Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Eric Kranz, M.D.,	)	DATE: August 1, 1991
	)	
Petitioner,	)	
	)	Docket No. C-325
- v. -	)	
	)	Decision No. CR148
The Inspector General.	)	
	)	

DECISION

On September 24, 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 [1] The I.G. told Petitioner that he was being excluded because his license to practice medicine in West Virginia had been revoked by that state's licensing authority. The I.G. cited section 1128(b)(4) 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 West Virginia.

Petitioner timely requested a hearing. The case was originally assigned to another administrative law judge for a hearing and a decision. It was reassigned to me on April 9, 1991. I held a hearing in Harrisburg, Pennsylvania, on April 18, 1991.

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

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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.

against Petitioner by section 1128(b)(4)(A) of the Act. However, I find that the indefinite exclusion imposed and directed by the I.G. is unreasonable. 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)(A) of the Act; and

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a physician. Tr. at 52-54.[2]

2. Petitioner is licensed to practice medicine in the District of Columbia and in Pennsylvania. P. Ex. 7/1, 9/1.

3. Petitioner presently practices medicine in Pennsylvania. Tr. at 52-53.

4. Petitioner was licensed to practice medicine in West Virginia. See I.G. Ex. 11.

5. On March 18, 1988, the West Virginia Board of Medicine revoked Petitioner's license to practice medicine in West Virginia. I.G. Ex. 11/8.

6. In revoking Petitioner's license to practice medicine in West Virginia, the West Virginia Board of Medicine found that Petitioner had engaged in unprofessional conduct. I.G. Ex. 11/7.

7. The West Virginia Board of Medicine found that Petitioner's unprofessional conduct included falsely representing in a June 29, 1987, West Virginia physician's license renewal application that he had not

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[2] The parties' exhibits and the transcript of proceedings in this case will be cited as follows:

Inspector General Exhibit	I.G. Ex. (number)/(page)
Petitioner Exhibit	P. Ex. (number)/(page)
Transcript	Tr. at (page)

been denied a license to practice medicine during the previous two years, when in fact Petitioner should have known as of June 23, 1987, that the State of Ohio had denied his application for a license to practice medicine. I.G. Ex. 11/5-7.

8. The West Virginia Board of Medicine additionally found that Petitioner's unprofessional conduct included committing an unsavory and insulting repugnant criminal act in a hospital setting upon a hospital employee. I.G. Ex. 11/6.

9. On June 19, 1987, the State Medical Board of Ohio (Ohio Medical Board) denied Petitioner's application for a license to practice medicine in Ohio. I.G. Ex. 12.

10. The West Virginia Board of Medicine also found that Petitioner's unprofessional conduct included the reasons enumerated in the Order of the Ohio Medical Board denying his license. I.G. Ex. 11/6.

11. The Ohio Medical Board's reasons for denying Petitioner's license application included findings that Petitioner: (1) offered to sell compilations of questions and answers from the 1978 FLEX and Medical Council of Canada examinations to persons planning to take these examinations in 1979; and (2) falsely stated in his license application that he was a licentiate of the Medical Council of Canada. I.G. Ex. 12/4-5.

12. The Ohio Medical Board also found that Petitioner had intentionally failed to disclose in his application for an Ohio license to practice medicine that previously he had been denied licenses to practice medicine in Oklahoma and Pennsylvania. I.G. Ex. 12/9.

13. The West Virginia Board of Medicine revoked Petitioner's license to practice medicine in West Virginia for reasons related to Petitioner's professional performance. Findings 6, 7, 10-12; Social Security Act, section 1128(b)(4)(A).

14. The Secretary of the Department of Health and Human Services (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.

15. On September 24, 1990 the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid.

16. The I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act. Findings 13-14.

17. The remedial purpose of section 1128 of the Act is to assure that federally-funded health care programs and their beneficiaries and recipients are protected from individuals and entities who have demonstrated by their conduct that they are untrustworthy.

18. The I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid until he obtains a license to practice medicine in West Virginia.

19. In revoking Petitioner's license to practice medicine in West Virginia, the West Virginia Board of Medicine did not state a date when Petitioner would be entitled to have his license restored. See I.G. Ex. 11.

20. Although Petitioner's explanation for his false answer on his application for renewal of his West Virginia license to practice medicine regarding the denial of his license in Ohio is not controverted by the record, he failed to recognize that he had a duty in good faith to promptly inform West Virginia licensing authorities that the Ohio Medical Board had denied his license application when he became aware of this action. See Tr. at 72-74.

21. Petitioner's failure to inform the West Virginia licensing authorities that the Ohio Medical Board had denied his license when he first became aware of this action is evidence of a lack of trustworthiness. Findings 7, 20.

22. Petitioner's explanation that he was not aware that his license application in Ohio had been denied at the time that he applied for renewal of his West Virginia license is self-serving. Findings 7, 20, 21.

23. Although Petitioner's explanation for his false representation that he was a licentiate in Canada on his Ohio license application is not controverted by the record, he failed to recognize that he had a duty in good faith to ascertain the meaning of the word "licentiate" before answering the question on the application. See Tr. at 57-59.

24. Petitioner's answer to a question on his Ohio license application in a light most favorable to him without first confirming the meaning of the question is evidence of a lack of trustworthiness. Findings 11, 23.

25. Petitioner's explanation that he did not understand the questions on the Ohio license application and mistakenly stated that he was a licentiate in Canada as a consequence of his misunderstanding is self-serving. Findings 11, 23, 24.

26. Petitioner's testimony that his sale of FLEX questions to 1979 candidates for that examination was solely motivated by a desire to help fellow medical residents to prepare for the examination is self-serving and strains credulity. See Tr. at 68-70.

27. Given that twelve years has elapsed since Petitioner sold compilations of questions from FLEX and the Medical Council of Canada examinations, the I.G. has failed to prove that Petitioner is presently untrustworthy based on this incident. See Finding 11; See P. Ex. 3.

28. The criminal act identified by the West Virginia Board of Medicine in its decision to revoke Petitioner's license to practice medicine in West Virginia consisted of Petitioner's 1986 nolo contendere plea to a misdemeanor charge of battery. I.G. Ex. 11/3.

29. Petitioner's plea was the consequence of a criminal complaint filed against him by a coworker at a West Virginia hospital. See I.G. Ex. 15.

30. Petitioner was initially charged with sexual abuse in the first degree, a felony under West Virginia law. I.G. Ex. 15/3.

31. Petitioner and the coworker who filed the criminal complaint against him were personal acquaintances who had maintained a social relationship. I.G. Ex. 15/37.

32. Petitioner's nolo contendere plea did not amount to an admission of unlawful sexual contact with a coworker.

33. The I.G. did not prove from Petitioner's admitted battery against a coworker that Petitioner posed a threat to the welfare or safety of beneficiaries or recipients of federally-funded health care programs. See Findings 28-32.

34. There is no evidence that Petitioner has engaged in fraudulent conduct against a health insurer or a federally-funded health care program. See Tr. at 86-87, 124.

35. There is no evidence that Petitioner has ever engaged in conduct which is harmful to program recipients or beneficiaries. See Finding 34; See Tr. at 86.

36. The indefinite exclusion which the I.G. imposed and directed against Petitioner does not serve the remedial purpose of section 1128 of the Act and is excessive.

37. The remedial purpose of section 1128 will be met in this case by a one-year exclusion from participation in Medicare and Medicaid.

ANALYSIS

The I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid, pursuant to section 1128(b)(4)(A). The event which triggered the exclusion determination was the decision by the West Virginia Board of Medicine to revoke Petitioner's license to practice medicine in West Virginia.[3] The West Virginia Board of Medicine based its revocation of Petitioner's license to practice medicine upon several grounds. First, the State Medical Board of Ohio denied Petitioner's application for a license to practice medicine in Ohio and the West Virginia Board of Medicine found that Petitioner was not qualified to practice medicine in West Virginia for the reasons given by the Ohio Medical Board in denying his license in Ohio. Second, Petitioner failed to advise the West Virginia Board of Medicine in his 1987 application for renewal of his license that the Ohio licensing authority had denied Petitioner's application for a license to practice medicine in Ohio. The West Virginia Board of Medicine concluded that Petitioner's failure to report this denial was a deliberately fraudulent act. Third, Petitioner had pleaded nolo contendere in 1986 to a misdemeanor battery against a coworker in a West Virginia hospital. The West Virginia Board of Medicine concluded that Petitioner had perpetrated a criminal

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[3] On February 9, 1989, the Oklahoma State Board of Medical Licensure revoked Petitioner's license to practice medicine in Oklahoma. This agency's decision appears to have been predicated on the decision of the West Virginia Board of Medicine. See P. Ex. 9/2. Licensing authorities in the District of Columbia and Pennsylvania also have reviewed Petitioner's case, including the action by the West Virginia Board of Medicine, and have decided not to revoke Petitioner's license to practice medicine in those jurisdictions. P. Ex. 7; P. Ex. 9.

sexual assault against the coworker, which it found to be morally repugnant. See I.G. Ex. 11.[4]

Hearings conducted pursuant to section 1128 of the Act generally subsume two issues. The first issue involves the authority of the I.G. to impose and direct an exclusion. More specifically, the question is whether the excluded person has committed an act or has been convicted of a criminal offense which falls within the purview of one of the subsections of section 1128, which authorizes the Secretary (or his delegate, the I.G.) to impose and direct exclusions. The second issue involves the reasonableness of the length of the exclusion.

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

Section 1128(b)(4)(A) of the Act authorizes the I.G. to impose and direct an exclusion against a party whose license to provide health care is revoked or suspended by a state licensing authority for reasons bearing on that party's professional competence, professional performance, or financial integrity. Petitioner contends that the West Virginia Board of Medicine did not revoke his license for any of the reasons enumerated in the Act. Therefore, according to Petitioner, the I.G. was without authority to impose and direct an exclusion against him.

I disagree with Petitioner's contention. The West Virginia Board of Medicine's license revocation decision was at least in part grounded on findings related to Petitioner's professional performance. The West Virginia Board of Medicine found that Petitioner committed a dishonest act in filing his application for license renewal, by not reporting the fact that Ohio had denied him a license to practice medicine. The West Virginia Board of Medicine's license revocation decision was also in part based on findings of the Ohio Medical Board that Petitioner had falsely stated in his application for licensure in Ohio that he was a licentiate of the Medical Council of Canada and that he had intentionally failed to disclose that he had been denied licenses in other states. Acts of dishonesty of this nature relate to Petitioner's "professional performance" as that term is used in section 1128(b)(4)(A). Therefore, the I.G. was

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[4] In addition to filing criminal charges against Petitioner, the coworker had also filed a complaint with the West Virginia Board of Medicine alleging that Petitioner had sexually assaulted her. I.G. Ex. 11/4.

authorized by section 1128(b)(4)(A) to impose and direct an exclusion against Petitioner.

The term "professional performance" is not defined in section 1128(b)(4)(A). However, that term plainly subsumes elements of professional deportment which include honesty and integrity in the discharge of professional duties. A health care provider's professional duties include compliance with applicable state laws and regulations concerning licensure and license renewals. A requirement by a state licensing board that a health care provider honestly and fully report the status of his licensure applications to the board is an integral element of professional performance. Dishonesty by a provider in reporting required information to a state licensing board therefore relates to that provider's professional performance.[5]

Petitioner contends that the findings made by the West Virginia Board of Medicine were based on circumstantial and erroneous evidence. Petitioner argues that since the findings of the West Virginia Board of Medicine are incorrect, the I.G. does not have the authority to base its exclusion determination on the West Virginia Board of Medicine's decision to revoke Petitioner's medical license.

It is well-settled that a petitioner's argument concerning the correctness or fairness of a state licensing board's license revocation proceeding is

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[5] The fact that Petitioner's license in West Virginia was revoked because, among other things, he had failed to honestly and fully report the status of his licenses to practice medicine in other jurisdictions satisfies the requirement in section 1128(b)(4)(A) that license revocation be for reasons bearing on Petitioner's professional performance. I do not make any findings on whether Petitioner's conviction for battery against a coworker or his sale of compilations of questions and answers from medical examinations relate to his professional competence or performance because there is no need for me to resolve these issues. See Andy E. Bailey, C.T., DAB Civ. Rem. C-110 (1989). While there is no need for me to make a finding on whether Petitioner's conviction for battery against a coworker and his sale of examination questions relate to his professional competence or performance in order to resolve the issue of whether the I.G. had the authority to exclude Petitioner, these incidents may be relevant to the issue of the reasonableness of the length of the exclusion.

irrelevant to the issue of whether the I.G. has authority to impose and direct an exclusion based on the state board's order revoking that petitioner's license. Roosevelt A. Striggles. DAB Civ. Rem. C-301 (1991). The I.G.'s authority to impose and direct exclusions pursuant to section 1128(b)(4)(A) emanates from the actions taken by state licensing boards. The law instructs the Secretary to rely on these boards' decisions. The law does not intend that the Secretary examine the fairness or propriety of the process which led to the decisions. A hearing on exclusions imposed pursuant to section 1128(b)(4)(A) may not be used by a petitioner to mount a collateral attack on a state board's decision. If a petitioner thinks that there are serious flaws in a state board decision, the petitioner should challenge it in the proper forum. Frank Waltz, M.D., DAB Civ. Rem. C-86 (1989).[6]

2. The exclusion imposed and directed against Petitioner by the I.G. is unreasonable.

The I.G. effectively imposed and directed an indefinite exclusion against Petitioner by excluding him until he obtained a license to practice medicine in West Virginia. The West Virginia Board of Medicine did not specify a date when Petitioner would be entitled to have his license restored. It is conceivable, from the license revocation decision, that the West Virginia Board of Medicine might never determine to restore Petitioner's license. I conclude that the I.G.'s indefinite exclusion of Petitioner is unreasonable because it bears no rational relationship to the remedial purpose of section 1128.

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

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[6] While the correctness of the findings made by the West Virginia Medical Board in its decision to revoke Petitioner's license are not relevant to the issue of whether the I.G. has the authority to exclude Petitioner, it may be relevant to the issue of whether the length of the exclusion imposed by the I.G. is extreme or excessive. See Bernardo G. Bilang, M.D., DAB Civ. Rem. C-298 (1991).

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. As stated by the United States Supreme Court:

> [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. Social Security 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. For example, I permitted the I.G. to offer evidence in this case pertaining not only to the basis for revocation of Petitioner's West Virginia license to practice medicine, but to disciplinary proceedings concerning Petitioner in states other than West Virginia. Similarly, I allowed Petitioner to offer evidence concerning disciplinary proceedings in other states. I also allowed both parties to offer evidence concerning the events which led to Petitioner's nolo contendere plea to a criminal battery charge.

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. 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).

There are circumstances where I have sustained an indefinite exclusion premised on a decision to revoke a license by a state licensing authority. Those circumstances are not present here. For example, in Richard L. Pflepsen, D.C., DAB Civ. Rem. C-345 (1991), I sustained an indefinite exclusion of the petitioner premised on his surrender of his health care license to a state licensing authority. However, as I noted in Pflepsen, the petitioner evidenced no desire to provide

health care in any jurisdiction besides Iowa, the state in which he had been licensed. Petitioner did not dispute the facts (his substance abuse) which led to the disciplinary action against him, nor did he argue that the conditions which Iowa attached to restoration of his license were unreasonable.

By contrast, Petitioner in this case is presently practicing in a jurisdiction other than West Virginia (Pennsylvania) pursuant to a valid license. The Pennsylvania licensing authorities reviewed the circumstances of Petitioner's West Virginia license revocation and concluded that Petitioner should continue to be a licensed physician in Pennsylvania.[7] Petitioner vigorously disputes the factual findings of the West Virginia Board of Medicine in its license revocation decision and contends, above all, that he is a trustworthy provider of care.

Given these distinctions and Petitioner's contentions, I cannot say that the I.G.'s decision to impose and direct an indefinite exclusion against Petitioner premised on the West Virginia license revocation is per se reasonable. See Lakshmi N. Murty Achalla, M.D., DAB App. 1231 (1991). Nor, for reasons which I express below, can I conclude that an indefinite, or even a lengthy exclusion, is reasonable based on the evidence.

It is apparent from the record of this case that Petitioner has on several occasions run afoul of state licensing authorities and has been found not to have been completely honest in his disclosures and reporting to these authorities. These episodes, taken in the aggregate, suggest that Petitioner is not an entirely trustworthy individual. I conclude from this evidence that an exclusion is not completely unwarranted in this case. On the other hand, there is not evidence of record in this case from which I can infer that Petitioner is so untrustworthy as to merit an indefinite exclusion from participation in Medicare and Medicaid or an exclusion for a lengthy term of years.[8]

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[7] Petitioner entered into a consent order with Pennsylvania authorities wherein he submitted to a reprimand and a civil penalty of $2,000. P. Ex. 9/7-8. However, Petitioner's license to practice medicine in Pennsylvania was not otherwise restricted.

[8] On page 31 of his posthearing brief, the I.G. suggested that, if I was not convinced that his indefinite exclusion should be affirmed, I should modify

Petitioner was less than candid in reporting the status of his Ohio license application to West Virginia authorities. He asserted to the West Virginia authorities that he had not been denied a license to practice medicine in Ohio, when in fact he had been denied such a license.

Petitioner testified before me that the Ohio license denial decision was mailed to him by certified mail several days prior to the date when he filed his application to renew his West Virginia license. The certification of delivery was signed by an employee in Petitioner's medical office. Petitioner's explanation for not advising the West Virginia authorities of the Ohio license denial was that he was out of the country when the Ohio denial was mailed to him. He asserted that he had not seen the denial when he filed his license renewal application in West Virginia. Therefore, according to Petitioner, there was no dishonesty in his failure to report the Ohio denial in his West Virginia renewal application. See Tr. at 72-73.

I am troubled by the glibness and self-serving quality of Petitioner's explanation for his failure to notify West Virginia authorities of his Ohio license denial. While this explanation is not contradicted by any evidence of record, I nevertheless find it troubling because it shows that Petitioner failed to recognize that he had a duty in good faith to report the denial of his license in Ohio when he did find about it.

Petitioner certainly knew about the Ohio denial within a few days of filing his application for renewal of his West Virginia license. He also knew that the denial and the circumstances relating to that denial were a matter of concern to West Virginia authorities, inasmuch as the West Virginia renewal form specifically required him to describe any license denials by other states. Petitioner had a duty in good faith to promptly inform West Virginia authorities when he became aware of the Ohio action. His failure to inform the West Virginia licensing authorities that the Ohio Medical Board had denied his license when he became aware of this action is evidence of a lack of trustworthiness.

This conclusion is reinforced by the fact that Petitioner presented me with other self-serving explanations for problems he had experienced on previous occasions with licensing authorities in states other than West Virginia.

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the exclusion to a term of three years.

For example, Ohio's licensing authority denied Petitioner a license to practice medicine in Ohio because it found, among other things, that Petitioner had falsely stated in his application that he was a licentiate in Canada. Petitioner's explanation for this concededly untrue averment in his Ohio license application was that he misunderstood the term "licentiate" to mean, in effect, eligibility for a license. See I.G. Ex. 12/8; Tr. at 58-59.

As with Petitioner's explanation for his failure to inform West Virginia authorities about his Ohio license denial, this explanation is not contradicted by evidence of record. However, it is troubling because it shows that Petitioner failed to recognize that he had a duty in good faith to ascertain the meaning of the word "licentiate" before answering a question referring to the term on a state licensing application.

Petitioner testified before me that he did not know the meaning of the word "licentiate" when he wrote his answer to the question on the licensing application. Tr. at 59. Assuming that this is true, at the very least it demonstrates a willingness on Petitioner's part to answer questions on licensing applications without first determining their meanings. Certainly Petitioner had a duty in good faith to ascertain the meaning of the questions he was responding to because a failure to do so would put him at risk of providing false information to the licensing board. His statement to the Ohio licensing authority regarding his status as a "licentiate" without even knowing what the word meant is evidence of a reckless disregard for the importance of making truthful representations to the state licensing authority.

Similarly, Petitioner provided me with an explanation for his sale of FLEX questions to 1979 candidates for that examination. He justifies his actions as being motivated by a good faith desire to assist fellow medical residents to prepare for that examination. See Tr. at 68-70. As with Petitioner's other explanations for past problems, this testimony is not entirely implausible, but it is self-serving. Petitioner's tendency to characterize his conduct in the light most favorable to him is further illustrated by his testimony before the Ohio Medical Board concerning this incident. Petitioner claimed that he was advancing the Hippocratic Oath by selling the FLEX questions, and the Ohio Medical Board found this rationalization for his conduct to be "astounding". I.G. Ex. 12/10. Petitioner's testimony before me regarding his motives for the sale of the FLEX questions is an unconvincing rationalization of his conduct when it is

viewed in context with his other self-serving explanations for his problems with state licensing authorities.

Petitioner's reckless disregard for the truthfulness of his statements in license applications is the ambit of the evidence in this case from which I can infer that Petitioner is not a trustworthy health care provider. I find unpersuasive other evidence asserted by the I.G. to establish lack of trustworthiness.

I am not persuaded that the evidence concerning the events which resulted in Petitioner's nolo contendere plea to a charge of battery provides substantial additional proof that Petitioner is an untrustworthy individual. Petitioner was charged by a coworker with a criminal felony of sexual abuse. The transcript of the preliminary hearing of these criminal proceedings shows that the complaining coworker testified that Petitioner approached her in the hospital where they were both employed and grasped her right breast without invitation. The coworker also testified that when she protested this offensive conduct, Petitioner said "just sit there and enjoy it." I.G. Ex. 15/9. Although the coworker admitted that she had enjoyed a social relationship with Petitioner which included going out to dinner and to a bar and that she had received free medicine from Petitioner, she denied that she had ever visited him in his home or that she had sexual relations with him. The coworker also testified that Petitioner had verbally harassed her and made unwelcome sexual advances to her on more than one occasion. I.G. Ex. 15/37-40, 45.

Petitioner vehemently denied these allegations. In pleading nolo contendere to a misdemeanor battery charge, Petitioner admitted to an unlawful contact with the complaining coworker. He did not, however, admit to the offense as she alleged it. At the hearing before me, Petitioner testified that he had dated the coworker and that she repeatedly and willingly had sexual relations with him. Petitioner also testified that he and the coworker frequently "flirted" at the hospital where they both worked. While Petitioner testified that he put his arm around the coworker and touched her right breast, he was under the impression that their relationship was such that "she didn't mind me hugging her or kissing her on occasion." Tr. at 77. Petitioner said that when the coworker told him to remove his hand from her breast, he immediately did so. In addition, Petitioner pointed out that the coworker did not file criminal charges against him for more than a week after the incident occurred. Tr. at 75-78.

I cannot discern from the record before me that the complaining coworker's allegations of sexual misconduct are true. Although I admitted the transcribed statement of the coworker into evidence, I was not provided the opportunity to judge the demeanor or credibility of this individual. Petitioner denied abusive sexual conduct at the hearing. He produced a witness, Denise Elswick, who in important respects corroborated Petitioner's assertion that the coworker had lied to authorities about the degree of intimacy in her relationship with Petitioner prior to the allegedly felonious sexual contact.[9]

It is not possible for me to draw meaningful inferences as to Petitioner's trustworthiness from this episode because I am not convinced from the record that Petitioner actually perpetrated an act of sexual abuse as alleged by the complainant in the criminal case.[10] This case is thus distinguishable from cases which I have adjudicated pursuant to section 1128(a)(2) of the Act, wherein I have inferred from proven episodes of abuse, including sexual misconduct, a propensity on the part of petitioners to engage in future abusive conduct. See, for example, Norman C. Barber, D.D.S., DAB Civ. Rem. C-198 (1991).

In Barber, the petitioner pleaded guilty to an offense consisting of the sexual abuse of his daughter in the

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[9] The findings of the West Virginia Board of Medicine concerning the conduct which underlies Petitioner's nolo contendere plea, do not, in my opinion, provide additional weight for the contention that Petitioner sexually abused a coworker. The hearing examiner appointed by the West Virginia Board of Medicine to review the complaints against Petitioner relied on the transcript of the preliminary hearing which is in evidence in this case as I.G. Ex. 15. In addition, I had the benefit of evidence which was not presented to the hearing examiner, consisting of the testimony of Petitioner and Ms. Elswick. See I.G. Ex. 11.

[10] Just because I am not persuaded that the coworker's allegations are true does not mean that I must find that Petitioner's version is true. There are too many inconsistencies in the record to enable me to find that the I.G. has submitted sufficient evidence to prove that Petitioner engaged in an act of sexual abuse as alleged by the coworker. I am not, however, required to, nor do I find, that Petitioner's explanation of the events underlying his criminal conviction are credible.

context of a patient relationship. In the Barber case, the conduct giving rise to the conviction was undisputed and admitted to by the petitioner. I was therefore able to infer from the record that the petitioner posed a threat to the welfare of program beneficiaries and recipients and on that basis I affirmed the exclusion imposed and directed against the petitioner by the I.G. By contrast, the most that can be said about the episode at issue in this case is that Petitioner may have engaged in sexually offensive conduct towards a coworker with whom Petitioner had previously had a personal relationship. Although Petitioner admits that he put his arm around a coworker and touched her breast without being given explicit permission to do so, the underlying circumstances of this incident are too ambiguous to enable me to infer that Petitioner might engage in sexual misconduct with patients. In view of the foregoing, I find that the I.G. has failed to establish that Petitioner poses a threat to program beneficiaries and recipients based on Petitioner's nolo contendere plea to a misdemeanor charge of battery.[11]

The fact that I do not draw inferences against Petitioner based on his nolo contendere plea to a battery charge and the allegations that he engaged in sexual abuse is not to say that the record establishes Petitioner to be an entirely honest or trustworthy individual. As I note above, Petitioner has in the past made false statements in his licensing applications filed with state licensing boards. While Petitioner was able to present plausible explanations for these false statements, I am troubled by the glib and self-serving nature of these explanations. Petitioner has consistently attempted to excuse and rationalize his actions without recognizing that he may have brought some of his trouble with the licensing boards upon himself.

However, I do not find that this lack of honesty in Petitioner justifies the indefinite exclusion imposed and directed by the I.G. or even an exclusion for a period of three years. While Petitioner's actions cause me to have reservations about his trustworthiness, my reservations are largely balanced by the fact that there is no

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[11] Had the I.G. proven that the complaining coworker's allegations of sexual misconduct are true, it would arguably have made a stronger case for a lengthy exclusion. However, even if the weight of the evidence had established the coworker's allegations, I would still have to infer that Petitioner posed a present threat to patients.

evidence that Petitioner has ever defrauded a health care program or engaged in conduct which jeopardized the welfare or a program beneficiary or recipient.

I also note that none of the episodes of misconduct alleged by the I.G. occurred later than 1987. Petitioner was first charged with the episode of alleged sexual abuse in May 1986. I.G. Ex. 15/7. He filed his application for license renewal in West Virginia in June, 1987. I.G. Ex. 11/7. He filed his Ohio license application in February, 1986. I.G. Ex. 12/8. His sale of FLEX examination questions occurred in 1979. See I.G. Ex. 12/8.[12] All of the episodes of misconduct identified by the I.G., including those Petitioner attempted to excuse in his testimony, occurred at least four years ago.

I am also mindful of the fact that professional licensing boards in both Pennsylvania and the District of Columbia have reviewed essentially the same record presented to me and have concluded that Petitioner is sufficiently trustworthy so as to be permitted to practice medicine in those jurisdictions. The evidence therefore does not convince me that Petitioner is so untrustworthy so as to require a lengthy exclusion from participating Medicare and Medicaid.

I conclude that the exclusion should be modified to a term of one year. At the completion of this term, more than four full years will have elapsed since the last episode in which Petitioner was found to have been untruthful to a state licensing board. Given that, and assuming that no other examples of Petitioner's dishonesty are identified, ample time will have elapsed

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[12] Petitioner also experienced difficulties with state licensing boards concerning statements he made regarding license applications he filed in 1981 (Pennsylvania) and in 1983 (Oklahoma). I.G. Ex. 12/8. The State Medical Board of Ohio concluded in its 1987 denial of Petitioner's license application that Pennsylvania and Oklahoma had denied Petitioner's applications for licenses. In fact, Pennsylvania did not deny Petitioner's license application. I.G. Ex. 3/7; P. Ex. 9/3. It is unclear from the record whether Oklahoma, in fact, denied Petitioner's 1983 application. There is evidence to suggest that Petitioner was granted a license in Oklahoma. P. Ex. 2/1. However, I cannot determine whether this license approval relates to the same application which the Ohio authorities found to have been denied.

for Petitioner to have demonstrated that he does not pose a threat to the integrity of federally-funded health care programs.

In modifying the exclusion, I am cognizant of the fact that I have found Petitioner's explanations for the events which resulted in disciplinary actions by several state licensing boards to be glib and self-serving, suggesting that Petitioner has been less than open in his testimony before me. Arguably, I could conclude from this finding that Petitioner was so untrustworthy an individual as to merit a lengthy exclusion. I do not do so because I cannot conclude from my review of the record that Petitioner actually lied to me in his testimony so much as he characterized the facts in a way intended to depict his actions in as favorable light as is possible.[13] Furthermore, Petitioner's testimony all concerned events that occurred in the remote past. I do not infer from his characterizations of such remote events that Petitioner is likely to commit offenses which jeopardize the integrity of the Medicare or Medicaid programs.

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[13] Petitioner made several representations to me which were not disproved by the I.G. Had the I.G. brought forward evidence which proved that Petitioner lied to me, I would be more inclined to find that a lengthy exclusion would be justified. For example, the decision of the Ohio Medical Board noted that although Petitioner claimed to be licensed to practice medicine in Italy, he had not produced documentary evidence of such licensure. I.G. Ex. 12/8. Petitioner testified before me that the reason he has not produced documentation of his Italian license is that he is required to pick up the Italian license certificate in person, and that he has never had the opportunity to do so. Tr. at 56. Again, this testimony strikes me as being self-serving, but there is nothing in the record to contradict it.

CONCLUSION

Based on the law and the evidence, I conclude that the indefinite exclusion imposed and directed against Petitioner by the I.G. is excessive. I conclude that the remedial purposes of section 1128 of the Act will be satisfied in this case by an exclusion of one year, and I modify the exclusion accordingly.

/s/

Steven T. Kessel
Administrative Law Judge