

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
The Brethren's Home,)	Date: June 4, 1998
)	
Petitioner,)	
)	
- v. -)	Docket No. C-98-164
)	Decision No. CR535
Health Care Financing)	
Administration.)	
)	

DECISION

I dismiss the hearing request of Petitioner, The Brethren's Home. I find that Petitioner has no right to a hearing in this case. Additionally, I deny Petitioner's motion to compel the Health Care Financing Administration (HCFA) to conform its statement of deficiencies to the contents of HCFA's April 6, 1998 letter to Petitioner. I have no authority to grant the relief requested by Petitioner in its motion.

I. Background

For purposes of this decision, I am admitting into evidence three documents which the parties submitted. These consist of: a notice letter which HCFA sent to Petitioner on September 16, 1997 (HCFA Ex. 1); Petitioner's November 18, 1997 request for a hearing (P. Ex. 1); and a notice which HCFA sent to Petitioner on April 6, 1998 (HCFA Ex. 2).

On September 16, 1997, HCFA notified Petitioner that HCFA had determined to impose against Petitioner civil money penalties which totaled \$15,350. HCFA Ex. 1. HCFA advised Petitioner that HCFA had made its determination based on findings made at a survey of Petitioner conducted on August 19, 1997 by the Ohio Department of Health. Id. On November 18, 1997, Petitioner requested a hearing from HCFA's September 16, 1997 determination. P. Ex. 1. The case was assigned to me for a hearing and a decision.

After Petitioner had made its hearing request, HCFA revised its determination to impose civil money penalties against Petitioner so that the total amount of penalties was reduced to \$8,250. See HCFA Ex. 2. However, on April 6, 1998, HCFA advised Petitioner that it and the Ohio Department of Health had reviewed additional documents that Petitioner had submitted to them. HCFA Ex. 2. HCFA told Petitioner that, on the basis of these additional documents, it

had determined not to impose a civil money penalty against Petitioner. *Id.* Additionally, HCFA advised Petitioner that it was rescinding a two-year prohibition against Petitioner conducting nurse aide training or operating a competency evaluation program. *Id.* That prohibition was based on HCFA's original conclusion that Petitioner was providing care of a substandard quality. *Id.* However, the additional documentation that Petitioner had submitted to the Ohio Department of Health and HCFA showed that Petitioner was, in fact, not providing care of a substandard quality. *Id.*

In its April 6, 1998 notice to Petitioner, HCFA advised Petitioner that it should withdraw its hearing request inasmuch as no remedies were being imposed against Petitioner. HCFA Ex. 2. Petitioner did not withdraw its hearing request. On April 14, 1998, HCFA moved to dismiss Petitioner's hearing request on the ground that Petitioner no longer had a right to a hearing. Petitioner responded by moving that HCFA be compelled to conform the statement of deficiencies that had been prepared by the Ohio Department of Health, and on which HCFA had based its September 16, 1997 notice to Petitioner, to the contents of HCFA's April 6, 1998 notice to Petitioner. Additionally, Petitioner argued that its request for a hearing not be dismissed until HCFA made the moved-for changes in the statement of deficiencies.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether: (1) Petitioner has a right to a hearing and (2) I have authority to direct HCFA or the Ohio Department of Health to revise the statement of deficiencies that the Ohio Department of Health prepared after completion of the August 19, 1997 survey of Petitioner.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision to dismiss Petitioner's hearing request and to deny Petitioner's motion to compel HCFA to revise the statement of deficiencies that the Ohio Department of Health prepared after the completion of the August 19, 1997 survey of Petitioner. I set forth each Finding below, as a separate heading. I discuss each Finding in detail.

1. Petitioner has no right to a hearing because HCFA has not determined to impose a remedy against Petitioner.

Petitioner is a long-term care facility that participates in federally funded health care programs, including Medicare and State Medicaid programs. *See* HCFA Ex. 1. HCFA originally determined to impose civil money penalties against Petitioner pursuant to the authority conferred on HCFA by sections 1819 and 1919 of the Social Security Act (Act). *Id.*

The Secretary has published regulations which, among other things, establish the right of a long-term care facility to a hearing from a determination by HCFA to impose a remedy against that facility. 42 C.F.R. Parts 488, 498. A long-term care facility is entitled to a hearing only in

the limited circumstance where HCFA has made a determination to impose a remedy against the facility. 42 C.F.R. §§ 488.408(g)(1); 498.3(b)(12). A long-term care facility is not entitled to a hearing where HCFA has not made such a determination. Fort Tryon Nursing Home, DAB CR425 (1996).

The undisputed facts of this case are that HCFA initially determined to impose a remedy against Petitioner consisting of civil money penalties. HCFA Ex. 1. That determination gave Petitioner a right to a hearing. However, HCFA subsequently rescinded its determination. HCFA Ex. 2. In doing so, HCFA extinguished Petitioner's right to a hearing. Petitioner has no right to a hearing because there exists no determination by HCFA to impose a remedy against it.

2. I have no authority to compel HCFA to modify the statement of deficiencies that the Ohio Department of Health prepared after the August 19, 1997 survey of Petitioner.

I have no authority to make findings concerning the accuracy of the statement of deficiencies that the Ohio Department of Health prepared after the August 19, 1997 survey of Petitioner. HCFA has rescinded its determination to impose a remedy against Petitioner based on that statement. I may hear and decide a facility's contentions concerning the accuracy of a statement of deficiencies only where HCFA has determined to impose a remedy based the findings contained in that statement.

Petitioner observes that it is required to make available to its residents the results of the most recent compliance survey of it. See 42 C.F.R. § 483.10(g). Petitioner argues that it is unreasonable to require it to post the results of the August 19, 1997 survey where subsequent events establish the survey results not to be accurate. However, the requirements of this regulation do not give Petitioner any hearing rights, or me any authority to address the accuracy of survey findings, where HCFA has not determined to impose a remedy against Petitioner.

I note that although the regulation cited by Petitioner does require it to post the results of the most recent survey – which would include any statement of deficiencies prepared after the August 19, 1997 survey – there is nothing to preclude Petitioner from posting additional explanatory materials along with the survey results to give its residents a complete picture of what was found ultimately by the Ohio Department of Health and HCFA as the result of the August 19, 1997 survey. Presumably, such additional documentation might include HCFA's April 6, 1998 notice to Petitioner. See HCFA Ex. 2.

/s/

Steven T. Kessel
Administrative Law Judge