

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:	)	
Lorraine Velush,	)	DATE: January 29, 1998
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-449
	)	Decision No. CR514
The Inspector General.	)	
_____	)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Lorraine Velush (Petitioner), from participating in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs (Medicare and Medicaid<sup>1</sup>), until Petitioner obtains a valid license to provide health care in the State of Connecticut. I find that Petitioner surrendered her license to practice as a registered nurse in Connecticut during the pendency of a formal disciplinary proceeding before the Connecticut licensing authority which concerned Petitioner's professional competence, professional performance, or financial integrity, within the meaning of section 1128(b)(4)(B) of the Social Security Act (Act). Additionally, I find that when an exclusion imposed by the I.G. pursuant to section 1128(b)(4)(B) of the Act is coterminous with the term of the revocation, suspension, or surrender of the excluded provider's State license, then no issue of reasonableness exists and an exclusion for at least that length is mandated by law.

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<sup>1</sup> In this decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

### BACKGROUND

By letter dated May 14, 1997, the I.G. notified Petitioner that she was being excluded from participating in Medicare and Medicaid. The I.G. explained that Petitioner's exclusion was authorized under section 1128(b)(4) of the Act because Petitioner's "license to practice medicine or provide health care in the State of Connecticut was revoked, suspended, or otherwise lost or was surrendered while a formal disciplinary proceeding was pending before the licensing authority for reasons bearing on [Petitioner's] professional competence, professional performance, or financial integrity." Additionally the I.G. advised Petitioner that her exclusion would remain in effect until she obtained a valid license to provide health care in the State of Connecticut.

Petitioner requested a hearing and the case was assigned to me for decision. The parties agreed that the case could be decided based on their written submissions, and that an in-person hearing was not necessary. The parties have each submitted written arguments and proposed exhibits.

The I.G. submitted four proposed exhibits (I.G. Ex. 1-4). Petitioner did not object to these exhibits. Petitioner submitted six proposed exhibits (P. Ex. 1-6). The I.G. did not object to Petitioner's exhibits. Thus, in the absence of objection, I am admitting I.G. Ex. 1-4 and P. Ex. 1-6 into evidence in this case. I base my decision in this case on these exhibits, the applicable law, and the arguments of the parties.

### APPLICABLE LAW

Pursuant to section 1128(b)(4) of the Act, the I.G. may exclude "[a]ny individual or entity - (A) whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license or the right to apply for or renew such a license, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity, or (B) who surrendered such a license while a formal disciplinary proceeding was pending before such an authority and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity."

Pursuant to section 1128(c)(3)(E) of the Act, as amended by section 212 of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104-191), the length of an exclusion under section 1128(b)(4) or 1128(b)(5) "shall not be less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered, or the individual or the entity is excluded or suspended from a Federal or State health care program." Prior to 1996, the Act provided no criteria for establishing the length of exclusions for individuals or entities excluded pursuant to section 1128(b)(4). The 1996 amendments require, at section 1128(c)(3)(E), that an individual or entity who is excluded under section 1128(b)(4) be excluded for not less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered. Under the 1996 amendments, no issue of reasonableness exists where the exclusion imposed by the I.G. is coterminous with the revocation, suspension, or surrender of a State license. A coterminous exclusion, as in Petitioner's case, is the mandated minimum required by law.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Petitioner was licensed by the State of Connecticut to practice as a registered nurse. I.G. Ex. 3.
2. Petitioner was a registered nurse employed as a case manager by Bethel Health Care in Bethel, Connecticut. I.G. Ex. 1.
3. On July 11, 1996, the State of Connecticut, Department of Consumer Protection, Drug Control Division, issued a report that alleged that on numerous instances in 1996, Petitioner, in her capacity as case manager employed at Bethel Health Care, improperly diverted controlled substances from several patients of that facility. I.G. Ex. 1
4. On July 12, 1996, a copy of the July 11, 1996 Drug Control Division report was sent to the Connecticut Public Health Hearing Office. I.G. Ex. 1.
5. The Connecticut Department of Public Health contacted Petitioner and advised her that she was under investigation for reasons bearing on her professional competence and performance. The Connecticut Department of Public Health also informed Petitioner that it would initiate disciplinary proceedings against her based on the investigation findings. I.G. Ex. 2.

6. The Connecticut Department of Public Health filed a petition against Petitioner, and in settlement of the allegations contained in the petition, Petitioner voluntarily surrendered her license to practice as a registered nurse in the State of Connecticut and waived her right to a hearing. Petitioner further agreed that if she seeks a new license or to reinstate her license at any time in the future, the allegations contained in the petition shall be deemed to be true. I.G. Ex. 3.

7. On May 14, 1997, the I.G. notified Petitioner of her exclusion from participation in Medicare and Medicaid.

8. Section 1128(b)(4)(B) of the Act authorizes the I.G. to exclude an individual who surrenders his or her license to provide health care during the pendency of formal disciplinary proceedings before a State licensing authority which concern the individual's professional competence, professional performance, or financial integrity.

9. Petitioner, as a registered nurse, possessed a license to provide health care within the scope of section 1128(b)(4)(B) of the Act.

10. Petitioner surrendered her nursing license during the pendency of a formal disciplinary proceeding before a State licensing authority, within the scope of section 1128(b)(4)(B) of the Act.

11. Petitioner's surrender of her registered nurse license was for reasons bearing on or concerning her professional competence, professional performance, or financial integrity within the scope of section 1128(b)(4)(B) of the Act.

12. The I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act.

13. Where an exclusion is imposed pursuant to section 1128(b)(4)(B) of the Act, the period of exclusion shall not be less than the period during which the individual's license to provide health care is revoked, suspended, or surrendered. Act, section 1128(c)(3)(E).

14. When an exclusion is imposed pursuant to section 1128(b)(4)(B) of the Act and the period of exclusion is coterminous with the revocation, suspension, or surrender of a State license, then no issue of reasonableness concerning the length of the exclusion exists.

15. The exclusion imposed by the I.G. against Petitioner is for the minimum period mandated by section 1128(c)(3)(E) of the Act.

#### PETITIONER'S CONTENTIONS

Petitioner does not dispute that the I.G. has the authority to exclude her under section 1128(b)(4)(B) of the Act, but she argues that the scope and length of her exclusion is unreasonable.

In particular, Petitioner asserts that she does not intend to seek reinstatement of her registered nurse's license because of the danger of substance abuse relapse which would result from having access to medications through a nursing license. However, she argues that the loss of her license should not affect her right to perform other services related to health care. She asserts that she intends to work in an administrative or managerial capacity in a health care field and she maintains that her exclusion should not apply to such employment. In addition, Petitioner argues that the law provides that she may be reinstated if she obtains a valid license to provide health care, and that neither the statute nor the regulations require that the license obtained be the same type of license that she surrendered.

She also maintains that the period of exclusion imposed by the I.G. is not consistent with the actions of the State licensing authority. She asserts that the Connecticut Department of Public Health, the Connecticut licensing authority, has no objection to her employment in a health care facility, provided she is not employed in any capacity requiring a health care license. Petitioner contends that the I.G. ought to rely on the Connecticut licensing authority's determination that she can be trusted to work in a health care facility in an unlicensed capacity.

She maintains that since she cannot seek reinstatement of her nursing license because of the danger of substance abuse relapse, her exclusion is permanent. She argues that the length of this exclusion is excessive and unreasonable in light of her circumstances. Petitioner contends that the exclusion period is excessive for the additional reason that it does not recognize an exception for early reinstatement set forth in 42 C.F.R. § 1001.501(c)(2). Petitioner contends that she has the right to rely on this exception. Petitioner therefore asks that the exclusion be limited to provision of services within the scope of her nursing license and that

the exclusion period be found to be unreasonable in length.

#### DISCUSSION

Petitioner does not dispute that the I.G. has the authority to exclude her pursuant to section 1128(b)(4)(B) of the Act, and I agree that that the evidence of record establishes that the I.G. is authorized to exclude her pursuant to that section.<sup>2</sup> The undisputed facts establish that Petitioner voluntarily surrendered her nursing license while a formal disciplinary proceeding was pending before the Connecticut licensing authority. Dillard P. Enright, DAB CR138 (1991); John W. Foderick, M.D., DAB CR43 (1989). The disciplinary proceeding was initiated as a result of an investigative report prepared by the Drug Control Division of the State Department of Consumer Protection. The report recited findings that Petitioner diverted controlled substances from patients within her care. Such conduct clearly involves her professional competence and professional performance within the meaning of section 1128(b)(4)(B) of the Act.

I reject Petitioner's argument that her exclusion should not apply to participation in Medicare and Medicaid in an administrative or managerial capacity. Exclusion from Medicare and Medicaid "means that items and services furnished by a specified individual or entity will not be reimbursed under Medicare or the State health care programs." 42 C.F.R. § 1001.2. Thus, Petitioner's exclusion covers any and all items or services, including administrative and management services, reimbursed by Medicare and Medicaid. The fact that the licensing authority in Connecticut does not object to her performing health care duties which do not involve licensure is irrelevant if such conduct constitutes the delivery of items or services for which Medicare and Medicaid reimbursement is sought.

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<sup>2</sup> The I.G.'s notice letter excluded Petitioner pursuant to section 1128(b)(4) of the Act. In her initial brief, the I.G. cited section 1128(b)(4)(B) as the basis for the exclusion against Petitioner. The I.G. also cited section 1128(b)(4)(A) as an alternative basis. Because Petitioner does not dispute that the I.G. is authorized to exclude her pursuant to section 1128(b)(4)(B) of the Act, I do not find it necessary to reach the issue of whether Petitioner's exclusion can be sustained under section 1128(b)(4)(A) of the Act.

A decision of an appellate panel of the Departmental Appeals Board supports this interpretation. In Walter J. Mikolinski, Jr., DAB No. 1156 (1990), the petitioner was a pharmacist who was excluded under section 1128(b)(4) for having his Massachusetts pharmacy license suspended for reasons bearing on his professional competence, professional performance, or financial integrity. The administrative law judge sustained the petitioner's indefinite exclusion as applied to his program participation as a pharmacist, but then imposed a two year exclusion as applied to his program participation as a nursing home administrator. The Departmental Appeals Board held that the administrative law judge holding was erroneous in that it was inconsistent with the statute:

Section 1862(e)(1) refers to an exclusion pursuant to section 1128 as being an exclusion from participation in the program in general, not as exclusion from participating in the program in one or more specified, limited capacities. Such an exclusion is for 'the' established period, and results in denial of payment for 'any' item or service. See also sections 1903(i)(2), 504(b)(6), and 2005(a)(9) of the Act. If Congress had intended the Secretary to apply different exclusion periods to different types of services, Congress would have used different wording, such as denying reimbursement for items or services covered by any exclusion pursuant to section 1128. Id. at 7.

Consequently, I find that the exclusion imposed on Petitioner by the I.G. is a program-wide exclusion, the effect of which is to deny payment for items or services under the federally funded programs, irrespective of the nature of the items or services. To hold otherwise would be to defeat one of the main purposes of excluding providers: protecting the programs and their beneficiaries and recipients from untrustworthy providers.

Moreover, I disagree with Petitioner's contention that the law provides that she may be reinstated if she obtains any type of license to provide health care. According to Petitioner, neither the statute nor the regulations require that the license obtained be the same type of license that was revoked, suspended or surrendered. Instead, in order to qualify for reinstatement, Petitioner asserts that she needs to obtain a valid license to provide health care, and it does not matter what type of license it is.

Petitioner's argument is contrary to the statute. The I.G. has the authority to exclude Petitioner in this case because she surrendered her nursing license while a formal disciplinary proceeding was pending within the meaning of section 1128(b)(4)(B) of the Act. The Act, as amended at section 1128(c)(3)(E), requires that an individual excluded pursuant to section 1128(b)(4) be excluded for not less than the period during which the individual's license to provide health care is revoked, suspended, or surrendered. It is plain from the language of the amendment at 1128(c)(3)(E) that the minimum length of the exclusion must be coterminous with the term of revocation, suspension, or surrender of the State license. Since Petitioner surrendered her license to practice as a registered nurse in the State of Connecticut, the Act requires that the period of the exclusion will not be less than the period during which her license to practice nursing in the State of Connecticut is surrendered. Petitioner is required to obtain from the Connecticut licensing authority the same type of license that she surrendered before she can be considered for reinstatement as a participant in Medicare and Medicaid.

Petitioner argues also that she has the right to rely on an exception for early reinstatement pursuant to the regulations at 42 C.F.R. § 1001.501(c)(2). That regulation provides that the I.G. will consider a request for early reinstatement if an individual fully and accurately discloses the circumstance surrounding the exclusion to a licensing authority of a different State, and that State grants the individual a new license or takes no significant adverse action as to a currently held license.

I do not agree that the regulation relied on by Petitioner applies to this case. The regulation was promulgated prior to the amendment to the Act which governs the length of the exclusion in this case. The statute, as amended, clearly and unambiguously requires a minimum mandatory exclusion for individuals excluded pursuant to section 1128(b)(4) of the Act. The statutory language requires that Petitioner's exclusion be at least coterminous with the period of her surrender of her Connecticut nursing license. The Act supersedes the regulations, and it controls.

Although Petitioner contends that the length of her exclusion is not reasonable, it has been held that under section 1128(c)(3)(E) of the Act, "no issue of reasonableness exists" where the exclusion imposed by the I.G. is coterminous with the revocation, suspension, or

surrender of a State license. Maurice Labbe, DAB CR488 at 3 (1997). As in Labbe, the exclusion period in this case is controlled by section 1128(c)(3)(E) of the Act. That section requires that Petitioner be excluded for a period no less than the period during which her license is revoked, suspended, or surrendered. The coterminous exclusion imposed by the I.G. in this case is the mandated minimum period required by law.<sup>3</sup>

Petitioner's exclusion is not punitive because it is clear that the purpose of exclusion is remedial, rather than punitive in nature. See Manocchio v. Kusserow, 961 F.2d 1539, 1541 (11 Cir. 1992); Greene v. Sullivan, 731 F.Supp. 838, 840 (E.D. Tenn. 1990). The remedial goal of exclusions is to "protect present and future beneficiaries from the abusers of these programs." Manocchio, at 1542. Therefore as long as the primary purpose of the exclusion is remedial in nature, i.e. to protect the public, then it is not improper.

#### CONCLUSION

I conclude that the I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act. I conclude also that the period of exclusion imposed by the I.G. is the minimum period mandated by section 1128(c)(3)(E) of the Act. Accordingly, I sustain it.

/s/

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**Joseph K. Riotto**  
**Administrative Law Judge**

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<sup>3</sup> An issue of reasonableness will arise only if the I.G. imposes an exclusion for a longer term than the minimum period mandated by the Act. In that event, the administrative law judge will hear and decide the issue of whether the period of exclusion which extends beyond the minimum period is reasonable.