petitioner's recently developed theory that its omissions to date were caused by its receipt of HCFA's December 3, 1997 letter

Petitioner asserts in its May 12, 1998 filing that "the issue of filing a request for hearing was before this Tribunal before the December 3, 1997 revised determination" and "[c]onsequently, neither party knew the status of the hearing request." P. Sur-Reply, 5. With these words, Petitioner is attempting to justify its failure to set forth its interpretation of HCFA's December 3, 1997 letter at an earlier time, as well as its failure to file anything purporting to be a request for hearing within 60 days of having received HCFA's December 3, 1997 letter.

These assertions by Petitioner ignore the fact that the DAB did not docket this case until December 10, 1997,[14] and that Petitioner's counsel submitted an unopposed motion dated March 10, 1998, to brief the good cause issue for the late filing of its November 13, 1997 letter.[15] Thereafter, Petitioner submitted the affidavit executed by John Stuber on March 17, 1998, which did not even mention HCFA's December 3, 1997 letter in attempting to explain its failure to file a hearing request timely. Nothing submitted by Petitioner within 60 days of its having received HCFA's December 3, 1997 letter, or until filing its sur-reply dated May 12, 1998, even hinted that

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[14] See letter dated December 10, 1997 to parties' counsel from Jacqueline T. Williams, Chief, Civil Remedies Division, DAB.

[15] Petitioner's unopposed motion dated March 10, 1998, specifically identified the issue to be "whether good cause for late filing can be shown which would permit an extension for the time for filing by the Administrative Law Judge." (Emphasis added).

Petitioner might have had the opinion that HCFA's December 3, 1997 letter created hearing rights.

When Petitioner submitted the affidavit of Mr. Stuber, it appeared to recognize that the existence of "good cause" cannot be created out of whole cloth. The test is not the ingenuity of Petitioner's ex post facto theories, but what the evidence proves to have taken place during the relevant time period. However, Petitioner has decided recently to interject HCFA's December 3, 1997 letter into its allegations of "good cause" without having even laid a foundation for its use through Mr. Stuber's affidavit or like documents. Petitioner's decision to do so highlights the other inconsistences of record and make even less credible Petitioner's earlier stated reasons for having failed to file a request for hearing timely.

B. Petitioner's erroneous arguments concerning its hearing rights under HCFA's December 3, 1997 letter

Petitioner is wrong in contending that HCFA's December 3, 1997 letter is a revised determination entitling it to file a request for hearing within 60 days of having received it. Even though the regulations do not specify what information must be contained in a document issued by HCFA in order for it to be construed as a "revised determination" (see 42 C.F.R. § 498.32), the regulations do specify which determinations made by HCFA may be challenged by filing a request for hearing before an administrative law judge. 42 C.F.R. § 498.3. Therefore, even though 42 C.F.R. § 498.40(a) states generally that a request for hearing may be filed by an affected entity within 60 days of its receiving HCFA's notice of revised determination, this right to request a hearing presupposes that HCFA's notice letter has set forth some new findings which are subject to challenge at a hearing. See also 42 C.F.R. § 498.70(b) (dismissal of a hearing

request where the requestor is not a proper party or does not otherwise have a right to hearing).[16]

HCFA's December 3, 1997 letter, whether Petitioner calls it a "revised determination" or not, contains no new finding which is subject to challenge at a hearing. HCFA Ex. 4. The only new findings and determinations set forth in that letter concern Petitioner's attainment of compliance, effective on July 8, 1997, which, therefore, resulted in HCFA's decisions to rescind the DPNA and termination remedies previously imposed against Petitioner and to end the previously imposed remedy as of July 7, 1997. None of the foregoing gives rise to hearing rights. 42 C.F.R. § 498.3(b).

Even though HCFA's December 3, 1997 letter sets forth for the first time HCFA's calculation of the total amount of CMP owed by Petitioner, the calculation is based on certain determinations HCFA had previously set forth in its earlier issued July 2, 1997 letter: i.e., the finding of noncompliance as of March 21, 1997, the use of March 21, 1997, as the effective date of the CMP, the amount of $500 per day, and the continuing accrual of the CMP until Petitioner achieved compliance or its provider agreement was terminated. The only new determination made by HCFA which was used in the calculation of the total amount (Petitioner's attainment of compliance as of July 8, 1997) is not appealable under 42 C.F.R. § 498.3. No separate hearing rights were created or implied by the regulation which required HCFA to issue a separate notice letter to Petitioner when it had attained compliance, in order to set forth the total CMP amount owed, the corresponding days of noncompliance, and other specified information. 42 C.F.R. §§ 488.434, 488.440(d).

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[16] HCFA correctly sums up the legal proposition thus: if the determination could not be contested at a hearing pursuant to 42 C.F.R. § 498.3(b) were HCFA to issue it as an "initial determination," then the same determination also cannot be contested at hearing if HCFA were to issue it as a "revised determination." HCFA Sur-Reply, 2 at n. 1.

Therefore, Petitioner is wrong in suggesting that Petitioner acquired the right to file a request for hearing following its receipt of HCFA's December 3, 1997 letter.

For these same reasons, there is no merit in Petitioner's argument that "[t]he good cause shown is that in the December 3, 1997 revised determination, HCFA did not advise Petitioner that if it disagreed with the revised determination, Northfield Place could file a written request for hearing." P. Sur-Reply, 5. It would have been legally incorrect for HCFA to have included such notice, given the content of it its December 3, 1997 letter. Insofar as HCFA's December 3, 1997 letter pertains to the previously imposed CMP remedy, the letter's content shows that HCFA had issued it to satisfy the requirements of 42 C.F.R. § 488.440(d).

VIII. CONCLUSION

On the basis of the record as a whole and the analysis set forth above, I issue these additional FFCLs in denying Petitioner's request for an extension of time:

22. Petitioner has not proven its allegation that "circumstances beyond Northfield Place's ability to control prevented it from making a timely hearing request" (P. Br. for Ext., 12).

23. Petitioner has not satisfied the "good cause" showing requirement for obtaining an extension of time to submit a hearing request under 42 C.F.R. § 498.40(c).

Accordingly, this case is dismissed pursuant to 42 C.F.R. § 498.70(c), as requested by HCFA.

/s/

Mimi Hwang Leahy

Administrative Law Judge