Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Corrine B. Kohn,	DATE: May 21, 1991
Petitioner,	
- v. -	Docket No. C-262
	Decision No. CR129
The Inspector General.	

DECISION

By letter dated April 20, 1990, the Inspector General (I.G.) notified Petitioner that she was being excluded from participation in the Medicare and State health care programs for five years.[1] Petitioner was advised that her exclusion resulted from her conviction of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. Petitioner was further advised that her exclusion was authorized by section 1128(b)(1) of the Social Security Act (Act).

By letter dated June 29, 1990, Petitioner requested a hearing, and the case was initially assigned to Administrative Law Judge Steven T. Kessel for hearing and decision. On July 31, 1990, the I.G. filed a motion to dismiss Petitioner's request for a hearing in this case on the grounds that Petitioner had not timely filed her hearing request. Judge Kessel denied this motion. A hearing date was then set for October 23, 1990 in Pasco, Washington. At the request of the parties, and in an attempt to facilitate a settlement of this case, the hearing date was changed to December 11, 1990. The parties were unable to effect a settlement. On November

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-assisted programs, including State plans approved under Title XIX (Medicaid) of the Act. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

6, 1990, this case was reassigned to me for hearing and decision. By letter dated November 28, 1990, the parties were informed that the hearing date had been changed to January 15, 1991. I held a hearing in Pasco, Washington, on January 15, 1991. At the hearing, Petitioner acknowledged that her conviction provided the I.G. with authority to exclude and that the sole issue was the reasonableness of the proposed five year exclusion.

I have considered the evidence introduced by both parties at the hearing, as well as the applicable law. I conclude that the five year exclusion imposed and directed against Petitioner is excessive. I conclude further that the remedial and deterrent purposes of section 1128 of the Act will be served in this case by a three year exclusion, and I modify the exclusion accordingly.

ISSUE

The sole issue in this case is whether the five year exclusion imposed and directed against Petitioner by the I.G. is reasonable.[2]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. From October 14, 1983 until January 31, 1987, Petitioner was employed as "House Manager" and "Trust Fund Custodian" of the Chelsea Group Home (Chelsea). I.G. Ex. 4/2.

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[2] The parties' exhibits, briefs and the transcript of the hearing will be cited as follows:

I.G.'s Exhibit	I.G. Ex. (number/page)
Petitioner's Exhibit	P. Ex. (number/page)
I.G.'s Brief	I.G. Br. (page)
Petitioner's Brief	P. Br. (page)
I.G.'s Reply Brief	I.G. R. Br. (page)
Petitioner's Reply Brief	P. R. Br. (page)
Transcript	Tr. (page)

2. Chelsea is a part of Camelot Society, Inc. (Camelot), a private, non-profit corporation providing group home services to indigent individuals in need of specialized group home services. I.G. Ex. 1/1.

3. During the relevant time period, Chelsea provided living accommodations for six mentally retarded adults. I.G. Ex. 5/4.

4. At Chelsea, Petitioner worked from six a.m. to three p.m. Petitioner got the residents up, gave them breakfast, made sure they got to work or school, got their lunches, and drove them to doctor's appointments or counseling sessions. Tr. 148.

5. As Chelsea's "Trust Fund Custodian" from October 14, 1983 to January 31, 1987, Petitioner had exclusive control over the residents' trust fund accounts. I.G. Ex. 1/1.

6. Petitioner was to keep an individual record of the amount coming in to be credited to each resident. However, all money coming in for these six individuals was kept in one account at the bank. Tr. 148 - 149.

7. Chelsea's residents' trust fund account at the bank contained commingled funds for the six residents of the Home. The trust fund account included State and federal Title XIX Medicaid funds, and earnings of the five residents who were employed at piece work. I.G. Ex. 1; Tr. 93, 148 -149, 154 - 155.

8. From the period beginning October 14, 1983, through January 31, 1987, Petitioner misappropriated funds from the residents' trust fund account for her own use and was able to repay only a portion of the amount taken. I.G. Ex. 4/2; Tr. 184.

9. Petitioner misappropriated these funds to finance her gambling activities. Petitioner had become involved in Bingo, spending up to $200 per weekend and had taken several gambling trips to Reno. Petitioner took funds from the residents' account to finance her gambling, and tried to pay it back with her winnings or paycheck. Her withdrawals for gambling costs and losses were greater than the amounts she was able to repay the trust account. I.G. Ex. 5/2; Tr. 89 - 90, 161.

10. Petitioner had no authority to personally use or borrow funds from the residents' trust account. I.G. Ex. 4/2.

11. On January 22, 1987, Washington's Department of Social and Health Services (DSHS), Office of Nursing Home Audit (ONHA) began a routine conformance audit of the trust fund accounts. I.G. Ex. 1/1.

12. Petitioner physically removed the trust fund account records from Chelsea on January 22, 1987. Petitioner took them to her son's home to try to reconcile the account records and receipts, but was unable to do so due to her lack of sophistication in financial matters and failure to maintain any credible process of keeping records. I.G. Ex. 1/1; Tr. 116 - 117, 163 - 165.

13. Petitioner told her son that she had an audit coming up and that she needed to "rectify" the trust fund account records. Petitioner did not tell her son that she had misappropriated money from residents' accounts to use for gambling. Tr. 116 - 117, 120.

14. Petitioner returned the trust fund account records to Chelsea on January 26, 1987, and informed her employers that she had taken trust fund money and spent it for her own use. I.G. Ex. 1; Tr. 165.

15. Petitioner informed her employers that she thought she owed $1,400. Tr. 165.

16. On August 8, 1987, DSHS/ONHA informed the Medicaid Fraud Control Unit (MFCU) of the Office of the Attorney General, State of Washington, that a DSHS/ONHA audit of Chelsea's patient trust fund accounts revealed as much as $20,000 in patient trust funds was unaccounted for during July 1982 - 1986. I.G. Ex. 1/1.

17. With Petitioner's assistance, MFCU was able to reconstruct the trust fund accounts. Petitioner identified 78 checks drawn on Chelsea trust accounts, written by Petitioner and payable to cash. They were for Petitioner's personal use. In addition, Petitioner obtained money by withholding/retaining money intended for deposit. In all, MFCU determined that Petitioner took $8,867.93. I.G. Ex. 1/2; I.G. Ex. 4/2; Tr. 168 - 169, 187.

18. The residents at Chelsea did not suffer physically due to Petitioner's misappropriation of their trust fund money. I.G. Ex. 7/4, 15, 16; Tr. 94 - 95.

19. Petitioner kept inadequate records of the amount of money she misappropriated from the trust account. Petitioner thought she owed $1,400. Tr. 165, 173 - 174.

20. Other than the MFCU audit, Petitioner has no independent knowledge of the amount she actually appropriated. Tr. 184 - 188.

21. Following the return of the trust fund records to Chelsea, Petitioner borrowed $2,500 from her brother-in-law and placed it in escrow to cover any shortfall, over and above the value of her last paycheck (which was withheld by Camelot). I.G. Ex. 3, 7/8; Tr. 165 - 166.

22. MFCU issued a Certification for the Determination of Probable Cause in November, 1988, and an Information was filed by an Assistant Attorney General, MFCU, in Washington's King County Superior Court (County Court) on November 22, 1988 charging Petitioner with the crime of theft in the first degree. I.G. Ex. 1, 2.

23. Petitioner pled guilty to First Degree Theft, RCW 9A.56.030. Petitioner stated that she took a net of $8,867.93 in trust fund moneys, from the period October 14, 1983 through January 31, 1987, which she had no authority to use or borrow. I.G. Ex. 4.

24. MFCU recommended that Petitioner should: 1) receive a first offender waiver and two years' active probation; 2) make full repayment of restitution in the amount of $8,867.93 at or before sentencing (with credit for $5,011.61 already repaid or currently held, for a total balance owed of $3,856.32); and 3) agree that she would not work in a facility using state or federal Medicaid/Medicare or Title XIX money during her probation. I.G. Ex. 3.

25. The Presentence and Intake Report prepared by the Washington Department of Corrections recommended that Petitioner be sentenced to: 1) a period of 30 days confinement converted to 240 hours community service work, to be completed within one year from sentence; and 2) payment of court costs and victim's assessment fee. This was based on their belief that Petitioner had: 1) responded appropriately since her termination from Chelsea; 2) aided MFCU investigators in determining the amount of loss and paying restitution in full by the time of sentencing; 3) alienated herself from gambling; and 4) demonstrated that it was unlikely that Petitioner would "re-offend". I.G. Ex. 5.

26. On February 27, 1989 Petitioner was sentenced in County Court under a first offender waiver. The County Court imposed the following sentence: 1) 30 days in jail, 28 suspended (Petitioner was to spend 48 hours in jail, due to the violation of her position of trust); 2) two

years probation; 3) Petitioner was to undergo an evaluation for gambling; 4) Petitioner was to go to a Gambler's or Alcoholic's Anonymous meeting twice per month; 5) Petitioner was to put in 120 community service hours, done at the rate of 10 hours per month; 6) Petitioner was to pay court costs; 7) during her probation, Petitioner was not to handle money or patient trust funds as part of her job responsibilities without supervision of another person accountable for those funds; 8) Petitioner was not to engage in criminal activity or gambling in any form; and 9) Petitioner was to notify all future employers of this conviction if she worked in a facility that handled or used Medicaid, Medicare, or other government funds. I.G. Ex. 7, 8.

27. The sentencing judge believed that Petitioner's crime was motivated by Petitioner's addiction, gambling. The Judge stated it would not serve society's best interests to have Petitioner sentenced without any provision for treatment, due to her age and the benefit Petitioner could provide to her community. The judge placed Petitioner on probation for rehabilitative, not punitive, purposes. I.G. Ex. 7/19 - 20, 25.

28. At sentencing on February 27, 1989, Petitioner paid the final balance due of the money she misappropriated from the residents' trust funds. P. Ex. 1.

29. Camelot conducted its own audit of the trust fund accounts. MFCU determined that the audit was incomplete and poorly done, and it was of no value in MFCU's investigation. Petitioner was not required by the County Court to reimburse Camelot for the audit. Petitioner did not offer to pay Camelot for the costs of the audit. I.G. Ex. 5/3, 7/6 - 7; Tr. 188.

30. The criminal offense of which Petitioner was convicted is a criminal offense within the meaning of the Act.

31. Pursuant to section 1128(b)(1) of the Act, the Secretary of the Department of Health and Human Services (the Secretary) has authority to impose and direct an exclusion against Petitioner from participating in Medicare and Medicaid.

32. The Secretary delegated to the I.G. the duty to impose and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

33. On April 20, 1990, the I.G. notified Petitioner that she was being excluded from participation in the Medicare

and Medicaid programs as a result of her conviction of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

34. Petitioner was notified that she was being excluded for five years, pursuant to section 1128(b)(1) of the Act.

35. The exclusion provisions of section 1128(b)(1) of the Act establish neither minimum nor maximum exclusion terms in those circumstances where the I.G. has discretion to impose and direct exclusions.

36. A remedial objective of section 1128 of the Act is to protect the integrity of federally funded health care programs, and their recipients and beneficiaries, from individuals who demonstrate by their conduct that they cannot be trusted to deal with program funds or to provide items or services to recipients and beneficiaries.

37. An ancillary 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.

38. In determining the reasonableness of the length of Petitioner's exclusion, I am guided by the regulations as set forth in 42 C.F.R. 1001.125(b). In making my decision, I take into consideration: 1) the number and nature of the program violations and other related offenses; 2) the nature and extent of any adverse impact the violations have had on beneficiaries; 3) the amount of damages incurred by the Medicare, Medicaid, and the social services programs; 4) whether there are any mitigating circumstances; 5) the length of the sentence imposed by the court; 6) any other factors bearing on the nature and seriousness of the program violations; and 7) the previous sanction record of the suspended party under the Medicare or Medicaid program.

39. Petitioner was convicted of a serious criminal offense. FFCL 22 - 23.

40. Petitioner's criminal conduct continued over a lengthy period of time and involved a substantial amount of money. FFCL 8, 16 - 17.

41. Petitioner was incarcerated for a brief period and was sentenced to a lengthy period of probation. Numerous

conditions were attached to that probation due to Petitioner's criminal conduct. FFCL 26.

42. Petitioner's theft involved mentally retarded individuals to whom she owed the highest duty of care. Petitioner's conduct could have had an adverse financial impact on these individuals. FFCL 2 - 3.

43. Petitioner would not have ceased her criminal activity absent the MFCU audit. FFCL 17, Tr. 82 - 83, 91 - 92.

44. Petitioner hid from her son that she had misappropriated funds for gambling when she brought the Chelsea books to his home. FFCL 12 - 13.

45. Although she admits her criminal activity in general, and has repaid the moneys the audit determined were missing, Petitioner still attempts to rationalize her conduct as a $1,400 mistake occasioned more by bad bookkeeping than criminal intent. She is as yet unable to realize the full significance of her criminal conduct and her failure to exercise the requisite duty of care in handling residents' trust accounts. Tr. 171, 173, 178, 187 - 188.

46. Petitioner apparently considers her ability to provide excellent personal care for the residents to entirely supersede her duty to ensure that their trust accounts are maintained without any possibility of any improper allocation of funds. Her lack of sophistication in financial matters and failure to understand or adhere to the duty she owes residents when handling their funds places future recipients and beneficiaries of Medicare and Medicaid at risk should Petitioner be placed in a similar position of trust fund custodian. FFCL 45.

47. Petitioner's criminal activity followed a difficult period in her life. Petitioner had been divorced and had turned to gambling in part as an escape. The gambling led to a need for a means to finance it, which led to the misappropriation of Chelsea's funds. Petitioner's life had previously been full of losses, including losing one child to Sudden Infant Death Syndrome and another in Vietnam. Petitioner's father was an alcoholic. Petitioner believes that his alcoholism played a part in forming her personality. Tr. 95 - 96, 136 - 138; I.G. Ex. 5/3.

48. Petitioner has no record of criminal offenses, including previous Medicare or Medicaid sanctions, other than the charge to which she pled guilty. I.G. Ex. 5/3.

49. Petitioner made full restitution at sentencing and attempted to cover the anticipated amount of loss at the time her misappropriation of funds was discovered. FFCL 21, 28; Tr. 66; I.G. Ex. 7/23.

50. Petitioner did not intend to deprive the residents of their money. Tr. 161.

51. Petitioner is a low risk to either begin gambling again or to commit another crime. The only risk arises where she is entrusted with maintaining and keeping records of residents' trust accounts without adequate supervision. Tr. 69, 72, 142; I.G. Ex. 5/5; FFCL 46.

52. Petitioner has expressed remorse for her conduct, and has made efforts to rehabilitate herself. Tr. 67 - 68.

53. Petitioner has made good progress in treating the "adjustment disorder" to which her gambling related. Tr. 141 - 143.

54. Petitioner has satisfactorily complied with the terms of her probation and the restriction on her handling funds without supervision has ended. Tr. 68 - 69, 77.

55. Subsequent to Chelsea, from September 1, 1987 to May 15, 1990, Petitioner was employed in a retirement home receiving Medicaid funds. There was no evidence of any new offenses or problems with Petitioner's employment. Petitioner's job performance was considered by her employer to be very good. Tr. 73, 102, 110 - 111. Petitioner's period of employment included time before her sentencing and probation and also while she was under probation. FFCL 28, 33.

56. Petitioner is particularly gifted in caring for residents of group homes. She is very patient and attentive to their needs. There are a limited number of people having such characteristics who are willing to work the long hours under difficult circumstances that is required in such positions. Tr. 109 - 110; I.G. Ex. 7/15.

57. Section 1128(b)(1) does not differentiate between convictions for felonies or misdemeanors. The fact of a "conviction" relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service forms the basis for the I.G. to

exclude. The factors considered by the ALJ in considering whether the length of an exclusion is reasonable are the same whether that conviction was termed a "misdemeanor" or a "felony".

58. The five year exclusion imposed and directed against Petitioner is excessive. A three year exclusion against Petitioner is reasonable and appropriate in light of factors demonstrating Petitioner's low risk of repeating conduct which will threaten program recipients and beneficiaries. Any longer exclusion will unnecessarily deprive individuals whose care requires special considerations from receiving assistance from a caregiver who has demonstrated an ability to provide the level of care needed. FFCL 51 - 56.

RATIONALE

There is no dispute in this case that Petitioner was convicted of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, within the meaning of section 1128(b)(1) of the Act. On the basis of this conviction, the I.G. had the authority to impose and direct an exclusion against Petitioner from participation in the Medicare and Medicaid programs. Petitioner does not dispute the I.G.'s authority to exclude her from participation in the Medicare and Medicaid programs. P. Br. 4. The only issue to be decided is whether the five year exclusion imposed on Petitioner by the I.G. is reasonable. To resolve this issue, I must review the evidence with regard to the exclusion law's remedial purpose.

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

There are two ways that an exclusion imposed and directed pursuant to the law advances this remedial purpose. First, an exclusion protects programs and their beneficiaries and recipients from an untrustworthy provider until that provider demonstrates that he or she can be trusted to deal with program funds and to serve beneficiaries and recipients. Second, as an ancillary

benefit, an exclusion deters providers of items or services from engaging in conduct which threatens the integrity of programs or the well-being and safety of beneficiaries and recipients. See House Rep. No. 393, Part II, 95th Cong. 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 3072.

An exclusion imposed and directed pursuant to section 1128 will likely have an adverse financial impact on the person against whom the exclusion is imposed. However, the law places program integrity and the well-being of beneficiaries and recipients ahead of the pecuniary interests of providers. An exclusion is not punitive if it reasonably serves the law's remedial objectives, even if the exclusion has a severe adverse financial impact on the person against whom it is imposed.

No statutory minimum mandatory exclusion period exists in cases where the I.G.'s authority arises from section 1128(b)(1). The determination of when an individual should be trusted and allowed to reapply for reinstatement as a provider in the federal programs is a difficult issue. It is subject to discretion without application of any mechanical formula. The federal regulations at 42 C.F.R. 1001.125(b) guide me in making this determination. The hearing is, by law, de novo. Act, section 205(b). See FFCL 38. Evidence which is relevant to the reasonableness of an exclusion is admissible whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. Given congressional intent to exclude untrustworthy providers, I also consider those circumstances which indicate the extent of an individual's or entity's trustworthiness. Essentially, I evaluate the evidence to determine whether the exclusion comports with the legislative purpose outlined above.

By not mandating that exclusions from participation in the programs be permanent, Congress has allowed the I.G. the opportunity to give individuals a "second chance." An excluded individual or entity has the opportunity to demonstrate that he or she can and should be trusted to participate in the Medicare and Medicaid programs as a provider. A determination of an individual's trustworthiness in section 1128(b) cases necessitates the following considerations: 1) the nature of the criminal conviction, the circumstances surrounding it and its impact on the federal programs; 2) whether and when that individual sought help to correct the behavior which led to such conviction; and 3) the extent to which the individual has succeeded in rehabilitation. Thomas J.

Depietro, R. Ph., DAB Civ. Rem. C-282 at 8 (1991). (See Joyce Faye Hughey, DAB App. 1221 at 10 (1991)).

Petitioner has been convicted of a serious crime. During the course of the criminal activity, she was the resident manager and trust fund custodian of Chelsea group home, a home for indigent mentally retarded individuals in need of specialized group home services. She was responsible for the residents' daily living needs, for giving them their weekly expense money, and for keeping track of that money by keeping records of the trust account of each resident. In this position, Petitioner owed a high degree of care toward these individuals and their finances, as they were people who could not effectively or adequately look after their own interests. FFCL 1 - 5, 42.

Due to what her psychologist has identified as an "adjustment disorder", Petitioner became involved in gambling activities. To finance these activities, Petitioner took money from the residents' trust fund account into which were deposited their monthly Medicaid checks, and income from piece work. At times, Petitioner would replace some of the money taken, but she apparently had no way of knowing the exact amount taken due to the absence of any meaningful method of record keeping. Although her duty as custodian of such funds required her to maintain separate accounts for each resident and keep detailed records of all transactions, Petitioner lacked both the sophistication and interest to maintain the accounts in an appropriate manner. FFCL 6 - 10, 46.

Petitioner's misappropriation of the residents' funds was discovered only as an audit of Chelsea's books was about to begin. Even with Petitioner's help, MFCU had great difficulty determining the amount of Petitioner's misappropriation of funds, finally estimated at approximately $8,800. As a result of this investigation, Petitioner was charged, convicted, and sentenced. FFCL 23 - 28.

In excluding Petitioner for five years, the I.G. is asserting that it will take that long to restore her trustworthiness to participate in the Medicare and Medicaid programs. He primarily relies on the following factors: 1) the seriousness of the crime; 2) the length of the criminal activity; 3) its impact on a vulnerable class of persons; 4) the criminal activity ceased only after Petitioner was put on notice of an audit of her activities; 5) her trustworthiness is in question because of her lack of understanding of the significance of the crime she committed; and 6) remorse is not a valid basis

to reduce the period of exclusion. I.G. Brief at 5 - 8, 17 - 20. The I.G. argues that only after five years, if Petitioner's behavior has been honest and exemplary, will Petitioner again be trustworthy enough to participate in the Medicare and Medicaid programs.

In arguing for a shorter exclusion, Petitioner relies primarily on the following factors: 1) Petitioner has rehabilitated herself; 2) Petitioner's crime was "small potatoes" in the overall picture of provider fraud; 3) Petitioner intended to repay the money she misappropriated, her repayments preceded the discovery of her crime, and had Petitioner "won big" full repayment may have been made before discovery of the offense; 4) the Chelsea residents did not want for anything, nor were they harmed by Petitioner's misconduct; 5) Petitioner is not a threat to program beneficiaries or to the integrity of the programs. P. R. Br. 1 - 8, 11 - 14.

Both parties have argued the application of the ALJ and Board decisions in the case of Joyce Faye Hughey, DAB Civ. Rem. C-201 (1990), aff'd DAB App. 1221 (1991). The petitioner in Hughey had been employed as a bookkeeper in a nursing home administered by her sister. At that time Ms. Hughey was experiencing financial difficulties as a result of an accident. She learned that her sister was misappropriating money from patients' trust funds. Ms. Hughey did not report her sister's unlawful acts, and then accepted some misappropriated funds from her sister. She discontinued the criminal activity on her own initiative. Eventually, Ms. Hughey was charged and pled guilty to a misdemeanor charge of theft. The I.G. sought to exclude her under section 1128(b)(1) of the Act for five years. The ALJ reduced Ms. Hughey's exclusion to one year. In doing so, the ALJ did not excuse or mitigate the seriousness of her actions. The ALJ found, however, that: 1) Ms. Hughey's offense was an isolated circumstance of wrongful conduct, occurring over a brief period of time; 2) the amount of money misappropriated, while substantial, did not constitute a large sum; 3) her misconduct was in some respects the consequence of emotional duress, and was at variance with her record for honesty; 4) there was little likelihood that she would repeat her unlawful conduct; and 5) the sentence imposed on her as a result of her conviction did not include incarceration. In reducing the period of her exclusion, however, the ALJ stressed that the Hughey case was unusual. The ALJ found Ms. Hughey's conduct to be a "serious and unforgivable offense", but he was convinced that her actions were the consequence of unique emotional pressures totally at variance with her past record and that it was unlikely that such circumstances would often

be present. Hughey at 9. In Hughey, the petitioner's unfortunate life circumstances alone did not influence the ALJ to modify her exclusion. Rather, the particular life circumstances in Hughey convinced the ALJ of the unique nature of the crime and the improbability of the petitioner repeating her criminal conduct.

The same unique circumstances are not present in this case. Petitioner, unlike Ms. Hughey, was the initiator of the criminal activity for which she was convicted. Petitioner's misappropriation of the Chelsea funds lasted over a lengthy period and involved a much larger sum of money than in Hughey. Petitioner was imprisoned, albeit briefly, and was sentenced to a longer probation, which included other stringent restrictions on her behavior. Ms. Hughey also resigned her employment and ended her beneficial involvement with the criminal activity before the criminal activity was discovered. Petitioner ended her criminal activity only when she learned of an impending audit of the residents' trust accounts for which she was responsible and was not likely to end her criminal activity absent discovery of her illegal activities. Thus, the remedial considerations in Hughey were much stronger than those here.

There are, however, circumstances in this case which mitigate against a five-year exclusion. Petitioner has no prior record of offenses. Petitioner did not intend to permanently deprive the Chelsea residents of their money and she attempted to pay it back even before her misappropriation was discovered. There is no evidence that the residents under Petitioner's care suffered. To the contrary, she appears to have taken excellent care of the Chelsea residents and to have been highly thought of by her supervisors.

Petitioner began early to seek help to correct her criminal behavior and to minimize the damage her behavior had caused. While Petitioner did remove Chelsea's books for a few days in order to attempt to conceal her misappropriation, she promptly returned the books and admitted her misappropriation of funds to her employers, escrowing money to make up what she thought would be the deficiency. Petitioner helped MFCU in its audit and reimbursed the full amount of the deficiency. Since her sentencing, Petitioner has complied with all the terms of her probation.

Petitioner has been undergoing counseling since May of 1989 for treatment of her gambling disorder and the circumstances that triggered her disorder, which led to her criminal conduct. Tr. 133. Petitioner's

psychologist stated, in answer to a question concerning whether Petitioner was at risk for future negative behavior, that Petitioner was not at risk to "re-offend gambling." Tr. 142. The psychologist stated that Petitioner had made "a number of tremendous changes in her life and in her attitude." Tr. 142. Petitioner's probation officer, who has monitored her since writing Petitioner's presentence and intake report in February of 1989, stated that Petitioner is "someone that I would view as rehabilitated." Tr. 68. The opinion expressed by the probation officer is that therapy has greatly benefitted Petitioner and that Petitioner is "an extremely low risk to re-offend." Tr. 69. The major reason given by the probation officer for this belief is that Petitioner's criminal behavior was not a part of Petitioner's lifestyle or typical behavior for Petitioner. Id. I conclude from this testimony that Petitioner is not likely to yield to the temptation to gamble or to misappropriate another person's money for any reason. My conclusion is further strengthened by the information that during her post-conviction employment at a nursing home, there was no evidence of any new offenses or problems with her employment and her job performance was considered by her employer to be very good. Tr. 102 - 103, 110. Petitioner has not gambled for three years. Tr. 180 - 181.

While Petitioner has made substantial progress towards correcting the behavior that led to her conviction, I do not find that this rehabilitation is so complete as to allow me to conclude that an exclusion of less than three years is reasonable.

Petitioner admitted her criminal activity to her employers and pled guilty to misappropriating the trust account funds. In this proceeding, however, Petitioner is still trying to rationalize her conduct as a $1,400 mistake caused more by bad bookkeeping than criminal intent. Petitioner states: "It was my fault because bad records, not keeping records, it's no one's fault but mine." Tr. at 186. Petitioner is unable to realize the full significance of her criminal conduct and her failure to exercise the requisite duty of care in handling residents' trust accounts, which includes the careful monitoring and recordkeeping of their funds.

Even if Petitioner intended to pay back all the money she misappropriated if she "won big," (P. R. Br. 4) she was not justified in using the funds of persons who were entrusted to her care. Petitioner does not seem to comprehend that she broke the high duty of care she owed to the residents and to their finances. Moreover, these

residents were totally dependent on her for both personal care and financial services. While there is no evidence indicating that there were deficiencies as a result of her misappropriation of funds, it is conceivable that Petitioner may have modified the extent to which she was providing those services due to diminished funds. Furthermore, Petitioner's conduct, if known to the residents, may have had a devastating emotional or psychological impact on them due to their trust of and dependence on Petitioner. It is Petitioner's lack of understanding and failure to exercise her duty of care to the residents' finances that concerns me.[3]

Petitioner apparently considered her ability to provide excellent personal care to the residents to entirely supersede her duty to ensure that their trust accounts were maintained without any possibility of improper allocation of funds. Her lack of sophistication in financial matters and failure to understand or adhere to the duty she owed residents when handling their funds still places future recipients and beneficiaries of Medicare and Medicaid at risk. Petitioner has not showed me that her ability to handle funds has been substantially enhanced. Her daughter handles Petitioner's personal finances. Tr. at 123. Moreover, any money Petitioner handled in her employment at the nursing home was merely as a conduit to her supervisor. Tr. 103. Petitioner's recent conduct has obviously been affected by her being faced with criminal charges or by her being on probation.

I do not find, having considered all the evidence, that Petitioner's rehabilitation is so complete that she can in the near future be entrusted with maintaining and keeping records of residents' trust accounts without adequate supervision. If I had the authority, I would bar Petitioner from handling beneficiaries' or recipients' funds, but allow her without further delay to participate in Medicare and Medicaid. I do not have authority to fashion such a remedy. See, Walter J. Mikolinski, Jr., DAB App. 1156 (1990) at 5 - 16.[4]

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[3] Petitioner's counsel did not seem able to understand this either. He termed Petitioner's crime "small potatoes" in the overall scheme of provider fraud. P. Br. 13.

[4] I am compelled by the circumstances of this case, as well as my experience in other cases, to express my regret that the statute and regulations as presently

(continued...)

I find that an exclusion of five years is unreasonable and I conclude that an exclusion of three years is reasonable. I do not believe that Petitioner presents a high risk to offend again. Both Petitioner's probation officer and Petitioner's psychologist testified convincingly that Petitioner is a low risk. Imposition of a three year exclusion will give Petitioner enough time to demonstrate that she is fully rehabilitated and trustworthy. A three-year exclusion will provide an ancillary benefit. It will put providers to the Medicare and Medicaid programs on notice that they may not with impunity steal large amounts of money over long periods of time and expect to escape exclusion solely by expressing remorse and declaring themselves rehabilitated.

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[4] (...continued)
worded do not give me sufficient flexibility in fashioning a remedy to allow Petitioner to offer her services as a caregiver - provider but exclude her, at least for a time, from having access to the personal funds of those in her care, or to be involved in the billing process. In this case, there would be a minimal burden on the I.G. to monitor Petitioner, as Petitioner would have had to supply the I.G. only with the information that she was not involved in providing any financial services to the programs and their recipients and beneficiaries. I believe that the programs and their beneficiaries and recipients would be better served if it were possible to craft remedies that more precisely prohibit the provision of items or services that place the programs and their beneficiaries and recipients at risk but that allow caregivers to provide other items or services that do not involve risk of continuation of the offending conduct.

CONCLUSION

Based on the evidence in this case and the law, I conclude that the five year exclusion imposed against Petitioner from participating in the Medicare and Medicaid programs is excessive and unreasonable, and I modify it to three years.

/s/

Edward D. Steinman
Administrative Law Judge