Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Dillard P. Enright,	DATE: June 19, 1991
Petitioner,	
- v. -	Docket No. C-320
The Inspector General.	Decision No. CR138

DECISION

By letter dated September 10, 1990, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs until he obtained a valid license to provide health care in the State of South Dakota.[1] Petitioner was advised that his exclusion resulted from his surrender of his license to provide health care while a formal disciplinary proceeding was pending before the South Dakota Board of Nursing. Petitioner was further advised that his exclusion was authorized by section 1128(b)(4)(B) of the Social Security Act (Act).

By letter of October 23, 1990, Petitioner requested a hearing, and the case was initially assigned to Administrative Law Judge (ALJ) Steven T. Kessel for hearing and decision. Judge Kessel held a prehearing conference in this case on January 4, 1991, at which time he set a hearing date for the case of March 12, 1991. On March 1, 1991, this case was reassigned to me for hearing and decision.

On March 12, 1991, I conducted an evidentiary hearing in Rapid City, South Dakota. Based on the evidence introduced by both parties at the hearing, and on the applicable law, I conclude that the I.G. had authority to exclude Petitioner and that the exclusion imposed and

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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.

directed against Petitioner by the I.G. is reasonable under the circumstances of this case.

ISSUES

The issues in this case are:

1. whether Petitioner's license to provide health care was surrendered while a formal disciplinary proceeding was pending before a State licensing agency and the proceeding concerned his professional competence, professional performance, or financial integrity;

2. whether the indefinite exclusion imposed and directed by the I.G. against Petitioner is reasonable and appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2] [3]

1. At all relevant times until October 11, 1989, Petitioner was a licensed (by South Dakota) practical

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[2] Some of my statements in the sections preceding these formal findings and conclusions are also findings of fact and conclusions of law. To the extent that they are not repeated here, they were not in controversy.

[3] Citations to the record and to Board cases in this Decision are as follows:

I.G. Exhibits	I.G. Ex. (number/page)
I.G. Brief	I.G. Br. (page)
I.G. Reply Brief	I.G. R. Br. (page)
Petitioner's Exhibits	P. Ex. (number/page)
Petitioner's Brief	P. Br. (number)
Findings of Fact and Conclusions of Law	FFCL (number)
Departmental Appeals Board ALJ Decisions	DAB Civ. Rem. (docket no./ date)
Departmental Appeals Board Appellate decisions	DAB App. (decision no./date)

nurse (L.P.N.) employed by the Sturgis Community Health Care Center (Sturgis). P. Br. 2, I.G. Ex. 11.

2. Petitioner is now, and was at all relevant times, a certified laboratory technician. Petitioner's certification is through the "Credentialing Commission," which is not a State agency, but an independent, autonomous, credentialing agency. The State of South Dakota does not license laboratory technicians. P. Ex. C; P. Br. 7.

3. On August 16, 1989, Petitioner was terminated by Sturgis for unprofessional conduct, as a result of two incidents of inappropriately touching male patients in the genital area. P. Br. 2; I.G. Ex. 5, 6, 7.

4. On May 31, 1989, Michael Penticoff (Penticoff), Sturgis' Administrator, received a letter from an attorney indicating that her client had been sexually molested in the early morning hours of March 25 and 26, 1989, while a patient at Sturgis. The attorney alleged that her client had been receiving counseling and had been "somewhat affected" by the incident. I.G. Ex. 5, 6; Tr. 19 - 20.

5. Petitioner and Sturgis' Director of Nursing, Sinnet Gorman Bestgen (Bestgen)[4], met with Petitioner on June 5, 1989, to discuss this letter. Petitioner denied the accusations at this meeting, and at a later meeting on June 21, 1989, attended by Penticoff, Bestgen, and an adjustor from Sturgis' insurance carrier. At this time, Penticoff, after contacting Sturgis' attorney, elected to do nothing about the complaint, as he had doubts about the allegations in the letter. I.G. Ex. 5; Tr. 20 - 21.

6. On August 12, 1989, Penticoff was called by a physician whose patient had just been discharged from Sturgis. This second patient claimed that he had awakened while he was a patient at Sturgis and a male nurse was standing next to his bed. The male nurse had his hand in the patient's genital area. I.G. Ex. 5; Tr. 21 - 22.

7. Bestgen first became aware of the second incident when a nurse working with the patient told her the patient had made allegations concerning the male nurse on the night shift. Bestgen visited the patient, who told her that he awoke to find a male nurse standing over him, with his hand in the patient's genital area. Bestgen

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[4] At the time of the events surrounding the termination of Petitioner's employment at Sturgis, Sinnet Gorman Bestgen was known as Sinnet Gorman. She has since married, and now goes by her married name of Bestgen.

called Petitioner into her office to discuss the allegations. Petitioner denied them. Tr. 62 - 63.

8. Penticoff interviewed the patient, who informed Penticoff that when he woke up the nurse quickly removed his hands and grabbed the patient's arm. The nurse asked how the patient's arm was, and indicated to the patient that he was "checking the I.V." I.G. Ex. 5, 6; Tr. 22 - 23.

9. Penticoff called Petitioner at home that day. Petitioner denied the allegations. Petitioner told Penticoff that he had gone into the patient's room to complete a paper report. He thought the "I.V. had infiltrated", and all he did was check the I.V. Penticoff suspended Petitioner with pay, pending an investigation. I.G. Ex. 5; Tr. 22 - 23.

10. During this telephone conversation, Petitioner volunteered that he seemed to be having quite a few problems, particularly with his foster children, one of whom he had struck. Penticoff suggested Petitioner see a psychologist, Dr. Arnio. I.G. Ex. 5; Tr. 23 - 26.

11. On August 15, 1989, Petitioner met with Penticoff, Sturgis' Assistant Administrator Roger Heidt (Heidt) , and Bestgen. Penticoff reviewed the allegations with Petitioner and Petitioner initially denied them. I.G. Ex. 5; Tr. 27 - 28.

12. Penticoff and Heidt left the room. Bestgen was left alone with Petitioner. Bestgen asked Petitioner if the second patient's allegation was true and he said yes, that he had done something very unprofessional to that patient. Bestgen then asked if the first patient's allegation was true. Petitioner told her it was true and that he could have touched the first patient "through the covers". Tr. 64; I.G. Ex. 5, 7.

13. Penticoff was called into the room and Petitioner admitted that the allegations made by both patients were true. Penticoff indicated to Petitioner that one of the most important things that could be done is for him to get help for himself. Tr. 28; I.G. Ex. 5.

14. On August 16, 1989 Penticoff terminated Petitioner's employment at Sturgis, based on Petitioner's admission of unprofessional conduct. I.G. Ex. 5, 6, 7; 28 - 29.

15. Penticoff informed the South Dakota Board of Nursing (Nursing Board) about Petitioner's unprofessional conduct and about Petitioner's subsequent employment in a nursing home, the Wesleyan Methodist Care Center. Penticoff was concerned about nursing home patients being alone with Petitioner. Petitioner had begun the job with the

nursing home job on Labor Day, 1989. I.G. Ex. 4, 5; Tr. 29 - 32, 122.

16. The Nursing Board investigated Petitioner's unprofessional conduct and in its Notice to Petitioner of October 11, 1989, summarily suspended his nursing license, after finding that his conduct "constitutes an immediate threat to the public welfare and safety, and that it imperatively requires emergency action by the Board." I.G. Ex. 8, 9.

17. The Nursing Board, in its Notice to Petitioner of October 11, 1989, ordered an "informal meeting" to be held October 25, 1989, at which meeting Petitioner was requested to show compliance with the requirements for licensure in South Dakota. The Nursing Board informed Petitioner that it had information from independent sources that he had been involved in the conduct described in affidavits from Penticoff and Bestgen. I.G. Ex. 6, 7, 9.

18. The Nursing Board specifically informed Petitioner in its October 11, 1989 Notice that Petitioner had the right to appear at the meeting with an attorney. If Petitioner did not appear, his right to the "informal meeting" would be waived and more formal proceedings would be held. I.G. Ex. 9.

19. The "informal meeting" was held on October 25, 1989, between Petitioner, the Nursing Board's attorney, and a nurse consultant to the Nursing Board. Petitioner announced that he did not want to contest the allegations as reflected in the affidavits. He asserted that at the time of the incidents he had been under a lot of pressure. I.G. Ex. 10.

20. Petitioner stated at the meeting that he had seen a Dr. Arnio after his termination, and that Dr. Arnio had referred Petitioner to a mental health center. Petitioner saw a psychologist there three times, but did not return to see the psychologist after early September 1989. The only other time Petitioner saw a mental health professional was in the week preceeding the March 12, 1991 hearing. I.G. Ex. 10; Tr. 134 - 137.

21. On November 15, 1989, the Nursing Board approved and entered a Stipulation and Order, signed by Petitioner on November 3, 1989, in which Petitioner voluntarily surrendered his nursing license. I.G. Ex. 11.

22. The Stipulation states that: 1) the parties desired to come to a professionally responsible solution and resolve the issues without the requirement of further formal hearings and disciplinary proceedings; and 2) Petitioner had been given ample opportunity to address the matters with an attorney and had entered into the

Stipulation fully understanding its consequences and not being under any duress. I.G. Ex. 11.

23. In the Stipulation, the parties agreed that: 1) Petitioner would: 1) surrender his license to practice nursing; 2) if Petitioner should ever seek reinstatement as a L.P.N. in South Dakota, Petitioner would have the right to present a petition to the Nursing Board, in which he would "provide satisfactory evidence to the Board, that the conduct and source of the problems noted in this disciplinary matter were being dealt with in a sound and professional manner and that in all respects he would be a proper candidate for licensure again in South Dakota"; 3) the Nursing Board would not guarantee reinstatement and the Nursing Board might "reasonably require Mr. Enright to file with the Board such reports and evaluations by appropriate counselors and professionals, as the Board may deem reasonably appropriate." I.G. Ex. 11.

24. In a letter of November 21, 1989 to Petitioner, enclosing a copy of the settlement agreement as accepted by the Nursing Board, Petitioner was told that Nursing Board staff encouraged him to seek further assistance in dealing with the difficulties he had experienced in the past months. The letter suggested that Petitioner's concerns went beyond nursing practice and employment and that Nursing Board staff hoped he would find ways to deal with these matters. P. Ex. A-31.

25. The Secretary of the Department 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).

26. Section 1128(b)(4)(B) authorizes the I.G. to impose and direct exclusions of individuals who have surrendered their licenses to provide health care before a State licensing authority 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.

27. Petitioner surrendered his license while a formal disciplinary proceeding was pending before a State licensing authority in a proceeding concerning his professional performance.

28. The I.G. had the authority to exclude Petitioner under section 1128(b)(4)(B) of the Act.

29. On September 20, 1990, the I.G. excluded Petitioner from participation in the Medicare program and directed

that he be excluded from participation in the Medicaid program, pursuant to section 1128(b)(4)(B) of the Act.

30. The I.G. excluded Petitioner until such time as he received a license to provide health care in the State of South Dakota.

31. The requirement that Petitioner obtain a valid license to provide health care in the State of South Dakota means that Petitioner must obtain a valid L.P.N. license from the Nursing Board.

32. At first Petitioner denied the two allegations of misconduct and admitted them only after he was suspended following the second incident. Tr. 63 - 64; I.G. Ex. 5, 8.

33. Petitioner has not actively participated in a counseling program for the conduct that was the subject of the disciplinary matter; such counseling program is the prerequisite for relicensure as an L.P.N., and was strongly suggested to him by Penticoff, the Nursing Board staff, and Dr. Jenter. Tr. 134 - 137, 152 - 153; I.G. Ex. 11; FFCL 20.

34. The professions of nursing and laboratory technician both involve patient contact and patient trust. Tr. 33, 65 - 66, 125 - 127.

35. Petitioner has not demonstrated that he is trustworthy to work as either an L.P.N. or a lab technician. FFCL 32 - 34.

36. The exclusion imposed and directed against Petitioner by the I.G. is reasonable. FFCL 1 - 35.

DISCUSSION

Petitioner was both a practicing L.P.N. and lab technician in the State of South Dakota. In November 1989, Petitioner surrendered his L.P.N. license in the State of South Dakota in the face of charges that he had improperly fondled two male patients in their genital area in the course of his duties as an L.P.N. Petitioner has no current plans to seek reinstatement as a L.P.N., but he would like to provide services to the Medicare and Medicaid programs as a lab technician. Petitioner argues that: 1) The proceeding in which he surrendered his nursing license was not a formal proceeding and that he was not advised that surrender of his license would lead to his exclusion from participation in the Medicare and Medicaid programs in any capacity; and 2) conditioning Petitioner's exclusion on reissuance of his L.P.N. license by the Nursing Board is unreasonable. I disagree.

1. Petitioner surrendered his L.P.N. license in South Dakota while a formal disciplinary proceeding was pending before the Nursing Board, which concerned Petitioner's professional performance, within the meaning of section 1128(b)(4)(B).

The term "formal disciplinary proceeding" in section 1128(b)(4)(B) refers to "a license proceeding which places a party's license in jeopardy and which provides that party with an opportunity to defend against charges which might result in a license suspension or revocation." John W. Foderick M.D., DAB Civ. Rem. C-113 at 6 (1989), aff'd DAB App. 1125 at 5 (1990). This interpretation is consistent with the legislative purpose behind section 1128(b)(4)(B), which "presumes that an individual or entity who surrenders a health care license in the face of charges, and in the circumstance where he has the opportunity to defend himself, is as likely to be untrustworthy as the individual or entity who loses a license after litigating the issue of his or her professional competence, performance, or financial integrity." Foderick, DAB Civ. Rem. C-113 at 6 - 7.

In this case, Petitioner argues that: 1) under regulations of the South Dakota Board of Nursing (P. Br. 29 - 32), the informal meeting Petitioner attended is not a step in a disciplinary proceeding; 2) the informal meeting was conducted only by a staff representative of the Nursing Board and Nursing Board counsel; and 3) no discipline or action could have been taken by the Nursing Board which would result in denial, revocation, suspension, annulment, withdrawal, or amendment of any application license or certificate. If a complaint was to be initiated, specific action was required by the Nursing Board after the informal meeting. Only the filing of a complaint would give the Board authority to place Petitioner's license in jeopardy. P. Br. 4 - 6.

I do not agree with Petitioner's interpretation that the informal meeting at which Petitioner surrendered his license was not a "formal disciplinary proceeding" within the meaning of the Act. As I interpret the phrase, such "formal disciplinary proceeding" in Petitioner's case began when he received his October 11, 1989, Notice of Informal Meeting and Order of Summary Suspension (I.G. Ex. 9); his license to practice nursing in South Dakota was, therein, summarily suspended. The Nursing Board suspended Petitioner's license "pending resolution of these matters," which matters concerned the affidavits of Penticoff and Bestgen recounting the unprofessional conduct at Sturgis for which Petitioner's employment was terminated. I.G. Ex. 6, 7, 9. If proven, these allegations could have resulted in the Nursing Board's revocation of Petitioner's license. As stated in Chester A. Bennett, M.D., DAB Civ. Rem. C-133 at 7 (1990), "it is reasonable to conclude that 'during a formal disciplinary

proceeding' encompasses more than just a hearing on the matter." A proceeding "entails a succession of events taking place, rather than just one event, such as a hearing." Id.

If Petitioner had not surrendered his license, the Nursing Board would have had a responsibility to resolve the issues raised by the claims. See I.G. Ex. 10. The Stipulation and Order signed by the Nursing Board on November 15, 1989, specifically stated that the parties decided to resolve the issues set forth in the affidavits and Order of Summary Suspension, without the requirement of further formal hearings and disciplinary proceedings. I.G. Ex. 11. The Nursing Board, in the absence of Petitioner's surrender of his license, was fully prepared to go forward.

Furthermore, whether or not this meeting was referred to as "informal" by the Nursing Board, is not definitive or meaningful in interpreting section 1128(b)(4)(B). This case is governed by federal law, and the interpretation of a federal statute or regulation is a question of federal, not state, law. Bennett, supra, at 7, United States v. Allegheny County, 322 U.S. 174, 183 (1944).

Thus, I find that Petitioner surrendered his license to provide health care to the South Dakota licensing authority, the Nursing Board while a formal disciplinary proceeding was pending, within the meaning of section 1128(b)(4)(B). I further find that he surrendered his license for reasons bearing on his professional performance, those being the incidents of unprofessional conduct alleged in the affidavits of Penticoff and Bestgen, and which formed the basis for the summary suspension of Petitioner's license. I also find that a determination of whether Petitioner was told that surrendering his license might result in his exclusion from the Medicare and Medicaid programs is irrelevant to the question of whether or not the I.G. had a basis upon which to exclude him. In Foderick, the appellate panel stated:

> The authority given to the I.G. to impose and direct exclusions pursuant to section 1128(b)(4)(B) is based on actions taken by state licensing boards. The statute clearly intended that the I.G. was to rely on the state board actions . . .

Foderick, DAB App. at 10; Also See, Andy E. Bailey, C.T., DAB App. 1131 (1990); Roosevelt A. Striggles, DAB Civ. Rem. C-301 (1991).

2. It is reasonable to exclude Petitioner from participating in the Medicare and Medicaid programs until he regains his L.P.N. license from the Nursing Board.

In deciding whether or not an exclusion under section 1128(b)(4)(B) is reasonable, 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. Among other things, the law was designed to protect program recipients and beneficiaries from individuals who have 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 untrustworthy providers until they demonstrate that they can be trusted to deal with program funds and to serve beneficiaries and recipients. Second, 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 H.R. 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)(4)(B), nor is there a requirement that a petitioner is to be excluded until he or she obtains a license from the state where their license was revoked, surrendered or suspended. See Lakshmi N. Murty Achalla, M.D., DAB App. 1231 at 9 (1991). 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.

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. This hearing is, by reason of section 205(b) of the Act, de novo. 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. I do not, however, simply substitute my judgment for that of the I.G. I evaluate the evidence in order to decide whether the exclusion imposed and directed against a petitioner is so extreme or excessive as to be unreasonable.

A determination of an individual's trustworthiness in section 1128(b)(4)(B) cases thus necessitates the following considerations: 1) the nature of the license surrender, the circumstances surrounding it, and its impact on the federal programs; 2) whether and when that individual sought help to correct the behavior leading to his license surrender; and 3) the extent to which the individual has succeeded in rehabilitation. See Thomas J. DePietro, R.Ph., DAB Civ. Rem. C-282 (1991).

Petitioner argues that he has now been excluded for a sufficient length of time to satisfy all legitimate concerns and questions that the I.G. may have. Petitioner also believes that any further exclusion would be punitive. P.Br. p. 12. Petitioner bases his argument on the following: 1) Petitioner wants to practice as a laboratory technician, and South Dakota does not license laboratory technicians; 2) it is unreasonable to base Petitioner's ability to provide services to the Medicare and Medicaid programs as a laboratory technician on his regaining his L.P.N. license, as the two professions are separate; 3) while what Petitioner did in the two incidents involving improper touching of male patients' genitalia through the covers (I.G. Ex. 5/3) was not proper, it cannot be characterized as sexual molestation or sexual abuse; 4) Petitioner had practiced for over ten years as a laboratory technician before pursuing his L.P.N. and was employed as a lab technician while employed as an L.P.N.; 5) Petitioner had been a loyal, reliable, professional, and dependable employee throughout his Sturgis employment; 6) Petitioner has had an otherwise unblemished 23 year employment history; and 7) no criminal conduct, fraud or financial abuse of the system was involved in Petitioner's case. P. Br. 6 - 11.

Petitioner has argued that earlier Departmental Appeals Board (DAB) decisions support his conclusion, principally the cases of Foderick, supra.; Walter J. Mikolinski, DAB Civ. Rem. C-166 (1989), rev'd DAB App. 1156 (1990); and Lakshmi N. Murty Achalla, M.D., DAB Civ. Rem. C-146 (1990), aff'd DAB App. 1231 (1991). I do not agree.

In Foderick, Dr. Foderick surrendered his license to practice medicine after the Minnesota Board of Medical Examiners' Discipline Committee concluded that a physical examination established that Dr. Foderick suffered from serious physical impairments and deteriorating mental abilities rendering him unable to practice medicine and surgery safely. In Foderick, both the ALJ and the appellate panel held that it was reasonable to exclude Dr. Foderick until such time as he regained his license to practice medicine.

In contrast, in Mikolinski, Mr. Mikolinski, a pharmacist and a nursing home operator, had his pharmacy license suspended by the Pharmacy Board for two years after the Pharmacy Board found that Mr. Mikolinski had violated a state law by knowingly possessing, with intent to distribute, a Class E controlled substance, and that he had conspired to divert drugs from Massachusetts General Hospital, thus not conducting his professional activities in conformance with law. The Pharmacy Board conditioned Mr. Mikolinski's reinstatement on maintaining his continuing education requirements and on taking a pharmacy law examination and passing with a grade of no less than 75 percent. The I.G. excluded him until he regained his pharmacy license. In deciding Mr. Mikolinski's appeal of this exclusion, the ALJ sustained the exclusion as it applied to his participation as a pharmacist, but modified it to a definite term of two years as it applied to Mr. Mikolinski's participation as a nursing home operator, administrator, or employee. The appellate panel reversed the ALJ and concluded that the ALJ had erred in setting different exclusion periods for different functions. They stated, however, that section 1128(b)(4) did not require an indefinite exclusion for all section 1128(b)(4) exclusions. Instead, the ALJ could modify the exclusion and set an exclusion for a term of years.

In Achalla, the Florida Board of Medicine revoked Dr. Achalla's license to practice medicine based on his delivery to another individual of 100 tablets of a Schedule II narcotic controlled substance, including telephoning a false prescription for a controlled substance, and on his subsequent conviction. Based on the license revocation, the I.G. excluded Dr. Achalla until he regained his license. On appeal, I found the length of Dr. Achalla's exclusion to be unreasonable and modified it to a three year exclusion. The appellate panel affirmed, specifically finding that there was no

explicit statement in section 1128(b)(4) or in its legislative history that the exclusion period should be coterminous with the period of license revocation on which it was based. This was because Congress had expressed an intent that the exclusion period should be set taking into consideration factors including the seriousness of the offense, the impact of the offense and the exclusion on beneficiaries, and any mitigating circumstances. The appellate panel stated that consideration of those factors would not be necessary if the exclusion period was intended to be tied automatically to the length of the license revocation. DAB App. 1231 at 9.

Petitioner asserts that these DAB decisions do not apply, because Petitioner: 1) was not specifically found to be suffering from serious physical and mental impairments (as was Dr. Foderick), and 2) had not been convicted in a criminal court nor was he guilty of fraud or financial abuse of the system (as were Mr. Mikolinski and Dr. Achalla). Petitioner argues that the indefinite length of his exclusion was unreasonable, and that Petitioner's exclusion should be limited to "time served," as any legitimate function and purpose for the exclusion had already been fulfilled. Petitioner states that his conduct, while improper, does not even approach the fraudulent criminal conduct of the decisions cited above. P. Br. 9 - 10.

Petitioner has stated that he wants to participate in the programs as a laboratory technician, a profession which is different than that of licensed practical nurse. Petitioner appears to compare his situation to that of Mr. Mikolinski, who desired to participate in the programs as a nursing home operator, not a pharmacist. Thus, Petitioner argues, the indefinite exclusion imposed against him is unreasonable. The decisions in Mikolinski and Achalla, however, never held that an indefinite exclusion was per se unreasonable for all 1128(b)(4) exclusions. Rather, they held that it was up to the ALJ to assess the reasonableness of the exclusion in light of all the circumstances detailed above.

In the case of Dr. Foderick, the DAB found that his physical and mental impairments made it reasonable that he remain excluded until the Minnesota licensing board found him competent. In the case of Dr. Achalla, in modifying Dr. Achalla's exclusion from an indefinite exclusion to a three year exclusion, I specifically found that Dr. Achalla's conduct subsequent to his conviction demonstrated that he was unlikely to again abuse his privileges as a physician, and that he did not pose a substantial risk of harm to beneficiaries or recipients or to the integrity of the Medicare and Medicaid

programs. DAB App. at 5.[5] It was the ALJ's task in each of these cases to determine when these individuals would be trustworthy to participate as providers in the Medicare and Medicaid programs. In this case, I do not find that Petitioner is as yet trustworthy to participate in the Medicare and Medicaid programs.

When Petitioner fondled those two patients, he broke a high duty of care and trust. In a hospital, a patient may be completely helpless and totally dependent on the professional care of the hospital staff. Patients need to believe that when hospital personnel touch their bodies, it is for professional reasons, not to gratify the sexual desires of the hospital staff. There is testimony that one of the patients Petitioner fondled needed therapy to deal with the consequences of Petitioner's conduct. FFCL 4. Petitioner's breach of those patients' trust and the duty he owed them is serious and extensive. Mr. Penticoff, Sturgis' administrator, realized this, and this concern was a factor in his determination to terminate Petitioner. Penticoff stated: "[t]he patients in the hospital basically give us their life and soul and put a lot of trust in us, and that trust had been violated, so I then terminated Mr. Enright." Tr. 29.

Petitioner has urged that, rather than focus on these two incidents, I should look at his prior unblemished employment history. I have taken that into consideration. I am more concerned, however, with Petitioner's present condition and any future danger he might pose to program beneficiaries and recipients. Petitioner has not as yet made any real efforts to deal with his problems. When confronted with the allegations of professional misconduct, Petitioner at first repeatedly denied that he had fondled either patient. Penticoff, the Nursing Board, and its staff, all urged Petitioner to get therapy for his problems, but as yet he has made no serious attempt to do so. Petitioner only saw a therapist a few times immediately after the incidents in question, and once during the week prior to the hearing in this case. FFCL 20, 33. Petitioner testified during the hearing that he planned to continue with counseling, and that given all he has gone through, incidents such as the ones at Sturgis are not likely to recur. Tr. 112, 137. He testified that at the time of the incidents he was under stress due to problems with foster children at home, and that stress is now gone. Tr. 118 - 123. Petitioner's explanation, however, is simply not sufficient, given his prior lack of commitment to counseling and working out his problems. I see no

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[5] In the Mikolinski case the appellate panel remanded the case to the ALJ to determine the length of Mr. Mikolinski's exclusion. The case is still pending.

indication that Petitioner has actively sought help to correct the behavior leading to his license surrender, or that he has made significant progress towards rehabilitation of the behavior which led him to surrender his license. There is no evidence that if stress recurred in his life he would deal with it in a more appropriate manner.

Petitioner's current employer, Dr. Jenter,[6] testified that he has no reservations concerning Petitioner working with patients. Tr. 148 - 149. Jenter feels that Petitioner today is a more "mellow person" than he was two years ago. Tr. 149. However, Jenter was not aware until February 19, 1991, when Petitioner's counsel told him, that Petitioner had surrendered his license voluntarily because of two cases of sexual misconduct at Sturgis. Jenter had previously been led to believe that there was a problem with Petitioner and a couple of male patients, but Jenter had no knowledge of the exact nature of the problems. When Jenter was informed of the nature of the problems, Jenter, as Penticoff and the Nursing Board staff had done previously, urged Petitioner to go for counseling. Tr. 152 - 154.

Petitioner asserts that it is unreasonable to preclude him from providing his services to the Medicare and Medicaid programs as a laboratory technician until he regains his L.P.N. license. However, while nursing would likely involve a greater amount of patient contact, Petitioner might also have a considerable amount of patient contact as a laboratory technician. Both Penticoff and Bestgen testified that, like nursing, the profession of laboratory technician involves patient contact and trust. Tr. 33, 66. Bestgen testified that, at Sturgis, laboratory technicians act as phlebotomists, which means that they directly draw blood from the patients for testing, in open and closed door situations, in the patient's room or in the emergency room. Tr. 66. Petitioner himself indicated that as a laboratory technician he has had patient contact. Tr. 126 - 127. Thus, I find that the two professions are not so different that the same standards of trustworthiness would not be applicable to both. This situation is unlike Mr. Mikolinski's, where his program participation as a nursing home operator became conditioned upon his

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[6] Dr. Jenter employs Petitioner as a part-time laboratory technician. Following advice of counsel, Dr. Jenter allows Petitioner no unsupervised contact with Jenter's patients, something that Jenter would not normally do for a laboratory technician (Tr. 151 - 152), and he segregates Petitioner's work, so that Petitioner only works with patients who are not recipients or beneficiaries of the Medicare or Medicaid programs. Tr. 158.

receiving a passing score of 75 percent or better on a pharmacy exam. In Petitioner's case, a determination of his trustworthiness to work with patients is the same whether he functions as a laboratory technician or a nurse.

Before Petitioner can regain his L.P.N. license, the Nursing Board wants Petitioner to show them that his problems have been dealt with in a sound and professional manner. Once Petitioner can do this, the Nursing Board stipulated that it would entertain Petitioner's petition to regain his license. FFCL 23. Such evidence that Petitioner is dealing with his problems, soundly and professionally, is precisely what I need to see before I can consider modifying the I.G.'s exclusion. I have not seen it in this proceeding.

Petitioner argues that he has attempted to contact the Nursing Board and that they have not been encouraging. Petitioner states that one Nursing Board staff member told him, "your chances of getting it [Petitioner's L.P.N. license] back are nearly not at all because you surrendered your license," and that Petitioner, "might as well forget trying to do it [regain his license]." Tr. 127 - 128. The Nursing Board's attorney, in a letter to Petitioner's counsel, indicated that Petitioner, "does have the option, I suppose, of coming back before the Board for licensure, but I would anticipate that under the circumstances of this case, this would be a difficult course for him to be successful in." P. Ex. A/11. However, Petitioner has never applied for relicensure (Tr. 128) and does not know what the Nursing Board would do if he reapplied. I realize that, since Petitioner has done nothing to seriously address the conduct for which he was excluded, it may be true that at this time he will not be able to regain his license. However, Petitioner has not permanently surrendered his nursing license. While Petitioner may not now be ready to regain his license, that does not mean that the Nursing Board will never consider his application. Before he can say convincingly that he cannot regain his nursing license, Petitioner needs to show the Nursing Board that he has professionally dealt with his problems.

In order to modify an exclusion imposed and directed against a petitioner by the I.G., I must find that the exclusion is so extreme or excessive as to be unreasonable. Because of the similarity of patient contact between the professions of licensed practical nurse and laboratory technician, and because the very conditions upon which the Nursing Board has stipulated it will consider Petitioner's application for relicensure are the same as those I need to see in order to consider modifying Petitioner's exclusion, I find that the exclusion imposed and directed against Petitioner by the I.G. is reasonable. Petitioner has not seriously sought

help to correct the behavior which led to his license surrender and has not yet made significant steps on the road to rehabilitation.

CONCLUSION

Based on the evidence in the record of this case, the arguments of the parties, and federal law and regulations, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs until he obtains a valid L.P.N. license in South Dakota is reasonable and appropriate. Therefore, I am entering a decision in favor of the I.G. in this case.

IT IS SO ORDERED

/s/

Charles E. Stratton
Administrative Law Judge