DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: Ohio Department of Public Welfare
Docket No. 78-50-OH-HC
Decision No. 66

DATE: OCT. 10, 1979

Geoffrey E. Webster, Legal Counsel, Ohio Department of Public Welfare, for the Ohio Department of Public Welfare. Margaret Jane Porter, Attorney, HEW Office of General Counsel, Health Care Financing and Human Services Division, for the Health Care Financing Administration.

DECISION

This case involves a requirement of Title XIX of the Social Security Act (Medicaid) for annual inspections of all participating nursing homes. In broadest terms, the issue presented is whether or not the State's failure to complete in the first quarter of 1978 the inspections due in that quarter is excused by a winter of extraordinary hazardous snow conditions so severe as to result in a declaration of emergency by the President. We conclude that under the circumstances of this case, the delay in inspections was a failure of a technical nature only which is excused under the terms of the statute. Accordingly, the penalty disallowance imposed in this case by the Administrator of the Health Care Financing Administration (HCFA) is set aside. This is the final administrative decision in this matter. (45 CFR 16.91(b)).

Note on the conduct of counsel for the State.

Although on the substantive issue our decision favors the State, we note with concern the obstructive character of the representation the State has received in this case. Counsel appeared determined to preclude alike a substantive decision in the State's favor (Transcript, pp. 10-15, 86-87) and a cooperative clarification with opposing counsel of substantive issues that might well have resulted in a quicker decision supporting the State's position and better long-term federal-state relations. (Transcript, pp. 47-48, 103-106, 109-118; Respondent's Submission in Response to the Panel's Ruling on Further Procedures to be Followed in the Disposition of This Case, dated 7/2/79, pp. 2-3.) Instead, counsel appeared to seek by choice confrontations on procedural excursions created by himself, in which he repeatedly violated the Board's rules of which he was fully aware, and filed with the Board certifications which were misleading and appeared in context calculated to mislead. (Letter from Board's Executive Secretary to parties, dated 7/25/79; letter from Board's Executive Secretary to counsel for the State, dated 8/1/79; letter from Board's Executive Secretary to parties, dated 8/15/79.) His conduct in this and other respects was obstructive and distracted from the expeditious consideration of the substance of an appeal which the Board finds meritorious in spite of counsel's cantankerous conduct.

We do not generally comment publicly on behavior of counsel except favorably. We are moved to comment in this case because of our concern that this extraordinary behavior not be repeated or initiated by others, and that neither the State, nor opposing counsel nor the Board suffer from it in the future.

Procedural history.

This case arises under Title XIX of the Social Security Act, which authorizes payments to States to enable them to carry out medical assistance plans. Section 1116(d) of the Act entitles a State to receive upon request reconsideration of a disallowance of costs claimed under that title. The reconsideration function is vested by the Secretary in the Departmental Grant Appeals Board pursuant to 45 CFR 16.91(a).

The disallowance in this case was made following the Agency's determination that the State had not met the basic requirement in Section 1903(g) of the Act for an annual inspection of all nursing homes or the conditions specified in Section 1903(g)(4)(B) under which the Secretary must waive that basic requirement. The State was first given notice of the disallowance, which was in substance a penalty and took the form of a $255,753 reduction in the State's Federal medical assistance percentage for expenditures under Title XIX in a subsequent quarter, in a June 1, 1978, mailgram from the Administrator of HCFA. The State filed an application for review by the Board dated June 22, 1978, which it supplemented after receiving a more detailed disallowance letter. During the course of the proceedings before the Board, HCFA changed the amount of the disallowance to $177,809 based on corrected information provided by the State. (Memorandum in Support of Respondent's Response to Petitioner's Request for Reconsideration and in Response to the Board's Order to Show Cause and in Support of Respondent's Motion for Decision on the Record Upholding the Disallowance and Rejecting the Appeal, dated 9/27/79, hereinafter referred to as HCFA's memorandum in response to Order to Show Cause, p. 27.)

This decision is rendered on the basis of written briefs in conjunction with an informal conference pursuant to 45 CFR 16.8(b)(1). The parties were given several opportunities to brief the issues in the case both before and after the conference was held. A transcript of the conference was made at the Board's expense and is a part of the record.

Legal issue.

The case turns on the interpretation of a statutory rule. No regulation has as yet been issued although we were informed by HCFA that a regulation was expected to issue (by May 31, 1979) that would possibly resolve the case in favor of the State. (Respondent's Memorandum in Response to the Notice of Informal Conference and in Support of Respondent's List of Additional Issues for Consideration at the Conference dated 3/20/79, hereinafter referred to

as HCFA's pre-conference brief, pp. 3-4; Transcript, pp. 32-34, 40, 44; Respondent's Proposal to the Board Concerning Further Procedures in This Reconsideration, dated 4/2/79, p. 3.) Since that regulation has not appeared, we proceed to decision without it and hold that the statute itself is sufficiently clear to require the same result in favor of the State.

Although no regulation has appeared, an Action Transmittal (AT-77-106, November 11, 1977) was issued shortly before the quarter in question. This transmittal gave the Agency's explanation of the statutory provisions in question here. Both parties rely on this document as supporting their present position in this dispute--the State with more plausibility than the Agency as will be noted below.

We turn, then, to the statutory rule which we must construe.

The original medical review requirement.

Section 1903(g)(1)(D) of the Social Security Act provides for certain penalty decreases in the Federal medical assistance percentage which affects the State's reimbursement for Medicaid expenditures unless the State makes a showing satisfactory to the Secretary for each quarter that there is in operation in the State an effective program of control over utilization of services. This showing must include evidence that the State has an effective program of medical review of the care of patients whereby the professional management of each case is reviewed and evaluated at least annually by independent professional review teams.

The medical review requirement was for some time after its enactment substantially or wholly unenforced by HEW. After an expression of Congressional displeasure, HEW reversed its practice and went to the opposite extreme of strict literal enforcement of the same provision. (H.R. REP. No. 393-- Part II, 95th Cong., 1st Sess. 84, 85 (1977); S. REP. NO. 453, 95th Cong., 1st Sess. 40, 41 (1977)). This overreaction was required neither by Congressional intention nor by a sound interpretation of the law.

It is not possible to state general rules of law with the absolute precision that would justify a totally rigid enforcement. A general statute must necessarily be read with at least a minimum element of common sense that recognizes extraordinary circumstances and extreme cases to which it does not apply. Where the reason for the rule stops, an ancient legal maxim teaches us, the rule stops.

As Harlan, J. stated the matter in Amalgamated Assn. of St. E. R. & M. C. Emp. v. Lockridge, 403 U.S. 274 (1971), with respect to the preemption doctrine, that doctrine "is, like any other purposefully administered legal principle, not without exception." 403 U.S. 274, 297. (Cf. 1 G. Sharswood, Blackstone's Commentaries 60 (1883) and discussion of Blackstone's example in Transcript, pp. 65-66.)

As noted by Douglas, J. dissenting in NLRB v. Seven-Up Bottling Company, 344 U.S. 344, (1953):

> "There are exceptions to most general rules; and the Board [NLRB] should be the guardian of the exceptions as well as the formula itself." 344 U.S. 344, 353.

Although this comment is contained in a dissenting opinion, the majority agreed with the dissenters on the importance of recognizing exceptions where circumstances make application of a general rule to a particular situation "oppressive and therefore not calculated to effectuate a policy of the Act". 344 U.S. 344, 349.

As Judge Leventhal has emphasized in a thoughtful decision:

> "The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." WAIT Radio v. FCC 418 F.2d 1153, 1157 (D.C. Cir. 1969). Cf. Gulf Oil Corporation v. Hickel, 435 F.2d 440, 447 (D.C. Cir. 1970).

Cf. also National Broadcasting Company, v. United States, 319 U.S. 190, 207, 225 (1943); United States v. Storer Broadcasting Company, 351 U.S. 192, 204-5 (1956). See also Davis, Discretionary Justice, pp. 25-26:

> "Rules alone untempered by discretion, cannot cope with the complexities of modern government and of modern justice."

Cf. Gardner, The Procedures by which Informal Action is Taken, 24 Ad. L.R. 155, 159-160, 165 (1972) where he comments that "...no man is wise enough to devise any rule, however narrow its scope and rich its obvious appeal, which can uniformly be applied..."

Cf. also, Friendly, The Federal Administrative Agencies, p. 16: where after noting:

> "'[T]he tendency of the law', Holmes told us eighty years ago, 'must always be to narrow the field of uncertainty,'"

he comments:

> "Of course, neither Holmes nor others who have sought to follow him ever supposed that complete certainty

> would be attainable; some critics have thus been beating not merely a dead but a phantom horse."

In general, statutory directions, particularly those addressed to administrative agencies, are intended to be construed reasonably in light of their purpose; the authority of the agency to make (with thoughtful care) common sense adjustments to extreme and oppressive instances is normally to be assumed. HEW was not legally required to behave catatonically, nor did the Congress intend that it should.

Faced with HEW's mechanical interpretation of its statute, Congress amended the statute so as to make clear that HEW was not permitted to reject State showings in cases in which performance, without being perfect, meets tests that assure substantial compliance and reasonable ground to excuse deficiencies. Some of the members of the Congress clearly felt that HEW had been over-rigid in its reading of the statute. (123 CONG. REC. (No. 148) at H 9823.) Others may have accepted as presumptively correct representations by HEW that the statute required the extreme application and objected to the result itself. (123 CONG. REC. (No. 148) at H 9825 and H 9826; 123 CONG. REC. (No. 112) at S 10928.) Both groups agreed that the rule as construed needed to be ameliorated.

The new exculpatory rule.

As amended by Pub. L. 95-142, the statute directs the Secretary to find a State's showing "satisfactory"--

> "if the showing demonstrates that the State has conducted such an onsite inspection [of SNF's and ICF's] during the 12-month period ending on the last date of the calendar quarter--
>
> (i) in each of not less than 98 percentum of the number of such hospitals and facilities requiring such inspection, and
>
> (ii) in every such hospital or facility which has 200 or more beds
>
> and that, with respect to such hospitals and facilities not inspected within such period, the State has exercised good faith and due diligence in attempting to conduct such inspection, or if the State demonstrates to the satisfaction of the Secretary that it would have made such a showing but for failings of a technical nature only." (Section 1903(g)(4)(B).)

This rule is also subject to a basic requirement of common sense interpretation in the light of its purposes, but it would be permissible to argue that since Congress has laid down so detailed a rule, it expected stricter compliance than when it had furnished only a sweeping general rule.

On the other hand, it is to be noted that the rule does not direct that the Secretary may excuse less than perfect performance only when the new statutory tests are met. Instead it directs that the Secretary must excuse such performance when the tests are met. That leaves open the possibility that there is a penumbra to the rule. The Secretary must excuse if the tests are met and still may excuse in a sufficiently extreme case of oppressive circumstances just outside the specific new tests.

The difference between the Secretary "shall excuse... only when" and the Secretary "shall not refuse to excuse... when" is not accidental. This is shown by the fact that successive paragraphs of the statute show distinct use of the different formulations and by the fact that the legislative history of the statute shows that both approaches were considered by the House. (H.R. REP. No. 393 -- Part II, 95th Cong., 1st Sess. 37, 141 (1977); 123 Cong. Rec. Daily Ed. H 9954, September 23, 1977; H.R. REP. No. 383 -- Part II, 95th Cong., 1st Sess. 140 (1977).)

It is not necessary, however, to reach a final resolution of this difficult issue since we are satisfied that the statute in any event requires a decision in favor of the State under the "technical failings" clause.

Exculpation for technical failings.

The State contends that its showing should be found satisfactory under both the good faith and due diligence and the technical failings exceptions in Section 1903(g)(4)(B) since it completed the inspections as soon as possible under the circumstances. (Letters from Director, Department of Public Welfare, to Board's Executive Secretary, dated 6/22/78 (pp. 1-2), 7/24/78 (Attachments C and E), and 9/26/78 (pp. 3-4); Transcript, pp. 21-26, 83, 85-86, 90-91, 93; Brief of the State of Ohio dated 8/6/78, pp. 6-7.) HCFA's position is that the basic requirement for inspection of all facilities by the end of the quarter cannot be waived pursuant to Section 1903(g)(4)(B) unless a State has inspected at least 98 percent of all facilities plus all facilities with 200 or more beds, regardless of the reason for the State's failure to make timely inspections. (HCFA's memorandum in response to Order to Show Cause, dated 9/27/78, pp. 11-12, 23; Transcipt, pp. 30, 33, 35-36, 40.) We do not find either reading of the statute completely tenable, however.

Section 1903(g)(4)(B) contains a basic requirement--" [t]he Secretary shall find a showing of a State... to be satisfactory"--followed by two "if" clauses which are separated by the conjunction "or", indicating that they are alternatives.

The first alternative is "if the showing demonstrates that the State has" inspected not less than 98 percent of all facilities plus all facilities with 200 or more beds and, with respect to those facilities not inspected, has exercised good faith and due diligence in attempting to conduct the inspections.

The second alternative is "if the State demonstrates to the satisfaction of the Secretary that it would have made such a showing but for failings of a technical nature only."

Thus, it appears that the exercise of good faith and due diligence in attempting to inspect those facilities not inspected excuses the failure to make a 100 percent inspection only if the State has met the "98 percent plus all 200 bed or more" standard, as HCFA contends. The technical failings provision, however, appears to be entirely independent of the "98 percent plus all 200 bed or more" standard, as the State argues. It is possible, therefore, that the State's failure to complete its inspections by the end of the quarter is excused by the technical failings provision even though it does not meet the "200 bed or more" part of the "98 percent plus all 200 bed or more" standard.

The legislative history of Section 1903(g)(4)(B) supports this reading of the technical failings provision. The House and Senate bills each contained provisions for some sort of exception to the requirement in Section 1903(g)(1)(D) for a reduction in payments to a State which had not inspected all facilities. The House bill provided that "[t]he Secretary shall find [a] showing of a State... to be satisfactory... if" the showing demonstrates that the State has conducted an onsite inspection during the 12-month period ending on the last date of the calendar quarter (i) in each of not less than 98 percent of all facilities requiring inspection and (ii) in every such facility which has 200 or more beds, and that, with respect to facilities not inspected, the State has exercised good faith and due diligence in attempting to conduct such inspections. (The bill was also reported in one instance with the language "[n]o showing of a State... may be found satisfactory by the Secretary unless..." substituted for the command that the Secretary shall find a showing satisfactory.)

The House report stated with respect to this provision:

> "This section further clarifies the conditions a State must meet to be deemed in full compliance with the onsite medical and independent review requirements. It must demonstrate good faith efforts to conduct onsite surveys in all mental hospitals, SNF's and ICF's and actually conduct such surveys in all large institutions and

> [98 percent of ?] all other institutions in the State. This provision was included because HEW has announced penalties on States which failed to review only two or three homes out of hundreds of homes subject to review within the annual time limit. In the light of the Secretary's position that HEW has no discretion in determining that the requirements of the law have been met, the Committee has provided a standard of reasonableness in the bill." (H.R. REP. NO. 393--Part II, 95th Cong., 1st Sess. 85 (1977).)

The Senate bill, on the other hand, authorized the Secretary to waive the penalty otherwise required to be imposed under Section 1903(g)(1) "in any case in which the Secretary determines that the unsatisfactory or invalid showing made by the State is of a technical nature only, or is due to circumstances beyond the control of the State." In explanation of this provision, the Senate Finance Committee report stated that the bill authorizes waiver of the penalty--

> "if the State's noncompliance is technical or due to circumstances beyond its control. The committee intends, however, that this waiver authority is to be invoked only when reasonably appropriate and not as a generalized routine exception. Circumstances considered outside of a State's control are those which could not reasonably be anticipated and provided for in advance. Technical noncompliance for example, would include instances where a State had reviewed patients in most facilities on time with the remaining facilities also reviewed but not until several weeks after the deadline for completion of all reviews by a State." (S. REP. NO. 453, 95th Cong., 1st Sess. 40(1977)).

The provision enacted into law thus contains elements of both the House and Senate bills. It contains the 98 percent plus all 200 bed or more, good faith and due diligence provision of the House bill, and also the technical noncompliance provision of the Senate bill. The conference report stated with respect to the compromise:

> "The conference agreement provides that [if a State makes?] good faith attempts to perform reviews of all institutions, and actually reviews all large institutions and 98 percent of all other institutions (or fails to meet this standard only for technical reasons), it will be considered in full compliance with the requirements of the law. The conferees stress

> that the intent of the law that all facilities be reviewed is not changed by this provision. If a facility is not reviewed, there will be a reduction in matching unless the Secretary finds there was a good faith attempt to review the institution, and there is no evidence that any institution, or kind or type of institution, is deliberately not reviewed." (H.R. REP. NO. 673, 95th Cong., 1st Sess. 48.)

The passage just quoted seems to indicate that the Congress intended that the technical failings provision, conceived independently of the "98 percent plus all 200 bed or more" standard, be treated as a separate test, since it states that a State will be considered in full compliance if it either meets the "98 percent plus all 200 bed or more" standard or fails to meet it "only for technical reasons."

The legislative history of Section 1903(g)(4)(B) is instructive not only because it supports the reading of the technical failings provision as independent of the "98 percent plus all 200 bed or more" standard but also because it indicates what Congress intended by the phrase "failings of a technical nature only."

The Senate Finance Committee report previously quoted states that "[t]echnical noncompliance for example, would include instances where a State had reviewed patients in most facilities on time with the remaining facilities also reviewed but not until several weeks after the deadline for completion of all reviews by a State." This language is in fact quoted in HCFA's AT-77-106 in a section on the "technical failings exception." That section further states that the exception gives the Secretary "some limited discretion" to find a showing satisfactory "although some facilities were not reviewed until after the end of the showing quarter," such as where some reviews required for the quarter ending December 31, 1977 are not completed until January 1978 (AT-77-106, p. 9). In the instant case, as noted in greater detail below, all but five of a total of 240 facilities scheduled for inspection during the first quarter of 1978 were inspected within two weeks of the end of the quarter, and those five facilities were inspected before the end of the next quarter. This situation seems within the ambit of the examples of technical noncompliance in the Senate Finance Committee report and in HCFA's action transmittal. Although HCFA claims that AT-77-106 supports its interpretation of the technical failings provision, (HCFA's memorandum in response to the Order to Show Cause, pp. 11-12; Transcript, pp. 35-36, 42), the action transmittal does not in fact contain any clear statement linking the technical failings provision to the "98 percent plus all 200 bed or more" standard, and the State could reasonably have understood from the action transmittal that it might be entitled to a waiver of the statutory penalty even if it did not meet that standard.

Factual issue.

Ohio had an effective program of medical review which operated satisfactorily in the last quarter of 1977 and in the second quarter of 1978. The review program failed, however, to inspect, in the first quarter of 1978, 17 skilled nursing facilities (SNF's) and intermediate care facilities (ICF's) (21 counting twice four institutions with both certifications), including two certified for 200 beds or over, out of a total of approximately 1,100 SNF's and ICF's in the State, 240 of which were scheduled for inspection in that quarter. (Letter from Director, Department of Public Welfare, to Board's Executive Secretary, dated 7/24/78; HCFA's memorandum in response to Order to Show Cause, dated 9/27/78, pp. 27-28; Respondent's Submission in Response to the Panel's Ruling on Further Procedures to be Followed in Disposition of This Case, dated 7/2/79, enclosed letter from Chief, Division of Medical Assistance, to Deputy Director, Medicaid Bureau, dated 5/9/79, Attachments #1 and #2.)

Although the State did not complete all the required inspections by the end of the first quarter, it proceeded with its inspections of the missed facilities in the next quarter, inspecting all but five of the 17 facilities by the end of the first two weeks of April, and the last of the first-quarter facilities on May 31. (Letter from Director, Department of Public Welfare, to Board's Executive Secretary, dated 6/22/78, enclosed letters from Director, Department of Public Welfare, to Acting Director, Medicaid Bureau, dated 5/26/78 and 5/31/78.)

Ohio attributes this failure (corrected fully in the next quarter--letter from Director, Department of Public Welfare, to Board's Executive Secretary, dated 9/26/78; Transcript, p. 76) to severe snow storms. HCFA intially conceded this explanation and indeed, almost throughout, HCFA has cooperatively accepted representations of fact by the State. (HCFA's Response to Order to Show Cause, pp. 25-28.) Somewhat belatedly, however, HCFA asked for proof of the causal relationship. (HCFA's pre-conference brief, pp. 4-5; Transcript, pp. 27-31.)

We are therefore required to consider whether in fact the failure to perform perfectly was attributable to the weather and if so, whether that excuses the State's delay.

The State submitted in support of its position a report by the Adjutant General of Ohio, dated March 24, 1978, entitled "Blizzard '78," which indicated that there were in fact three successive blizzards in the State in January 1978: one in northeastern Ohio from January 9 through January 14, one in southern Ohio from January 16 through January 24, and a statewide blizzard from January 26 through February 5, which the Adjutant General characterized as "the most severe blizzard in the history of Ohio." In

the two earlier blizzards, the Governor of Ohio declared several counties in a state of emergency or disaster areas and National Guard assistance was required for snow removal and road clearance. The new storm on January 26 brought 12-14 inches of new snow, accompanied by 50-70 mph winds and a wind chill factor of minus 70 degrees. On January 26, the President declared a state of emergency under the Disaster Relief Act of 1974 (Pub. L. 93-288), which entitled the State to Federal assistance "to supplement State and local efforts to save lives and protect property, public health and safety," and federal troops were dispatched. An estimated 31,000 miles of roads were cleared of snow. ("Blizzard '78," pp. 1-4, 6.) Documentation provided by the State shows that the State's inspection teams lost 308 working hours during the week of January 9, 288 working hours the week of January 16, and 250 working hours the week of January 23 due to weather conditions, as compared to less than 100 hours during most weeks during the winter (Respondent's Submission in Response to Panel's Ruling on Further Procedures, enclosed letter from Chief, Division of Medical Assistance, Ohio Department of Public Welfare, to Deputy Director Medicaid Bureau, HCFA, dated 5/9/79, Attachment #4).

We find it inconceivable that under these weather conditions, the State's original review schedule would not have been disrupted to such an extent that the State could not reasonably have been expected to complete its inspections in a timely fashion. Our conclusion that the weather conditions were the cause of the delay, rather than either careless or deliberate behavior on the part of the State, is reinforced by the fact that the State completed in a timely fashion 100 percent of required inspections both in the last quarter of 1977 and in the second quarter of 1978. We do not believe that the technical failings exception requires any greater degree of scrutiny since there is in fact no express requirement in the statute that good cause be shown. While it seems implicit that the State must show good cause even when its failure to comply with the statute is merely technical, since otherwise the basic requirement for completion of all inspections by the end of the quarter would be rendered virtually meaningless, we consider that the circumstances of this case are sufficiently unusual that this basic requirement is not in fact rendered meaningless by excusing the State's failure.

After HCFA raised the question whether the cause for the delay in inspections was the extreme weather conditions, and prior to the production of the documentation cited above, the Panel determined that the issue might be most fairly and expeditiously resolved by the parties themselves without the participation of the Panel, and advised the parties accordingly, directing HCFA to file a report stating what agreement, if any, was reached by the parties. (Ruling on Further Procedures to be Followed in Disposition of Case dated 4/12/79, p. 3.) HCFA's report stated that the State had failed to respond to its request for certain documents and information, and that HCFA was therefore unable to stipulate that the delay in completing the inspections was due to the blizzard. (Respondent's Submission in Response to the Panel's Ruling on Further Procedures to be Followed in the Disposition of This Case, dated 7/2/79, pp. 2-3.)

HCFA identified in particular two matters that precluded it from stipulating as to the cause of the delay. HCFA stated that the information provided by the State did not support an assertion made by the State at the conference that, after falling behind on the original review schedule, it deliberately chose to inspect facilities with less than 200 beds prior to the two facilities with over 200 beds but with less patients than the smaller facilities (Transcript, pp. 19, 79, 97-98), and that the State failed to clarify this matter although requested by HCFA to do so. (Respondent's Submission in Response to the Panel's Ruling on Further Procedures, attached letter from Porter to Webster, dated 6/5/79, pp. 1-2.) In view of our holding that the technical failings provision is not tied to the "98 percent plus 200 bed or more" standard, however, the order in which the missed facilities were inspected is not of any significance.

HCFA stated, secondly, that it appeared that, contrary to the State's contention that the blizzard had disrupted inspections on a large scale, the State had in fact met its original review schedule for all but the 17 facilities which were reviewed after the end of the quarter. (Respondent's Submission in Response to the Panel's Ruling on Further Procedures, attached letter from Porter to Webster, dated 6/5/79, pp. 2-3.) The State clearly asserted with respect to each of the 17 facilities in question that the inspections were delayed beyond the end of the quarter because weather conditions had caused delays throughout the entire schedule. (Respondent's Submission in Response to the Panel's Ruling on Further Procedures, enclosed letter from Chief, Division of Medical Assistance, Department of Public Welfare, to Deputy Director, Medicaid Bureau, HCFA, dated 5/9/79, pp. 1-2.) HCFA compared a list of facilities and dates which the State represented as "[t]he original review schedule for the period January 1 to March 31, 1978" with two other lists supplied by the State showing the facilities reviewed from January 26 to February 8, 1978, and the facilities reviewed from February 9 to March 31, 1978 and found that the dates were the same. The list identified by the State as the "original review schedule" is clearly not the original, however, since the 17 missed facilities are not included on it. HCFA stated that the State had failed to provide a copy of the original review schedule which it had subsequently requested in order to make a clear determination on this point.

It is possible that, even if the entire schedule was not thrown into disarray, at least the 17 facilities which were missed were scheduled to be reviewed during the blizzard. Again, however, the State's documentation fails to show that this was the case. A list provided by the State of the date each of the 17 facilities was "due for review" and the date each facility was actually reviewed shows that all but two of the facilities were "due for review" after the date of the blizzard which the State contends was responsible for the delays. (Respondent's Submission in Response to the Panel's Ruling on Further

Procedures, enclosed letter from Chief, Division of Medical Assistance, Department of Welfare, to Deputy Director, Medicaid Bureau, HCFA, dated 5/9/79, Attachment #1.) From a comparison of these dates with the State's Quarterly Showing, however, it appears that the "due for review" dates are merely the anniversary dates of each facility's previous inspection, which, at least in the case of the other facilities, were not necessarily the dates they were originally scheduled for review in the first quarter of 1978. If the State had provided a copy of the original review schedule as requested by HCFA, this matter might have been clarified.

Rather than cooperate with HCFA, counsel for the State instead proceeded on his own initiative to take a deposition, apparently on this issue. He refused, however, to serve a copy of the transcript of the deposition on HCFA, asserting that the Federal Rules of Civil Procedure required that the opposing party pay for a copy if it wanted one, this despite the fact that he had been specifically advised that the Federal Rules did not apply in proceedings before the Board. Although he refused to serve the deposition in accordance with 45 CFR 16.53, counsel for the State on two occasions filed with the Board certificates of service which, in context, appeared calculated to mislead the Board to believe that service was properly made. This confrontation was entirely of counsel's own making, since the Board's rules do not provide for the taking of a deposition, and further, since the Panel had preliminarily indicated that there was in the case no dispute of material fact the resolution of which would be materially assisted by the taking of oral testimony. In fact, it seems apparent that with less cost, less space, less time and less confrontation, a short affidavit could have provided the same information in view of the diffuseness of the deposition technique.

State's counsel, by insisting improperly and deliberately on violating the Board's rules, has made it inappropriate for us to consider the deposition which, if the material had been properly submitted, might perhaps have strengthened his case. Nevertheless, we find that the evidence already in the record impels the inference the blizzard was a substantial cause of the 17 missed inspections.

Other issues raised by the State.

The State at one point argued that it had in fact met the "98 percent plus all 200 bed or more" standard. It contended that the "200 bed or more" part of the standard refers to actual patients and not bed capacity, and that since the two uninspected facilities which had bed capacities of over 200 had only 33 and 156 patients, respectively, it did inspect all facilities with 200 or more beds. (Letter from Director, Department of Public Welfare, to Board's Executive Secretary, dated 9/26/79, p. 2.)

The State has failed to show, however, that there is any ambiguity in the statute's use of the word "beds". The State bases its interpretation on the fact that the formula in Section 1903(g)(5) for computing the amount of the penalty for failure to complete the required inspections calls for the number of patients and not beds. This tends, however, to undermine rather than support the State's argument since it appears that if Congress had intended a count of "patients" in Section 1903(g)(4)(B), it would have said so. Moreover, the State has shown no reason why it is inconsistent to use beds as the criterion in one section and patients as the criterion in another. Finally, it seems that it would not make sense in practical terms to require the inspection of all facilities with more than a certain number of patients rather than beds since the number of patients in a facility fluctuates whereas the number of beds remains relatively constant.

Another issue, raised by the State for the first time during the informal conference, was whether the disallowance was invalid since HCFA, in calculating the amount of the disallowance, had used the number of facilities rather than the number of patients as required by Section 1905. (Transcript, pp. 6-8.) HCFA explained that this procedure was used since States were not required to submit patient data to it on a routine basis, and stated that if the State would supply the patient data, it would be willing to recalculate the amount of the disallowance. (Transcript, pp. 45-46, 49-50.) Thus, on the basis of facts which are available and serve as reasonable estimators, HCFA makes a rough disallowance which the State is free to correct by furnishing more refined data if it is in its interest to do so. HCFA's procedure, which avoids acquiring voluminous reports that may prove unnecessary, seems to be a reasonable accommodation of the interests of all parties. The State took the position, however, that the case should be dismissed without prejudice to HCFA, which could issue a new notification of disallowance once it had properly calculated the amount of the disallowance. (Transcript, pp. 47-49, 52-53.) We declined to dismiss the case, but requested the parties themselves to try to agree on the proper amount of the disallowance (assuming that disallowance was required under the statute). (Ruling on Further Procedures to be Followed in Disposition of Case, dated 4/12/79, p. 3.),The parties did not reach any agreement on this issue (HCFA's Summary Memorandum, dated 8/6/79, p. 7.); since we have determined that the State's showing should have been found satisfactory, however, the resolution of this issue is not required.

Precedential value of decision.

We note, finally, that HCFA stated that if the Panel did proceed to decision before a final regulation was issued, and adopted an interpretation of the statute different than that adopted in the final regulation, HCFA would not consider itself bound by the Panel's ruling in making further

disallowances under the final regulation. (Respondent's Summary Memorandum, dated 8/6/79, p. 5.) Our conclusions of law under the present situation where no regulation interpreting the statute was in effect of course would not necessarily be the same where a regulation had been issued.

After this decision was in final form, we learned of the issuance of amendments to 42 CFR Part 456, published at 44 FR 56333 (October 1, 1979) and effective December 31, 1979, dealing in part with the exception clauses of Section 20, Pub. L. 95-142, amending Section 1903(g) of the Act. Preliminary examination of this regulation indicates that it is not retroactive in terms and thus does not directly affect the issues in this case. We do not inquire into the consistency of this opinion and the new regulation which is not applicable here. We leave determination under that regulation for such time as a case may arise before this Board under it, at which time the matter can be resolved.

CONCLUSION

We hold that the State's showing was satisfactory under the technical failings provision of Section 1903(g)(4)(B) of the Social Security Act, and accordingly, reverse the disallowance made by the Administrator of HCFA.

/s/ Manuel B. Miller

/s/ Thomas Malone

/s/ Malcolm S. Mason, Panel Chairman