Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Ronald Allen Cormier,	DATE: December 17, 1990
Petitioner,	
- v. -	Docket No. C-206
The Inspector General.	Decision No. Cr 112

DECISION

On November 20, 1989, the Inspector General (I.G.) notified Petitioner that he was being excluded for ten years from participation in the Medicare and any State health care programs.[1] The I.G. told Petitioner that he was being excluded as a result of his conviction in the County Court of the Eighth Judicial Circuit in and for Alachua County, Florida (Alachua County Court), of a criminal offense relating to patient abuse.[2] The I.G. advised Petitioner that the exclusion of individuals convicted of such an offense is mandated by section 1128(a)(2) of the Social Security Act (Act), and that Section 1128(c)(3)(B) of the Act provides that the minimum period of exclusion for such an offense is five years. The I.G. excluded Petitioner for five years in addition to the minimum mandatory period after taking

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

[2] Inspector General Exhibits 1 and 2 refer to Petitioner as Ronald Allen Courmier. Documents submitted by Petitioner to the Civil Remedies Division refer to him as Ronald Allen Cormier. Petitioner did not object to the introduction of these exhibits, and from this I infer that Ronald Allen Courmier and Ronald Allen Cormier are one and the same person.

into consideration that "the program violations had a significant adverse physical, mental or financial impact on program beneficiaries or patients."

Petitioner, through his attorney, requested a hearing on January 17, 1990, and the case was assigned to me for a hearing and a decision. About March 15, 1990, before the first prehearing conference, Petitioner's attorney withdrew from the case. I provided Petitioner with time to secure the representation of another attorney. However, Petitioner has not obtained new counsel and appeared before me pro se.

I held a telephone prehearing conference in this case on April 24, 1990. At that time I set a date and a place to hear this case; June 5, 1990, in Gainesville, Florida. Petitioner later requested a postponement of this hearing, explaining that he needed additional time to collect evidence in support of his case, in light of unexpected items in the I.G.'s exhibit and witness lists. The I.G. did not oppose this request. In an Order dated June 15, 1990 I set a new hearing date of September 18, 1990.

On August 24, 1990, the I.G. made a motion to dismiss Petitioner's appeal, as Petitioner had failed to file the requisite submissions itemized in my June 15, 1990 Order. Petitioner's submissions were to include copies of proposed witness and exhibit lists, and copies of proposed exhibits and written statements. On August 29, 1990, I issued an Order to show cause why Petitioner had both failed to file his submissions or to contact either the I.G. or my office. In the absence of any communication from Petitioner, I stated that I must conclude that Petitioner did not intend to pursue his hearing request. I gave the Petitioner until September 5, 1990 to contact my office to let me know whether he still wanted a hearing and, if so, why he had not complied with my Order. Failure to contact my office would have resulted in a dismissal of his case, and a forfeiture of his right to a hearing.

Petitioner timely contacted my office and informed me that he did want a hearing, but that he would not be offering any evidence or witnesses. Accordingly, I reconfirmed the hearing for Tuesday, September 18, 1990, at the Alachua County Courthouse.

By telephone on September 17, 1990, Petitioner informed my office that he would be unable to keep his September 18, 1990 hearing date because on that date he was to be

in court to defend a charge of driving under the influence.

Accordingly, I held a hearing in this case on October 12, 1990 in Gainesville, Florida. Petitioner declined to submit a post-hearing written statement, preferring instead to base his arguments on the hearing request submitted by his attorney. The I.G. submitted a post-hearing statement on November 27, 1990.

I have considered the parties' arguments, the undisputed material facts, and the applicable law and regulations. Based on the record before me, I conclude that the ten year exclusion imposed by the I.G. is reasonable. Therefore, I sustain the exclusion imposed and directed against Petitioner.

ISSUES

The issues in this case are whether:

1. In the absence of regulations, the I.G. has jurisdiction to impose and direct Petitioner's exclusion;

2. Abuses in the criminal proceeding against Petitioner would preclude the I.G.'s exclusion of Petitioner;

3. There are any constitutional issues in Petitioner's case which would preclude the I.G.'s exclusion of Petitioner;

4. Petitioner was convicted of a criminal offense;

5. The criminal offense of which Petitioner was convicted relates to neglect or abuse of patients in connection with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Act;

6. The length of the exclusion imposed and directed by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

1. At all times relevant to this case Petitioner was employed as a nursing assistant (nurse tech) at University Nursing Care Center in Gainesville, Florida. Tr. at 15, 21 - 22.

2. On September 22, 1987, Petitioner was indicted in the Alachua County Court of six counts of criminal abuse of a disabled person. I.G. Ex. 1.

3. On September 26, 1988, Petitioner pleaded nolo contendere to Count IV of this indictment. Count IV states that Petitioner "on or about February 2, 1987, in the County of Alachua and the State of Florida, did knowingly or willfully abuse, neglect, or exploit an aged or disabled person, to-wit: Anna Lou Tomlinson and by such omission and/or failure, significantly impaired and/or jeopardized the physical or emotional health of the patient contrary to Section 415.111(4), Florida Statutes." I.G. Ex. 1, 2.

4. Pursuant to Petitioner's nolo contendere plea, on September 26, 1990, the court entered an order withholding adjudication of guilt and placing Petitioner on probation. Petitioner received six months probation, and was ordered to either complete 20 hours of community service or pay $101.25 in court costs and fees. I.G. Ex. 2.

5. Nurse techs at University Nursing Care Center were responsible for patient care; they made sure patients were bathed, fed, and kept clean and changed when they were incontinent. Tr. at 18 - 19, 21.

6. Most of the patients on the floor in question at University Nursing Care Center had Alzheimers or senile dementia - organic brain syndrome, or had strokes. They were not able to carry on intelligible conversations. Some were bedridden, and the others could not voluntarily ambulate. Tr. at 19 - 21, 33 - 34, 38 -39.

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[3] The I.G.'s exhibits and the hearing transcript will be referred to as follows:

I.G.'s Exhibit	I.G. Ex. (number)/(page)
Hearing Transcript	Tr. (page).

7. Credible testimony as to Petitioner's interactions with his patients, bolstered by Petitioner's inability to rebut the testimony, depicts a pattern of abusive conduct towards aged and helpless individuals. Specifically, Petitioner: 1) forcefully grabbed a patient by the arms in a way painful to the patient; 2) spanked a patient in a way painful to the patient; 3) left a patient restrained for an entire day, unfed and soiled and in an agitated condition; and 4) restrained another patient in a chair in an improper way and for such a length of time that the patient urinated on the floor. Tr. at 22 - 33.

8. Petitioner was convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. Findings 1 - 4, 7.

9. Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) of the Act. Findings 1 - 4, 7.

10. Petitioner was convicted of a criminal offense as defined by section 1128(i) of the Act.

11. The Secretary of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21661 (May 13, 1983).

12. The I.G. has the authority to impose and direct Petitioner's exclusion even in the absence of regulations.

13. I do not have the authority to decide the constitutional issues raised by Petitioner.

14. Sections 1128(a)(2) and 1128(c)(3)(B) set a minimum mandatory period of exclusion of five years in cases of persons convicted of patient abuse. However, the I.G. may direct and impose an exclusion for more than the minimum mandatory period in the appropriate circumstance.

15. On November 20, 1989, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid, pursuant to section 1128(a)(2) of the Act.

16. The I.G. excluded Petitioner for ten years due to Petitioner's significant adverse physical, mental or financial impact on program beneficiaries or patients.

17. A remedial objective of section 1128 of the Act is to protect program beneficiaries and recipients by permitting the Secretary (or his delegate the I.G.) to impose and direct exclusions from participation in Medicare and Medicaid of those individuals who demonstrate by their conduct that they cannot be trusted to provide items or services to program beneficiaries and recipients.

18. An additional remedial objective of section 1128 of the Act is to deter individuals from engaging in conduct which jeopardizes the integrity of federally-funded health care programs.

19. Petitioner engaged in acts that endangered the health and safety of patients. Finding 7. See 42 C.F.R. 1001.125(b)(2).

20. Petitioner has not demonstrated any comprehension of the wrongfulness of his acts or of the injury that these acts caused. See 42 C.F.R. 1001.125(b)(6).

21. Petitioner, by his acts and his failure to comprehend the wrongfulness of his acts or the injury that these acts caused, has demonstrated that he cannot be trusted to deal with beneficiaries and recipients of federally funded health care programs.

22. A lengthy exclusion is needed in this case to protect beneficiaries and recipients from the possibility that Petitioner might expose them to harm, and to deter others from engaging in the misconduct engaged in by Petitioner.

23. The ten year exclusion imposed and directed against Petitioner by the I.G. is reasonable. Findings 1 - 22.

ANALYSIS

The I.G. excluded Petitioner from participation in the Medicare and Medicaid programs after concluding that Petitioner had been convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Act. The I.G. further concluded that aggravating factors necessitated a longer exclusion than that mandated as a minimum by section 1128(c)(3)(B).

Petitioner has contested his exclusion. Petitioner has not, however, presented any evidence or offered any testimony in this case to rebut the evidence presented by the I.G. Petitioner has instead relied for his defense on unsubstantiated arguments raised by his attorney in Petitioner's request for a hearing. In this request, a number of threshold objections were raised as to whether or not the I.G. had the authority to exclude Petitioner. Petitioner argued that: 1) the I.G. had no jurisdiction to impose and direct his exclusion in the absence of regulations; 2) abuses in Petitioner's trial court criminal proceeding invalidated Petitioner's conviction as a basis for excluding Petitioner; and 3) imposition of an exclusion against Petitioner contravened provisions of the United States Constitution. Petitioner also contests the reasonableness of the length of his exclusion.

I find that the I.G. has the authority to exclude Petitioner, and that there are no valid issues precluding the I.G.'s exercise of that authority in this case. Further, I find that the length of the exclusion directed and imposed against Petitioner is reasonable given the gravity of Petitioner's conduct and Petitioner's manifest untrustworthiness to deal with program beneficiaries and recipients. Findings 1 - 23.

1. The I.G. has the authority to impose and direct Petitioner's exclusion even in the absence of regulations.

Petitioner argues that under section 1128(c) of the Act Congress required that the Department of Health and Human Services (DHHS) promulgate regulations to implement the mandatory exclusion sanctions of Public Law 100-93, the Medicare and Medicaid Patient and Program Protection Act of 1987, which became effective on August 18, 1987. Petitioner further argues that without such regulations the I.G. is without jurisdiction to impose exclusions. I disagree with Petitioner's contention.

This issue was raised in the case of Jack W. Greene, DAB Civ. Rem. C-56, aff'd DAB App. 1078, aff'd Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990), a case brought under section 1128(a)(1). Section 1128(a)(1) provides a minimum mandatory five year exclusion for convictions of "a criminal offense related to the delivery of an item or service" under the Medicare or Medicaid programs. In Greene, the Departmental Appeals Board (the Board) held that a mandatory exclusion may be applied on the basis of the statute alone and the existing regulations that preceded these 1987 revisions. The Board stated that the Secretary could rely on

existing regulations as long as they were compatible with the revised statute, and provided for the timing and notice of the exclusion in a manner fully consistent with the revised statutory provisions. The Board stated that as long as the agency proceeds in accordance with "ascertainable standards" and "provides a statement showing its reasoning in applying the standards," formal rulemaking was not required. Moreover, the Board held that Congress clearly authorized the Secretary to apply the revised provisions prior to promulgating new regulations when it authorized exclusions based on convictions occurring on or after the enactment of the revisions.

The Board's interpretation was upheld in Greene, 731 F.Supp 835, where the Court held:

> The 1987 amendments simply imposed a five-year minimum period of exclusion . . . . These provisions are self executing and do not require the formation of additional regulations prior to their application. Adequate notice and hearing regulations were already in place when Congress enacted the 1987 Amendments.

2. I do not have authority to consider alleged improprieties in Petitioner's criminal conviction as grounds to challenge the I.G.'s determination to exclude Petitioner pursuant to section 1128(a)(2).

In his hearing request, Petitioner alleged that he had been denied due process in the criminal proceeding in which he entered his plea of nolo contendere. He argued that, because his conviction was unfairly imposed, the I.G. lacked authority to impose and direct an exclusion. Petitioner specifically alleged that ineffective assistance of counsel and the fact that he did not give his consent to be represented by a legal intern as required by Florida law violated his rights to competent counsel and to be represented by an attorney under the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner did not, however, introduce any evidence to substantiate these allegations.

Claims of impropriety in a state criminal proceeding are not relevant to deciding whether the I.G. had a legal basis to impose and direct exclusions pursuant to section 1128(a)(2). The section of the Act which entitles parties to administrative hearings in certain contested cases does not authorize collateral challenges of state criminal convictions. See Andy E. Bailey, C.T., DAB App. 1131 (1990).

Section 205(b) of the Social Security Act authorizes hearings with respect to specific decisions by the Secretary (or by officials with authority delegated by the Secretary such as the I.G.). The decision which Petitioner seeks to challenge here is the I.G.'s determination that he has authority to exclude Petitioner based on Petitioner's conviction of a criminal offense within the meaning of section 1128(a)(2). The only pertinent question with respect to the issue of authority is whether Petitioner was in fact convicted of a criminal offense within the meaning of Section 1128(a)(2). Section 1128(a)(2) does not require the I.G. to look behind a criminal conviction in order to determine whether that conviction was imposed consonant with the requirements of due process. Therefore, Petitioner may not litigate the due process issue in this hearing.[4]

3. I do not have authority to adjudicate the constitutional arguments raised by Petitioner.

Petitioner argues in his hearing request that the Act is unconstitutional as applied to him. Petitioner argues that: (1) application of the Act to him would be a retroactive ex post facto violation of the Constitution, as the sanctions imposed are penal in nature and based on purported criminal conduct occurring before the date of the law's enactment; (2) the definition of "conviction" as contained in section 1128(i) of the Act, without the protection of a criminal trial, constitutes a constitutionally proscribed bill of attainder; and (3) the exclusion violated Petitioner's due process rights by excluding him before a hearing, by informing him in only an arbitrary and capricious manner of the basis for the exclusion, and by excluding him for an excessive period of time.

I am without authority to decide the validity of federal statutes or regulations in cases brought pursuant to the Act. I make no decision concerning the constitutionality of the Act as it is being applied to Petitioner. However, I do have authority to rule on the factual premises and contentions of the parties and to interpret laws, regulations, and court decisions. 42 C.F.R. 1003.105(c); See Betsy Chua M.D. et. al., DAB Civ. Rem. C- 139, aff'd DAB App. 1204 (1990); Jack W. Greene, DAB Civ. Rem. C-56, aff'd DAB App. 1078 (1989), aff'd Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990). I

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[4] The exclusion law did not bar Petitioner from appealing his conviction in State court.

conclude that Petitioner's constitutional arguments are inapplicable to the facts of this case.

a. Retroactivity and ex post facto:

Petitioner contends that the mandatory minimum five year exclusion provisions cannot be applied in this case, because the activity underlying his conviction took place on February 2, 1987, prior to the August 18, 1987 enactment of the mandatory exclusion provisions. Petitioner further contends that if the Act can be construed to permit the imposition of such sanctions, these sanctions violate the ex post facto clause of the Constitution. Although I make no decision concerning Petitioner's constitutional argument, I disagree with its premise.

First, the exclusion law is not being retroactively applied in this case. Congress intended the mandatory minimum exclusion provisions to apply prospectively from the date of the statute's enactment to all convictions occurring on or after the effective date of the 1987 amendment. In this case, Petitioner's conviction occurred on September 26, 1988, after the date of the law's enactment. Second, the exclusion law is not a penal law, but is remedial. The purpose of the exclusion law is not to punish, but to protect program integrity by preventing untrustworthy providers from having ready access to the Medicare and Medicaid trust funds. See Betsy Chua, M.D. et. al., DAB Civ. Rem. C-139 (1990), aff'd DAB App. 1204 (1990); Francis Shaenboen, R.Ph., DAB Civ. Rem. C-221 (1990). See also H.R. Rep. No. 158, 97th Cong., 1st Sess. 461-462, reprinted in 1981 U.S. Code Cong. & Admin. News 727-728; Preamble to the Regulations at 48 Fed. Reg. 38827 to 38836 (August 26, 1983).

b. Due process:

Petitioner argues that his due process rights were violated by the I.G. when the I.G. allegedly refused to permit a hearing or an informal discussion with counsel prior to the imposition of sanctions against Petitioner. Petitioner also argues that the I.G.'s actions were arbitrary and capricious because of the vagueness of the I.G.'s notice to Petitioner. Petitioner states that he was only advised in very conclusive terms of the basis of his ten year exclusion, without disclosure of the evidence supporting the conclusion. I make no decision concerning the constitutionality of the I.G.'s actions in this case. However, it is evident that the pre-exclusion actions taken by the I.G. in this case were in accord with procedures established by Congress. Furthermore,

the notice of exclusion sent to Petitioner by the I.G. reasonably apprises Petitioner of the basis for the exclusion in this case.

Congress directed the Secretary to provide excluded parties with the opportunity to have hearings on their exclusions. Act, section 1128(f). They do not, however, have a right to a pre-exclusion hearing. A hearing scheduled promptly after an exclusion is enough to satisfy a petitioner's due process rights. See Ram v. Heckler, 792 F.2d 444 (4th Cir. 1986). The law only requires that an excluded party be afforded reasonable notice and opportunity for a hearing by the Secretary to the same extent as is provided in section 205(b) of the Act. Section 205(b) states that:

> Upon request by any . . . individual who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered . . .[the Secretary] shall give such . . . [individual] reasonable notice and opportunity for a hearing with respect to such decision, and if a hearing is held, shall on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision.

In this case, Petitioner received reasonable notice of the I.G.'s actions, and took advantage of the hearing offered to him, which culminated in this action.

The I.G.'s exclusion notice states that Petitioner was excluded due to his conviction for patient abuse, and that the I.G. excluded Petitioner for ten years, five years more than the minimum mandatory exclusion, due to program violations which had a significant adverse physical, mental or financial impact on Petitioner's patients. While the Notice does not itemize Petitioner's actions, it does put Petitioner on notice that it is his actions with respect to the incidents that led to his indictment and conviction that the I.G. looked at when the I.G. determined to exclude Petitioner for ten years.

c. Bill of attainder:

Petitioner argues that the trial court judge withheld adjudication of guilt so that Petitioner has not been convicted of any offense. Petitioner further argues that even though Congress at section 1128(i) of the Act has defined "conviction" to include a plea of nolo contendere, the imposition of sanctions based on this redefinition of "conviction" without the protection of a criminal trial constitutes a constitutionally proscribed

"bill of attainder." Again, I make no decision on the constitutional issue raised by Petitioner. However, the statutory definition of conviction contained in section 1128(i) does not fall within the common and ordinary meaning of "bill of attainder." Therefore, I disagree with this premise of Petitioner's constitutional argument.

Black's Law Dictionary, Fifth Edition, West Publishing Co., 1979, page 116, defines a "bill of attainder" as:

> Such special acts of the legislature as inflict capital punishments upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a "bill of pains and penalties," but both are included in the prohibition in the Constitution. (Art. 1, Sec. 9).

Today the courts view a bill of attainder as a legislative act imposing a punishment on a named individual or identifiable members of a group. See Nixon v. Administrator of General Services, 433 U.S. 425, 474-475 (1977). Two tests were applied by the Court in Nixon, supra, to determine whether a statute was punitive. The first was functional,

> . . . analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes . . . Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers. Id. at 2806-2807.

The other test was motivational, an inquiry as to whether the legislative record evinced a Congressional intent to punish.

The exclusion law was enacted by Congress to protect the integrity of federally funded health care programs. Among other things, the law was designed to protect program recipients and beneficiaries from individuals who have demonstrated by their behavior that they cannot be entrusted with the well-being and safety of recipients and beneficiaries.

There are two ways that exclusions imposed and directed pursuant to this law advance the remedial purpose. First, the law protects recipients and beneficiaries from untrustworthy providers until they can be trusted to serve program recipients and beneficiaries. Second, exclusions function as examples to deter providers of items or services from engaging in conduct which threatens the well-being and safety of recipients and beneficiaries. See House Rep. No. 95-393, Part II, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News, 3072. Thus, as the exclusion law is a non-punitive, remedial law, the Act (and its various subsections) is not a bill of attainder.

4. Petitioner was convicted of a criminal offense.

Section 1128(i) of the Act provides that an individual has been "convicted" of a criminal offense when:

> (1) a judgment of conviction has been entered against the individual or entity by a Federal, State or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged.
>
> (2) there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
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> (3) a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
>
> (4) the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Petitioner pleaded nolo contendere to one count of abuse of a disabled person. Findings 2, 3. Under section 1128(i)(3) a plea of nolo contendere which is accepted by a Federal, State, or local court constitutes a conviction for the purposes of the Act.

Petitioner argues, however, that he was never "convicted", as after he pleaded nolo contendere an adjudication of guilt was withheld and he was placed on probation. Petitioner contends that, as he was not convicted of a criminal offense under state law, he cannot be considered as having been "convicted" within the meaning of the Act.

Section 1128 is a federal statute. It defines what constitutes a conviction independently from the definitions or interpretations applied by the states. It is not relevant that an action might not constitute a conviction within the meaning of state law, so long as the action meets the federal definition of a conviction. James F. Allen, M.D.F.P., DAB Civ. Rem C-152 at 6 (1990); Carlos E. Zamora, M.D., DAB Civ. Rem. C-74 (1989), aff'd DAB App. 1104 (1989). Congress intended that its definition of conviction sweep in the situation where a party admits or pleads nolo contendere to dispose of a complaint. In Congress' view, a party's admission of guilt or nolo contendere is sufficient to establish a conviction, regardless of how that admission is treated under the various states' criminal statutes and procedures. Allen at 8 - 9.

The Congressional committee which drafted the 1986 version of section 1128 stated "If the financial integrity of Medicare and Medicaid is to be protected, the programs must have the prerogative not to do business with those who have pleaded to charges of criminal abuse against them." H.R. No. 727, 99th Cong., 2d Sess. 75, reprinted in 1986 U.S. Code Cong. & Admin. News 3607, 3665; see Zamora, DAB App. 1104 at 5 - 6.

Furthermore, the fact that a plea of guilty or nolo contendere is held in abeyance or subsequently expunged does not mean that the plea is not a conviction within the meaning of section 1128(i). This section specifically provides that guilty or nolo contendere pleas which are accepted by courts are "convictions" regardless whether the conviction or other record is subsequently expunged, or whether judgment of conviction has been withheld. Social Security Act, section 1128(i)(1), (4).

Petitioner pleaded nolo contendere. That plea was accepted by the Alachua County Court. While Petitioner's adjudication of guilt was then withheld, this is a conviction for the remedial purposes of sections 1128(i)(3), 1128(i)(4), 1128(a)(2) and 1128(c)(3)(B).

5. Petitioner's "conviction" relates to the neglect or abuse of patients in connection with the delivery of a health care item or service.

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act require the I.G. to exclude individuals and entities from the Medicare and Medicaid programs when individuals or entities have been "convicted" of neglect or abuse of patients in connection with the delivery of a health care

item or service. Petitioner pleaded guilty to a criminal charge that he "did knowingly or willfully abuse, neglect, or exploit an aged or disabled person, to-wit: Anna Lou Tomlinson and by such omission and/or failure, significantly impaired and/or jeopardized the physical or emotional health of the **patient** contrary to Section 415.111(4), Florida Statutes." (Emphasis added.) I.G. Ex. 1.

Petitioner, in his hearing request, has argued that section 1128(a)(2) necessitates a basis for a conviction of neglect or abuse of patient(s) in the plural, and that he was convicted of neglecting or abusing only one patient. Section 1128(a)(2), however, does not require that the offense include abuse or neglect of more than one patient. Rather, section 1128(a)(2) describes the offense as "a criminal offense **relating** to neglect or abuse of patients" and concerns the issue of whether or not a petitioner's offense relates to patient abuse or neglect, not to the number of patients a petitioner might have neglected or abused. (Emphasis added.)

On its face the charging document refers to Ms. Tomlinson as a "patient" of Petitioner's. Thus, when Petitioner pleaded nolo contendere, he was pleading guilty to the neglect or abuse of a patient. Evidence presented at the hearing makes it quite clear that such neglect or abuse took place in the setting of the University Nursing Care Center, where Petitioner delivered health care services to patients. Findings 1, 5, 6, 7. I conclude, therefore, that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) of the Act.

5. The ten year exclusion imposed and directed by the I.G. is reasonable.

The I.G. excluded Petitioner for ten years. The I.G. is required by law to exclude a petitioner for a minimum of five years under sections 1128(a)(2) and 1128(c)(3)(B). There is no mandated maximum exclusion period for exclusions imposed pursuant to section 1128. In this case the I.G. determined to impose a ten year exclusion as he found:

> The program violations had a significant adverse physical, mental or financial impact on program beneficiaries or patients.

In determining the reasonableness of an exclusion, the primary consideration must be the degree to which the exclusion serves the law's remedial objectives of

protecting program recipients and beneficiaries from untrustworthy providers and acting as an example to deter other providers from engaging in similar conduct. An exclusion is not excessive if it does reasonably serve these objectives, even if it has an adverse impact on the person against whom it is imposed.

The hearing is, by law, de novo. Social Security Act, section 205(b). Evidence which is relevant to the reasonableness of an exclusion will be admitted in a hearing on an exclusion whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. Moreover, evidence which relates to a petitioner's trustworthiness or to the remedial objectives of the exclusion law is admissible at an exclusion hearing, even if that evidence is of conduct other than that which establishes statutory authority to exclude a petitioner. The purpose of the hearing is not to determine how accurately the I.G. applied the law to the facts before him, but whether, based on all relevant evidence, the exclusion comports with legislative intent.

The Secretary has adopted regulations to be applied in exclusion cases. The regulations specifically apply only to exclusions for "program-related" offenses (convictions for criminal offenses relating to Medicare and Medicaid). However, they express the Secretary's policy for evaluating cases where the I.G. has some discretion in determining the length of an exclusion. Thus, the regulations are instructive as broad guidelines for determining the appropriate length of exclusions in cases where the Secretary has discretionary authority to exclude individuals and entities. The regulations require the I.G. to consider factors related to the seriousness and program impact of the offense, and to balance those factors against any mitigating factors that may exist. 42 C.F.R. 1001.125(b)(1) - (7).

An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent. "The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the [exclusion] determined . . . was not extreme or excessive." (Emphasis added.) 48 Fed. Reg. 3744 (Jan. 27, 1983). However, based on the law and the evidence, should I determine that an exclusion is unreasonable, I have authority to modify the exclusion. Social Security Act, section 205(b).

The evidence in this case overwhelmingly establishes that Petitioner abused gravely disabled individuals who were entrusted to his care. These individuals were utterly dependent on Petitioner to provide them with the minimum necessities to sustain them. The evidence shows that Petitioner treated these patients with disdain, and, at times, engaged in acts of cruelty against them. There is no evidence of record which would mitigate or even explain Petitioner's conduct. Petitioner is a manifestly untrustworthy individual, and the evidence in this case amply justifies the ten-year exclusion imposed by the I.G.

The testimony of Ms. Shirley Shealy is especially critical to my understanding of the nature and circumstances surrounding Petitioner's conduct towards patients. She had direct contact with Petitioner and was able to observe Petitioner interacting with his patients. She provided graphic testimony that Petitioner mistreated these individuals. Petitioner's cruelty towards patients included restraining and abandoning an elderly and hopelessly mentally incapacitated patient. Hours later, Ms. Shealy found this patient bound to a chair, amid her own feces and urine.

Petitioner has not contested any of this testimony, despite ample opportunity provided at the hearing both to cross-examine the I.G.'s witnesses or to testify on his own behalf. During the hearing, after listening to the testimony of the I.G.'s witnesses, Petitioner stated it had been so long since the incidents in question that he didn't recall details, and that he would rely on the legal arguments presented by his attorney in his hearing request. Tr. at 61 - 62. In the absence of any rebuttal by Petitioner, I infer that Petitioner concedes the truthfulness of the I.G.'s witnesses' testimony.

Although Petitioner pleaded nolo contendere to, and was convicted of, only one count of his indictment, Ms. Shealy's testimony depicts a disturbing pattern of abusive conduct towards elderly and incompetent persons in his care. Finding 7. Petitioner did not seem to understand the harm he could cause to his patients, and scorned those who tried to work with these patients in a caring manner. Tr. at 34 -35. While Petitioner's patients may not have been cognizant of their surroundings, they could still feel discomfort and pain. Tr. at 22 - 23. The contrast between this pattern of conduct and the level of care Petitioner was obliged to provide to these patients (Finding 5) demonstrates the extent of his abuse.

The unrebutted evidence in this case provides strong justification for the exclusion imposed by the I.G. The ten-year exclusion is, in this case, entirely consistent with the remedial purpose of section 1128.

CONCLUSION

I conclude that the exclusion imposed and directed against Petitioner is reasonable. Given the facts of this case, a ten year exclusion is needed to protect program beneficiaries and recipients and the integrity of federally-funded health care programs.

/s/

Steven T. Kessel
Administrative Law Judge