Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Bernardo G. Bilang, M.D.,	DATE: July 12, 1991
Petitioner,	
- v. -	Docket No. C-298
The Inspector General.	Decision No. CR141

DECISION

On July 10, 1990, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs.[1] The I.G. told Petitioner that he was being excluded because he had surrendered his license to practice medicine in the State of Florida while a formal disciplinary hearing was pending before the Florida Department of Professional Regulation, Board of Medicine (Florida Board of Medicine). The I.G. cited section 1128(b)(4)(B) of the Social Security Act (Act) as authority for his decision to exclude Petitioner. He advised Petitioner that the exclusion would remain in effect until Petitioner obtained a valid license to practice medicine in Florida.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and decision. I scheduled an in-person evidentiary hearing. Shortly before the date of the scheduled hearing, the parties advised me that they had agreed that the case should be heard and decided based on documentary exhibits and arguments to be submitted by the parties. The parties subsequently filed a Joint Stipulation of Facts and Joint Exhibits

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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-financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

1 - 19. Petitioner additionally filed Petitioner's Exhibits 1 - 8. By letter dated April 22, 1991, I admitted into evidence the Joint Exhibits and Petitioner's Exhibits and established a schedule for the parties to file proposed findings of facts and conclusions of law and supporting briefs. The parties then filed briefs.

I have considered the evidence, the parties' arguments, and the applicable laws and regulations. I conclude that the I.G. was authorized to impose and direct an exclusion against Petitioner pursuant to section 1128(b)(4)(B) of the Act. However, I find that neither the indefinite exclusion originally imposed by the I.G. nor the three-year exclusion which the I.G. proposed in his brief as a modification of the term of the exclusion is reasonable. I modify the exclusion to a one-year exclusion.

ISSUES

The issues in this case are whether:

1. the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act; and

2. the three-year exclusion which the I.G. requests that I impose would be reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a physician who was licensed to practice medicine in Florida, until he relinquished his license in October 1989. Stip. 1; J. Ex. 6/43; 7/45-46.[2]

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2 The parties' Joint exhibits were submitted to me in a bound folder entitled "Document Appendix." The individual Joint Exhibits are separately numbered, and each page of the "Document Appendix" is sequentially numbered. In citing to a Joint Exhibit, I cite to the exhibit as "J. Ex. (number)/(page)" with the number reference being to the exhibit number, and the page reference being to the page as it is numbered in the "Document Appendix." The pages of Petitioner's Exhibits are mostly unnumbered. However, each of Petitioner's Exhibits is a short document. I cite to Petitioner's exhibits as "P. Ex. (number)." In citing to the parties' Stipulations, I cite to them as "Stip. (number)" with the numeric designation being to the

2. Petitioner is presently licensed to practice medicine in Kansas. See J. Ex. 18/78.

3. On November 4, 1987, an administrative complaint was filed against Petitioner before the Florida Board of Medicine. Stip. 2; J. Ex. 1/1-4.

4. Petitioner was charged with: violating Florida law by failing to keep written medical records justifying his course of treatment of a patient; intentionally making a false report; intentionally or negligently failing to file a report or record required by state or federal law; willfully impeding or obstructing, or inducing another person to willfully impede or obstruct, the filing of a report; and failing to practice medicine with the level of skill or care which is recognized by reasonably prudent physicians as being acceptable under similar conditions or circumstances. J. Ex. 1/2-3.[3]

5. On April 25, 1989, a hearing officer designated by the Florida Board of Medicine held an administrative hearing concerning the charges against Petitioner. J. Ex. 4/14.

6. On July 11, 1989, the hearing officer issued a recommended decision in Petitioner's case. J. Ex. 4/14-33.

7. The hearing officer concluded that Petitioner had: failed to keep adequate written records, required by Florida law, to justify his course of treatment of a patient; knowingly filed a false report, in violation of Florida law, concerning his treatment of that patient; and failed to conform with the acceptable medical standards of the community, as defined by Florida law, in his treatment of that patient. J. Ex. 4/31-32.

8. The hearing officer concluded that the evidence before him did not sustain a charge that Petitioner had committed gross and repeated malpractice. J. Ex. 4/32.

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numbered paragraph of the stipulation.

3 The administrative complaint was twice amended. However, the allegations of unlawful or wrongful conduct were not amended.

9. The hearing officer made findings of fact to support his conclusion that Petitioner had violated Florida law concerning the practice of medicine. J. Ex. 4/16-29.

10. The hearing officer recommended to the Florida Board of Medicine that Petitioner's Florida license to practice medicine be suspended for two years. Stip. 10; J. Ex. 4/33.

11. On July 31, 1989, the attorney who prosecuted the complaint in Petitioner's administrative proceeding moved to increase the penalty to be imposed against Petitioner by the Florida Board of Medicine. Stip. 11; J. Ex. 5/36-41.

12. The motion requested that the Florida Board of Medicine, in addition to suspending Petitioner's license to practice medicine in Florida for two years, require as a condition for reinstatement that Petitioner pass a standardized competency examination. Stip. 11; J. Ex. 5/40-41.

13. The motion also requested that the Florida Board of Medicine place Petitioner on five years' supervised probation, to begin after Petitioner completed the term of his license suspension. Stip. 11; J. Ex. 5/40-41.

14. On October 6, 1989, Petitioner agreed to permanently relinquish his license to practice medicine in Florida and never to seek reinstatement of that license, in exchange for termination of the administrative proceedings before the Florida Board of Medicine. Stip. 12; J. Ex. 6/42-44.

15. On October 11, 1989, the Florida Board of Medicine accepted the agreement with Petitioner. Stip. 13; J. Ex. 7/45-46.

16. On January 17, 1989, Petitioner applied for a license to practice medicine in Kansas. Stip. 7; J. Ex. 16/66-74.

17. On June 16, 1989, the Kansas State Board of Healing Arts (Kansas Board of Healing Arts) granted Petitioner a permanent license to practice medicine in Kansas subject to the terms and conditions of a stipulation entered into between Petitioner and the Kansas Board of Healing Arts. J. Ex. 17/75-77; 18/78.

18. The terms and conditions of the stipulation between Petitioner and the Kansas Board of Healing Arts included the requirements that Petitioner: arrange for the monitoring and review of his patient treatment records by designated physicians; file monthly a list of controlled substances prescribed by him; and permit investigators or any other designee of the Kansas Board of Healing Arts to monitor his practice. J. Ex. 17/75-76.

19. The I.G. offered no evidence to show that Petitioner has violated the terms of his stipulation with the Kansas Board of Healing Arts or has been charged with violations of laws or regulations governing the practice of medicine in Kansas.

20. Petitioner surrendered his license to provide health care in Florida while a formal disciplinary proceeding was pending before the Florida Board of Medicine concerning Petitioner's professional competence or professional performance. Findings 3-15.

21. The Secretary of the Department of Health and Human Services (Secretary) had authority to impose and direct an exclusion against Petitioner from participating in Medicare and Medicaid, pursuant to section 1128(b)(4)(B) of the Act. Social Security Act, section 1128(b)(4)(B).

22. 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. 21662 (May 13, 1983).

23. On July 10, 1990, the I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid, pursuant to section 1128 of the Act, effective 20 days from the date of the letter. Stip. 17; J. Ex. 14/63-64.

24. The I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid until Petitioner obtained a valid license to practice medicine in Florida. J. Ex. 14/63.

25. The effect of the exclusion imposed and directed against Petitioner by the I.G. is permanently to exclude him from participating in Medicare and Medicaid. Findings 14, 24.

26. The I.G. has requested that the exclusion imposed and directed against Petitioner be modified to a term of three years.

27. The remedial purpose of section 1128 of the Act is to protect the integrity of federally-funded health care programs and the welfare of beneficiaries and recipients of such programs from individuals and entities who have been shown to be untrustworthy. Social Security Act, section 1128.

28. The I.G. has not shown that a three-year exclusion of Petitioner from participating in Medicare and Medicaid is reasonably necessary to satisfy the remedial purpose of section 1128 of the Act. See Findings 1-20.

29. The remedial purpose of section 1128 of the Act will be satisfied in this case by modifying the exclusion imposed and directed against Petitioner to a term of one year.

ANALYSIS

Petitioner is a physician who was licensed to practice medicine in Florida. In November 1987, a disciplinary proceeding was brought against Petitioner before the Florida Board of Medicine. Petitioner was charged with gross malpractice and with misconduct concerning his preparation of medical treatment records. A hearing was held before a hearing examiner designated by the Florida Board of Medicine. In April 1989, the hearing examiner issued a recommended decision in which he found that Petitioner had violated Florida law concerning medical record-keeping and had knowingly filed a false treatment report. He also concluded that Petitioner had failed to provide medical care in accord with accepted medical standards. The hearing examiner found that the charge of gross malpractice was not sustained by the evidence. He recommended that Petitioner's license be suspended for a period of two years.

The attorney prosecuting the administrative case against Petitioner moved that the Florida Board of Medicine adopt a more stringent remedy than that recommended by the hearing examiner. However, the Florida Board of Medicine never made a final decision in the case, either as to the merits or remedy. Petitioner entered into an agreement with the Florida Board of Medicine to dispose of the charges against

him by permanently resigning his license to practice medicine in Florida. As an element of that agreement, Petitioner promised never to reapply for a license to practice medicine in Florida. This agreement was accepted by the Florida Board of Medicine in October 1989.

In January, 1989, Petitioner applied for a license to practice medicine in Kansas. In his application for a license, Petitioner disclosed the then-pending disciplinary proceeding in Florida. He provided the Kansas Board of Healing Arts with his version of the facts of the episode which led to the disciplinary proceeding. J. Ex. 16/72-73. He also disclosed a previous disciplinary proceeding in Florida which resulted in his license being placed in a probationary status. J. Ex. 16/74.[4] There is no evidence that Petitioner subsequently provided the Kansas Board of Healing Arts with a copy of the Florida hearing examiner's recommended decision.[5]

In June 1989, Petitioner and the Kansas Board of Healing Arts entered into an agreement. Petitioner was granted a permanent license to practice medicine in Kansas. However, his license was simultaneously placed in a probationary status. The terms of the probation included the requirement that Petitioner submit his treatment records for review by two physicians designated by the Kansas Board of Healing Arts, that he cooperate with any requests for disclosure of his records to investigators, and that he submit monthly reports concerning his prescription of controlled substances. The agreement provided that Petitioner

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4 That case involved allegations that Petitioner had unlawfully prescribed a legend drug to a patient and had unlawfully failed to keep proper medical records of his treatment of that patient. J. Ex. 8/48-50. In September 1987, Petitioner entered into a consent agreement with the Florida Board of Medicine in which he agreed to a one-year term of probation. J. Ex. 9/52-56. Petitioner completed his probation in November 1988. J. Ex. 11/59.

5 Nor is there evidence that Petitioner advised the Kansas Board of Healing Arts of the final disposition of his Florida disciplinary proceeding. I note, however, that proceeding was concluded in October 1989, after Petitioner had been granted a license to practice medicine in Kansas.

could apply to terminate the probation after one year. J. Ex. 17/77. There is no evidence that Petitioner has applied for termination of probation.

The I.G. excluded Petitioner based on his surrender of his license to practice medicine in Florida. The exclusion was made coterminous with the Florida license revocation. As a practical consequence, the effect of the exclusion was to permanently exclude Petitioner from participating in Medicare and Medicaid, inasmuch as Petitioner had agreed never to seek reinstatement of his Florida license. The I.G. now requests that I modify the exclusion to a term of three years.

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

An administrative hearing concerning an exclusion imposed and directed pursuant to section 1128 subsumes two issues. The first issue is whether the I.G. had authority to impose and direct an exclusion under one of the subsections of section 1128. The second issue is whether the term of the exclusion imposed and directed by the I.G. is reasonable. See 42 C.F.R. 1001.128(a).

The I.G. had authority to exclude Petitioner. That authority emanated from Petitioner's resignation of his Florida license to practice medicine under circumstances described in section 1128(b)(4)(B) of the Act. Section 1128(b)(4)(B) authorizes the Secretary (or his delegate, the I.G.) to exclude an individual or entity who:

> surrendered . . . a license [to provide health care] while a formal disciplinary hearing was pending before . . . [any state licensing authority] and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity.

Petitioner surrendered his license to provide health care to the Florida Board of Medicine, Florida's licensing authority for physicians, while a formal disciplinary hearing concerning Petitioner's license was pending before that agency. The proceeding concerned Petitioner's professional competence or performance.

Although the terms "professional competence" and "professional performance" are not defined in section 1128(b)(4)(B), the plain meaning of these terms encompasses the ability or willingness of a provider to practice a licensed service with reasonable skill and safety, consistent with the requirements of state law and regulations. See Richard L. Pflepsen, D.C., DAB Civ. Rem. C-345 (1991). Here, the essence of the charges against Petitioner was that Petitioner either willfully or negligently failed to provide care of a quality which met minimum standards of care and knowingly prepared treatment records in a manner which violated state law. I find that these allegations squarely fall within the plain meaning of the terms "professional competence" and "professional performance." Therefore, the actions concerning Petitioner's license in Florida met the criteria for exclusion established by section 1128(b)(4)(B).

2. A three-year exclusion would not be reasonable.

Section 1128 is a civil remedies statute. The remedial purpose of section 1128 is to enable the Secretary to protect federally-funded health care programs and their beneficiaries and recipients from individuals and entities who have proven by their misconduct that they are untrustworthy. Exclusions are intended to protect against future misconduct by providers.

Federally-funded health care programs are no more obligated to deal with dishonest or untrustworthy providers than any purchaser of goods or services would be obligated to deal with a dishonest or untrustworthy supplier. The exclusion remedy allows the Secretary to suspend his contractual relationship with those providers of items or services who are dishonest or untrustworthy. The remedy enables the Secretary to assure that federally-funded health care programs will not continue to be harmed by dishonest or untrustworthy providers of items or services. The exclusion remedy is closely analogous to the civil remedy of termination or suspension of a contract to forestall future damages from a continuing breach of that contract.

Exclusion may have the ancillary benefit of deterring providers of items or services from engaging in the same or similar misconduct as that engaged in by excluded providers. However, the primary purpose of an exclusion is the remedial purpose of protecting the trust funds and beneficiaries and recipients of those funds. Deterrence cannot be a primary purpose for

imposing an exclusion. Where deterrence becomes the primary purpose, section 1128 no longer accomplishes the civil remedies objectives intended by Congress. Punishment, rather than remedy, becomes the end.

> [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

United States v. Halper, 490 U.S. 435, 448 (1989).

Therefore, in determining the reasonableness of an exclusion, the primary consideration must be the degree to which the exclusion serves the law's remedial objective of protecting program recipients and beneficiaries from untrustworthy providers. An exclusion is not excessive if it does reasonably serve these objectives.

The hearing in an exclusion case is, by law, de novo. Act, section 205(b). Evidence which is relevant to the reasonableness of the length 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. Evidence which relates to a petitioner's trustworthiness or 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. Because of the de novo nature of the hearing, my duty is to objectively determine the reasonableness of the exclusion by considering what the I.G. determined to impose in light of the statutory purpose and the evidence which the parties offer and I admit. The I.G.'s thought processes in arriving at his exclusion determination are not relevant to my assessment of the reasonableness of the exclusion.

Furthermore, my purpose in hearing and deciding the issue of whether an exclusion is reasonable is not to second-guess the I.G.'s exclusion determination so much as it is to decide whether the determination was extreme or excessive. 48 Fed. Reg. 3744 (Jan. 27, 1983). Should I determine that an exclusion is extreme or excessive, I have authority to modify the exclusion,

based on the law and the evidence. Social Security Act, section 205(b).

The Secretary has adopted regulations to be applied in exclusion cases. The regulations specifically apply to exclusion cases for "program-related" offenses (convictions for criminal offenses relating to Medicare or Medicaid). The regulations express the Secretary's policy for evaluating cases where the I.G. has discretion in determining the length of an exclusion. 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 factors that may exist demonstrating trustworthiness. 42 C.F.R. 1001.125(b)(1) - (7). In evaluating the reasonableness of an exclusion, I consider as guidelines the regulatory factors contained in 42 C.F.R. 1001.125(b).

I conclude that the I.G. has failed to show a meaningful remedial basis for the three-year exclusion which he requested that I impose. I conclude that a three-year exclusion would be excessive given the evidence of record.[6]

The evidence concerning Petitioner's practice largely consists of the Florida hearing examiner's report of Petitioner's disciplinary hearing. For the reasons which I discuss below, I find that report does not support a conclusion that a lengthy exclusion is needed in this case. Nor have the parties offered meaningful evidence concerning Petitioner's practice of medicine subsequent to his Florida hearing. While Petitioner may have seen and treated many patients in Florida and in Kansas, no evidence is of record concerning his competence or performance with respect to those patients.

The I.G. argues that I should conclude that a three-year exclusion is reasonable based on the Florida hearing examiner's findings of misconduct. The hearing examiner's report depicts conduct by Petitioner which, if true, would suggest that Petitioner is not a

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6 The I.G. recognizes that, in light of the facts of this case, a permanent exclusion would not be reasonable. See I.G.'s Brief at 9. In order for a permanent exclusion to be reasonable, the evidence would have to establish that there is little or no likelihood that Petitioner would ever become trustworthy.

trustworthy provider of care. The hearing examiner concluded that Petitioner failed to properly diagnose and treat a life-threatening medical condition affecting a hospitalized patient under his care and attempted to cover up his deficiencies after the fact by preparing and filing a misleading treatment record, in violation of Florida law. J. Ex. 4. Had the evidence which led to these conclusions been before me, and had I been able to resolve the parties' conflicting allegations concerning this evidence favorably to the I.G., I might have agreed with the I.G. that a three-year exclusion was reasonably necessary.

However, I have seen none of the evidence considered by the hearing examiner, inasmuch as the record of the disciplinary hearing was not offered as evidence by either party. The hearing examiner's findings were never adopted by the Florida Board of Medicine. These findings are not a final action of the Florida agency. Furthermore, the findings and conclusions of the hearing examiner are disputed by Petitioner. See Petitioner's letter to me, received May 31, 1991; P. Ex. 3. Petitioner argues that the hearing examiner misconstrued the evidence in the state administrative case. There is therefore a dispute as to the veracity and accuracy of the hearing examiner's report. I cannot resolve this dispute in favor of the I.G. without reviewing the evidence as to the conduct which underlay the state misconduct charges and the hearing examiner's decision.

Furthermore, it is apparent from the report itself that the hearing examiner had to resolve conflicting evidence in order to reach his findings. The fact that there were inconsistencies in the evidence leads me to conclude that I cannot reject out-of-hand Petitioner's assertions that the report is materially incorrect.

Given the fact that the report was not accepted by the Florida Medical Board, and given further the dispute between the parties as to its accuracy and probative value, I cannot conclude that the report alone justifies the imposition of a lengthy exclusion.[7]

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7 My analysis of the hearing examiner's report is confined to its probative value. There is no issue as to the admissibility of the hearing examiner's report. I admitted the report into evidence. The document is a hearsay statement which is relevant to the issue of the Petitioner's trustworthiness. I routinely admit hearsay statements in lieu of testimony

A party is not collaterally estopped on the issue of trustworthiness from asserting that a state agency report is inaccurate or misleading. See Christino Enriquez, M.D., DAB Civ. Rem. C-277 at 11-12 (1991). Where a party has called into question the accuracy of such evidence, my duty to independently decide whether an exclusion is reasonable may preclude me from simply relying on reports or decisions of state agencies.[8] Neither section 1128 nor section 205 of the Act suggest that I must discharge my duty as an independent fact-finder by accepting on its face the report or decision of a state agency. Indeed, one reason for Congress enacting section 1128 was its concern that state licensing authorities were not adequately protecting federally-funded programs and their beneficiaries and recipients from untrustworthy providers. See S. Rep. No. 109, 100th Cong., 1st Sess. 3, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 684, 688.[9]

That is not to say that there are never circumstances where I may draw inferences as to a petitioner's trustworthiness from the conclusions contained in state agency reports. A petitioner might not contest the accuracy of the report or dispute the implications of its findings. For example, in the Pflepsen case, the petitioner never asserted that the allegations which

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in hearings brought under section 1128. Arguably, the report would also have been admissible in a federal court proceeding as an excepted public record under the Federal Rules of Evidence. See Federal Rules of Evidence, Rule 803(8).

8 Petitioner did not simply assert that the report was inaccurate. Had he done so, without offering evidence to suggest that the report might be inaccurate, I might have been persuaded to overrule his objections. However, Petitioner has offered evidence that the hearing examiner's conclusions were not correct. For example, Petitioner has asserted that his after-the-fact preparation of medical records comports with accepted medical standards. See P. Ex. 3. This squarely contradicts the hearing examiner's findings. See J. Ex. 4/31-32. I am not capable of resolving these conflicting assertions absent the record of Petitioner's Florida disciplinary hearing.

9 By contrast, I am bound by the final action of a state agency in deciding whether the I.G. has authority to exclude a petitioner. Enriquez, supra; Pflepsen, supra.

formed the basis for state disciplinary charges against him were untrue. Moreover, there may be circumstances surrounding a report which so buttress the conclusions made by the fact-finder as to enhance significantly its probative value. For example, I would be much more inclined to accord substantial weight to the hearing examiner's report in this case had it been accepted by the Florida Board of Medicine after that agency had considered and decided Petitioner's objections. However, even in that circumstance I would have permitted Petitioner to offer evidence, assuming he desired to do so, to show that the report or the state agency's findings did not prove that he was untrustworthy. See Enriquez, supra.

Although I cannot conclude from the evidence before me that the three-year exclusion urged by the I.G. is reasonable, I can conclude that an exclusion is warranted. I find that an exclusion of one year is justified by the evidence, and I modify the exclusion accordingly.

Congress concluded that, ordinarily, an exclusion was justified where providers resigned their licenses to practice health care to avoid the imposition against them of adverse findings and sanctions by state licensing authorities. The legislative history of section 1128(b)(4)(B) suggests congressional recognition of the probability that providers who resign their licenses to provide health care in the face of disciplinary charges ordinarily do so in order to avoid the stigma of an adverse finding. See S. Rep. No. 109, 100th Cong., 1st Sess. 3, reprinted in 1987 U.S. Code Cong. & Admin. News, 682, 688. This amounts to a legislative finding that an inference of culpability ought to attach to those providers who resign their licenses in the face of state disciplinary actions.

Petitioner argues that, in this case, no inference of culpability ought to attach to his resignation of his Florida license. He claims that he was the victim of a vendetta by his peers, who resented Petitioner's participation in a Health Maintenance Organization (HMO).

I am not persuaded by Petitioner's argument. There is no evidence that the misconduct charges against Petitioner were levied by his peers. However, even assuming that to be the case, and assuming further that those who brought charges against Petitioner were motivated by personal animosity resulting from Petitioner's HMO participation, the fact remains that

an impartial hearing examiner did make adverse findings concerning Petitioner's practice methods and ethics. Thus, what motivated Petitioner to resign his license was not the animosity of his peers, but the possibility that the Florida Board of Medicine would take adverse action against Petitioner based on the hearing examiner's report.

Had the hearing examiner's report been accepted by the Florida Board of Medicine, it appears probable that Petitioner's license to practice medicine in Florida would have been suspended. The misconduct charges against Petitioner constituted the second alleged episode of misconduct by him within a two-year period (the previous case was resolved with a stipulation in which Petitioner consented to a one-year term of probation). Both the hearing examiner and the attorney who prosecuted the case recommended that Petitioner's license be suspended. I infer from these facts that, whatever can be said about the weight to be accorded the hearing examiner's report, Petitioner certainly recognized that adverse findings by the Florida Board of Medicine were likely and that a suspension of his license was a likely remedy. His resignation of his license to avoid the stigma of an imposed remedy is evidence of some degree of culpability. Under the circumstances, an exclusion is justified. I am not persuaded, however, that a three-year exclusion is justified, especially considering that the hearing examiner only recommended a two-year suspension of Petitioner's license to the Florida Board of Medicine. I would note that even had the two-year suspension been accepted by the Florida Board of Medicine, that suspension would have been completed on or about the completion of this one-year exclusion as I have modified it in this case.

I am persuaded that, in this case, a one-year exclusion is reasonable. Petitioner's license to practice medicine in Kansas was granted conditioned on Petitioner being subject to close supervision by his peers and the Kansas Board of Healing Arts. I find it unlikely, given this degree of supervision, that Petitioner would commit in Kansas the kind of misconduct he was alleged to have perpetrated in Florida.[10]

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10 On July 10, 1991 Petitioner contacted Ms. Winerman of my office to advise her that the decision in this case should be sent to an address in Florida. Petitioner indicated that he was no longer practicing

CONCLUSION

Based on the law and the evidence, I conclude that the I.G. was authorized to impose and direct an exclusion against Petitioner from participating in Medicare and Medicaid. I conclude that the exclusion imposed and directed against Petitioner, or a modification of that exclusion to a term of three years, is not reasonable. I conclude that a one-year exclusion is reasonable.

/s/

Steven T. Kessel
Administrative Law Judge

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at his previous address in Meade, Kansas.