Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Tajammul H. Bhatti, M.D.,	DATE: December 14, 1992
Petitioner,	Docket No. C-92-045
- v. -	Decision No. CR245
The Inspector General.	

DECISION

This case is governed by section 1128 of the Social Security Act (Act). By letter dated December 12, 1991, 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. advised Petitioner that his exclusion was due to the fact that his license to practice medicine in the State of Wisconsin was revoked by the Wisconsin Medical Examining Board (Wisconsin Medical Board). The I.G. asserted that the exclusion was authorized by section 1128(b)(4)(A) of the Act. Petitioner was advised that the exclusion would remain in effect until such time as Petitioner obtained a valid license to practice medicine in the State of Wisconsin.[2] The I.G. told Petitioner that when he

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[1] "State health care program" is defined by section 1128(h) of the Act, 42 U.S.C. § 1320a-7(h), to cover three types of federally assisted programs, including State plans approved under Title XIX (Medicaid) of the Act. Unless the context indicates otherwise, I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

[2] During the in-person hearing held in this case on June 11, 1992, the I.G. modified Petitioner's exclusion. The I.G. stated that Petitioner's exclusion is in effect until he receives a valid license to practice medicine in either the State of Wisconsin or the State of South Dakota.

obtained a valid license, he had the right to apply for reinstatement to the Medicare and Medicaid programs.

Petitioner timely requested a hearing before an Administrative Law Judge (ALJ), and the case was assigned to me for hearing and decision. Petitioner appeared pro se throughout this proceeding. On February 7, 1992, I issued an Order and Notice of Hearing and Schedule for Filing Motions for Summary Disposition. The I.G. moved for summary disposition by filing a motion and brief. Petitioner did not file a response. During a conference call with the parties, I denied the I.G.'s request for summary disposition.

I conducted an in-person hearing in Washington, D.C. on June 11, 1992. The parties were given the opportunity to file posthearing briefs and proposed findings of fact and conclusions of law. The I.G. filed a posthearing brief and proposed findings of fact and conclusions of law. Petitioner did not file a posthearing brief or proposed findings of fact and conclusions of law.

I have considered the evidence of record, the parties' arguments, and the applicable law. I conclude that the I.G. was authorized to impose and direct an exclusion against Petitioner pursuant to 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 five-year exclusion.

ISSUES

1. Whether the new regulations published on January 29, 1992 govern the disposition of this case.

2. Whether the I.G. had a basis upon which to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

1. Petitioner is a psychiatrist and is licensed to practice medicine in Virginia and West Virginia. I.G. Ex. 13/37.[4]

2. Petitioner was licensed to practice medicine in Wisconsin and South Dakota. I.G. Exs. 2, 8.

3. Petitioner practiced psychiatry in South Dakota from 1976 to 1989. I.G. Ex. 13/38-39.

4. On November 29, 1988, the South Dakota State Board of Medical and Osteopathic Examiners (South Dakota Medical Board) filed a complaint against Petitioner alleging that he engaged in unprofessional conduct and gross incompetence because of his improper sexual contacts with a female patient he was treating for bulimia, anorexia, and depression. I.G. Ex. 4/1-2. This patient was also employed by Petitioner. Tr. at 29.

5. South Dakota law provides that the following is unprofessional conduct: "the exercise of influence within the physician-patient relationship for the purposes of engaging a patient in sexual activity, and for the purposes of this statute, the patient is presumed incapable of giving free, full and informed consent to sexual activity with the physician." S.D. Codified Laws Ann. § 36-4-30(19). I.G. Ex. 9/3.

6. Petitioner has admitted that he had a sexual relationship with a patient whom he was treating for psychological problems. Tr. at 12, 28; I.G. Ex. 13/39.

7. On March 29, 1989, Petitioner voluntarily entered into a Stipulation on Agreed Disposition (Stipulation)

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[3] 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.

[4] Citations to the record in this case are noted as follows:

I.G.'s Exhibits	I.G. Ex. (number/page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Posthearing Brief	I.G. P. Br. (page)
Transcript	Tr. at (page)

with the South Dakota Medical Board. The Stipulation provided that Petitioner's license to practice medicine would be suspended for four years and that the suspension would be stayed during a four-year period of probation if Petitioner met certain conditions of probation. I.G. Ex. 5; I.G. Ex. 13/113.

8. The Stipulation required in part that, during probation, Petitioner should: (1) obtain an evaluation and/or assessment of his condition from Dr. Gary Schoener, a psychologist who specializes in counseling sexual misconduct by therapists, or his designee; (2) not practice medicine by direct patient care for one year or until his condition was successfully treated, whichever was longer; (3) not engage in the solo practice of medicine by direct medical care; and (4) not see, treat, or enter into a physician-patient relationship with female patients. I.G. Ex. 5; Tr. at 31.

9. The Stipulation also provided that the South Dakota Board could summarily cancel Petitioner's license to practice medicine if Petitioner violated any of the terms of the Stipulation. I.G. Ex. 5/7.

10. Petitioner agreed to voluntarily surrender his Drug Enforcement Administration (DEA) certificate as a result of the Stipulation. Tr. at 13, 36; I.G. Ex. 7/2; I.G. Ex. 13/49.

11. On February 28, 1992, the South Dakota Medical Board canceled Petitioner's license to practice medicine in South Dakota since Petitioner violated the Stipulation in the following ways: (1) Petitioner engaged in direct patient care within one year of entering the Stipulation; (2) Petitioner failed to get an assessment of his condition as required; and (3) Petitioner treated female patients within four years of entering the Stipulation. I.G. Ex. 8.

12. The South Dakota Medical Board is a State licensing authority, within the meaning of section 1128(b)(4)(A).

13. Physical conduct of a sexual nature between a physician and patient is a professional activity and is related to Petitioner's professional competence and professional performance. FFCL 4-11; I.G. Ex. 5.

14. Petitioner's license was revoked by the South Dakota Medical Board for reasons bearing on his professional competence and professional performance. FFCL 4-11.

15. On February 19, 1991, the Wisconsin Medical Board held a hearing to determine whether Petitioner's license to practice medicine in Wisconsin should be revoked. Neither Petitioner nor his representative appeared at the hearing held by the Wisconsin Board. I.G. Ex. 2.

16. The Wisconsin Medical Board determined that Petitioner had failed to obtain the psychological evaluation and treatment required by his Stipulation with the South Dakota Medical Board. I.G. Ex. 2/2.

17. The administrative law judge presiding at the hearing at the Wisconsin Medical Board determined that Petitioner's failure to obtain counseling as required by his Stipulation with the South Dakota Board left an "unanswered question as to whether or not [Petitioner] suffers from any psychological and/or physical condition(s) adversely effecting his ability to practice . . . it is my opinion that the protection of the public requires that [Petitioner] not be permitted to practice medicine and surgery in the State of Wisconsin at this time." I.G. Ex. 2/2.

18. On March 20, 1991, the Wisconsin Medical Board revoked Petitioner's license to practice medicine. I.G. Ex. 2.

19. The Wisconsin Medical Board revoked Petitioner's license because of activities bearing on his professional competence and professional performance, within the meaning of section 1128(b)(4)(A) of the Act. FFCL 15-18.

20. By letter dated December 12, 1991, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participation in the Medicaid program until he obtained a valid license to practice medicine in Wisconsin, pursuant to section 1128(b)(4)(A) of the Act. I.G. Ex. 1/1.

21. During the period August 1989 through November 1990, Petitioner was employed at Southwestern Virginia Mental Health Institute (Southwestern). I.G. Ex. 7.

22. While employed at Southwestern, Petitioner failed to comply with the terms and conditions of the South Dakota Stipulation. Within one year of the Stipulation, Petitioner engaged in direct patient care; he failed to get counseling for his condition; and within four years of the Stipulation, he treated female patients. I.G. Ex. 7/1-3; I.G. Ex. 8/2.

23. On at least 11 occasions while practicing at Southwestern, Petitioner failed to obtain a physician countersignature on Schedule IV drugs, despite the fact that he did not hold a valid DEA certificate. I.G. Ex. 7/2.

24. On October 25, 1990, Petitioner prescribed Haldol for a female patient with a history of neuroleptic malignant syndrome, despite the fact that Haldol is contraindicated for patients with that condition. The patient required intensive care and treatment because of the harm resulting from that erroneous prescription. I.G. Ex. 7/2-3; I.G. Ex. 11/177.

25. Petitioner was terminated from employment at Southwestern due to patient abuse in the form of neglect and failure to follow hospital policy. FFCL 23-24; I.G. Ex. 10.

26. In August 1991, the Virginia Board of Medicine (Virginia Board) held a formal administrative hearing on Petitioner's violation of the laws governing the practice of medicine in that State. I.G. Ex. 7.

27. In its October 29, 1991 decision, the Virginia Board of Medicine concluded in effect that: (1) because of the restrictions on his license by the South Dakota Medical Board, Petitioner's practice of medicine in Virginia was in violation of § 54.1-2915.A(3) of the Virginia Code; (2) Petitioner's violation of the Stipulation with the South Dakota Medical Board constitute a violation of § 54.1-2915.A(3) as defined in § 54.1-2914.A(9) of the Virginia Code; (3) Petitioner's prescribing of Haldol to a patient when the medication was contraindicated was gross carelessness and constituted a violation of § 54.1-2915.A(4) of the Virginia Code; and (4) Petitioner's prescribing medications without the proper DEA certificate constituted a violation of § 54.1-3303 of the Virginia Code. I.G. Ex. 7.

28. Based on its findings, the Virginia Board of Medicine suspended Petitioner's license to practice medicine in Virginia. I.G. Ex. 7/3.

29. The Virginia Board of Medicine stayed its suspension of Petitioner's license based on terms and conditions, including: (1) Petitioner should be evaluated by a clinical psychologist or psychiatrist approved by the Virginia Board of Medicine and it should receive a report of the evaluation; (2) Petitioner should authorize free communication between the Virginia Board of Medicine and his evaluators; (3) Petitioner's psychiatric practice

should be limited to a group medical setting or his practice should be supervised by the Virginia Board of Medicine; and (4) Petitioner should appear before an informal conference committee of the Virginia Board of Medicine in one year. I.G. Ex. 7.

30. Petitioner has not yet complied with the terms and conditions imposed by the Virginia Board of Medicine. Tr. at 43-44.

31. The Secretary of the Department of Health and Human Services delegated to the I.G. the authority to determine, impose, and direct exclusions of individuals whose license to provide health care has been revoked or suspended by any State licensing authority, for reasons bearing on the individual's professional competence, professional performance, or financial integrity.

32. The regulations concerning permissive exclusions pursuant to section 1128(b), to be codified at 42 C.F.R. § 1001, subpart C, published at 57 Fed. Reg. 3298, 3330-42 (Jan. 29, 1992), were not intended to apply retroactively to ALJ hearings regarding I.G. exclusion determinations in which the request for the ALJ hearing was made prior to the date the regulations were published.

33. The regulations concerning permissive exclusions pursuant to section 1128(b), to be codified at 42 C.F.R. § 1001, subpart C, published at 57 Fed. Reg. 3298, 3330-42 (Jan. 29, 1992), were not intended to govern administrative review of I.G. exclusion determinations.

34. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(b)(4)(A) of the Act. FFCL 4-20. Social Security Act, section 1128(b)(4).

35. The exclusion imposed and directed against Petitioner by the I.G. is extreme and excessive. Social Security Act, section 1128(b)(4).

36. 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.

37. The primary purpose of section 1128(b)(4) of the Act is to protect the Medicare and Medicaid programs from fraud and abuse and to protect the beneficiaries of those programs from incompetent practitioners and from

inappropriate or inadequate care. S. Rep. No. 109, 100th Cong., 1st Sess. 1-2, reprinted in 1987 U.S.C.C.A.N. 682.

38. An additional purpose of section 1128(b)(4) is to prevent individuals or entities from evading sanctions by moving from their home jurisdiction to avoid sanctions imposed there, and thus protect the integrity of State regulation of medical professional standards. S. Rep. No. 109, 100th Cong., 1st Sess. 3-4, reprinted in 1987 U.S.C.C.A.N. 682.

39. Petitioner's admission that he had a sexual relationship with a patient he was treating for psychiatric problems is evidence of his untrustworthiness to treat Medicare and Medicaid program beneficiaries and recipients. Tr. at 12, 28; I.G. Ex. 13/39.

40. Petitioner's failure to obtain the counseling required by the South Dakota Medical Board is evidence of his untrustworthiness to treat Medicare and Medicaid program beneficiaries and recipients.

41. Petitioner's violation of his Stipulation with the South Dakota Medical Board is evidence of his untrustworthiness to meet his obligations under the Medicare and Medicaid health care programs.

42. Petitioner has failed to admit his responsibility for noncompliance with the obligations to which he voluntarily bound himself in his Stipulation with the South Dakota Medical Board. Tr. at 16; I.G. Ex. 13/45-46, 110, 113, 115-16.

43. Petitioner's use of his move to Virginia to avoid the obligations to which he voluntarily bound himself in his Stipulation with the South Dakota Medical Board is evidence of his untrustworthiness to meet his statutory and regulatory obligations under the Medicare and Medicaid health care programs. I.G. Ex. 13/43.

44. Petitioner offered no evidence to show that he had changed his conduct to comport with the Stipulation entered into with the South Dakota Medical Board, or the terms imposed on him by the Wisconsin Medical Board or the Virginia Board of Medicine.

45. Considering the nature of the allegations against Petitioner, any continuation of such activities could place beneficiaries and recipients of the Medicare and Medicaid programs at risk.

46. The I.G. has not shown that an exclusion until Petitioner regains his license to practice medicine in either Wisconsin or South Dakota is reasonably necessary to satisfy the remedial purpose of section 1128 of the Act. FFCL 1-45.

47. 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 five-year exclusion.

DISCUSSION

Petitioner is a psychiatrist who is licensed to practice medicine in Virginia and West Virginia. FFCL 1. Petitioner's medical license was revoked in both Wisconsin and South Dakota. FFCL 11, 18. The uncontested facts show that the South Dakota Medical Board filed a complaint against Petitioner alleging that he engaged in unprofessional conduct because of his improper sexual contacts with a female psychiatric patient. FFCL 4. Petitioner has admitted that he had a sexual relationship with one of his female patients. FFCL 6.

On March 29, 1989, Petitioner entered a Stipulation with the South Dakota Medical Board which provided that Petitioner's license to practice medicine would be suspended for four years, but the suspension would be stayed during a four-year period of probation if Petitioner met certain conditions of probation. FFCL 7. The Stipulation also provided that Petitioner was to obtain an evaluation of his condition from a psychologist or psychiatrist; he was not to practice direct patient care for one year; he was not to engage in solo practice; and he was not to treat female patients. FFCL 8. The Stipulation also provided that the South Dakota Medical Board could cancel Petitioner's medical license if he violated any of the Stipulation's terms. FFCL 9. Petitioner also voluntarily surrendered his DEA certificate when he entered the Stipulation. FFCL 10.

The Wisconsin Medical Board held a hearing to determine whether to revoke Petitioner's license because he did not comply with the terms of the Stipulation with the South Dakota Medical Board. FFCL 15. After a hearing in which neither Petitioner nor his representative appeared, the Wisconsin Medical Board found that Petitioner had violated the Stipulation because he never received an assessment of his condition. FFCL 15-16. Subsequently, on March 20, 1991, the Wisconsin Medical Board revoked

Petitioner's license to practice medicine and surgery. FFCL 18. On February 28, 1992, the South Dakota Medical Board canceled Petitioner's license because he violated the Stipulation by: engaging in direct patient care within one year of entering the Stipulation; failing to get psychological treatment as required; and treating female patients within four years of entering the Stipulation. FFCL 11.

From August 1989 through November 1990, Petitioner was employed at Southwestern. FFCL 21. While there, he failed to comply with the terms and conditions of the Stipulation. FFCL 22-25. While at Southwestern, Petitioner had direct patient care; he did not get psychological treatment; he treated female patients; and he prescribed medicine without having a valid DEA certificate. FFCL 22-25.

On October 29, 1991, the Virginia Board found that Petitioner had engaged in direct patient care within one year of the Stipulation and had treated female patients within four years of the agreement -- these acts were performed by Petitioner during the probationary period of the Stipulation. I.G. Ex. 7. The Virginia Board found also that when Petitioner prescribed Haldol for a patient with a history of neuroleptic malignant syndrome -- which is contraindicated for patients with that condition -- it caused harm to the patient; the patient required intensive care and treatment. FFCL 24, 27. The Virginia Board found also that Petitioner did not have a valid DEA certificate and he failed to get countersignatures on 11 filled prescriptions. FFCL 23, 27. The Virginia Board suspended Petitioner's license to practice medicine; however, it stayed the suspension based on Petitioner meeting certain conditions. FFCL 28-29. Also, the Virginia Board required Petitioner to appear before an informal conference committee in one year, which would monitor his compliance with the terms and conditions of the order, and the committee would determine whether Petitioner had to appear before it in the future. FFCL 29.

I. The new regulations published on January 29, 1992 do not establish criteria which govern my decision in this case.

In his motion for summary disposition, the I.G. asserts that the regulations published on January 29, 1992 (57 Fed. Reg. 3298 et seq., to be codified at 42 C.F.R. Part

1001-1007) (new regulations) control the disposition of this case. I.G. Br. 7.[5]

The I.G.'s position is without merit in light of the decision in Behrooz Bassim, M.D., DAB 1333 (1992). In that case, an appellate panel of the DAB held that, as interpreted by the I.G., the new regulations effected a substantive change in the right of a petitioner to a de novo hearing to challenge his exclusion pursuant to section 1128(b)(4)(A) of the Act. For that reason, the panel held that retroactive application of the new regulations would deprive petitioner of due process. I conclude that application of the new regulations to the present case would similarly materially alter Petitioner's substantive rights. Therefore, I conclude that the new regulations do not apply to this case.[6]

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

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) of the Act. Subsection (A) of that provision authorizes the Secretary, or his delegate, the I.G., to impose and direct exclusions against any individual or entity:

> whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license or the right to apply for or renew such a license, for reasons bearing on the individual's or entity's

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[5] The I.G. also argues that under the new regulations, application of 42 C.F.R. § 1001.501(b)(1) would not result in an injustice and that I must affirm the period of exclusion determined by the I.G. I.G. Br. 14-15. If I were to agree with the I.G.'s argument, I would have no choice but to conclude that, despite statutory language to the contrary, Petitioner is not entitled to an administrative hearing as to the reasonableness of the exclusion.

[6] I note also that in Steven Herlich, DAB CR197 (1992), the ALJ reasoned that the regulation cited by the I.G. establishes criteria to be used by the I.G. in making exclusion determinations, but does not establish criteria binding on an ALJ in conducting a de novo review of the reasonableness of an exclusion. Id. at 8-16. See also Charles J. Barranco, M.D., DAB CR187 (1992).

> professional competence, professional performance, or financial integrity.

Petitioner contends that the actions by both the South Dakota Board and the Wisconsin Board are not for reasons related to his professional competence and financial integrity. I.G. Ex. 3. Petitioner contends that the South Dakota Medical Board revoked his license merely because he failed to renew his medical license in that State and not because of his involvement with a patient.[7] Tr. at 12. Further, Petitioner claims that the Wisconsin Medical Board took an adverse action against him because he was not represented or present at the hearing before them. Tr. at 12. Petitioner believes that the I.G. is without authority to impose and direct an exclusion against him.

I disagree with Petitioner's contentions. South Dakota filed a complaint against Petitioner alleging that he engaged in unprofessional conduct because of his improper sexual contacts with a female psychiatric patient that he was treating. Based on this allegation, Petitioner voluntarily entered into a Stipulation with the South Dakota Medical Board whereby he agreed to a probationary period of four years with certain terms and conditions. Petitioner has admitted that he had a sexual relationship for approximately two years with a person who worked in his office and who also was a patient of his that he was treating for psychological problems. Tr. at 12-13, 18; I.G. Ex. 13/39.

The Wisconsin Medical Board revoked Petitioner's license to practice medicine on March 20, 1991 because he violated the terms of the Stipulation with South Dakota. The administrative law judge for the Wisconsin Medical Board stated that South Dakota's order which imposed probation on Petitioner was related to a "formal disciplinary complaint alleging that [Petitioner] had engaged in improper sexual contacts with a patient." I.G. Ex. 2/2.

The terms "professional competence" and "professional performance" are not defined in section 1128(b)(4)(A) of the Act. However, the plain meaning of the terms encompasses the ability to practice a licensed service with reasonable skill and safety consistent with the

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[7] The Stipulation provided "[t]that Tajammul Bhatti, M.D., . . . renew license #2183 before March 1 of each year during the duration of this Agreement." I.G. 5/3.

requirements of State law and regulations. Bernardo G. Bilang, M.D., DAB CR141 (1991), aff'd, DAB 1295 (1992). See also Leonard R. Friedman, M.D., DAB 1281, at 9-10 (1991) (sexual activity between a psychiatrist and his patient clearly bears on his professional competence and performance and the exclusion falls within 1128(b)(4)(A)). See also Behrooz Bassim, M.D., DAB CR168, at 6 (1991), aff'd, DAB 1333 (1992) (improper physical or sexual contact with patients bears on professional competence/performance).

I find that Petitioner's license to practice medicine was revoked by both the Wisconsin Medical Board and South Dakota Medical Board -- State licensing authorities -- for reasons bearing on his professional competence and professional performance. In this case, Petitioner's sexual relationship with a patient clearly bears on his professional competence and professional performance and the exclusion falls within section 1128(b)(4)(A) of the Act. I find that the I.G. had the authority to exclude Petitioner.

III. The exclusion imposed and directed against Petitioner is unreasonable.

In deciding whether or not an exclusion under section 1128(b)(4)(A) is reasonable, I must review the evidence with regard to the purpose of section 1128 of the Act. Joel Davids, DAB CR137 (1991); Roderick L. Jones, R.N., DAB CR98 (1990); Frank J. Haney, DAB CR81 (1990).

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 threaten 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. See S. Rep. No. 109, 100th Cong., 1st Sess., reprinted in 1987 U.S.C.C.A.N. 682.

An exclusion imposed and directed pursuant to section 1128 of the Act advances this remedial purpose. The principal purpose is to protect programs and their beneficiaries and recipients from untrustworthy providers until the providers demonstrate that they can be trusted to deal with program funds and to properly serve beneficiaries and recipients. As an ancillary benefit, the exclusion deters other 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, 9th Cong., 1st Sess., reprinted in 1977 U.S.C.C.A.N. 3072.

Punishment cannot be the primary purpose of imposing an exclusion. Where punishment becomes the primary purpose, section 1128 no longer accomplishes a civil remedial purpose. Such a result has been determined by the Supreme Court to contravene the Constitution and to be beyond the purpose of a civil remedy statute. See United States v. Halper, 490 U.S. 435 (1989). Here, punishment is not a primary objective of the I.G.'s exclusion of Petitioner.

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)(A), nor is there a requirement that a petitioner be excluded until he or she obtains a license from the State where their license was revoked. Walter J. Mikolinski, Jr., DAB 1156, at 20 (1990). However, an exclusion until petitioner obtains a license from the State where his or her license was revoked is not per se unreasonable. See Behrooz Bassim, M.D., DAB CR168 (1991), aff'd, DAB 1333 (1992); Lakshmi N. Murty Achalla, M.D., DAB CR104 (1990), aff'd, DAB 1231 (1991); John W. Foderick, M.D., DAB 1125 (1990); Sheldon Stein, M.D., DAB CR144 (1991), aff'd, DAB 1301 (1992).

Where the danger of harm to patients is great, a lengthy exclusion is justified to insure that program recipients and beneficiaries are protected from even a slight possibility that they will be exposed to such danger. Bernard Lerner, M.D., DAB CR60 (1989); Michael D. Reiner, M.D., DAB CR90 (1990); Norman C. Barber, D.D.S., DAB CR123 (1991); Myron R. Wilson, Jr., M.D., DAB CR146 (1991).

By not mandating that exclusions from participation in the programs be permanent, however, 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. See Achalla, DAB CR104, at 10-11.

This hearing is, by reason of section 205(b)(1) 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. I do not, however, substitute my judgment for that of the I.G. An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent. "The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the [exclusion] determined . . . was not extreme or excessive." (Emphasis added.) 48 Fed. Reg. 3744 (1983).

Petitioner vehemently objects to the reasonableness of the exclusion. Tr. at 12-15; I.G. Ex. 3. The essence of his objection is that the exclusion is not only punitive in nature but it will force him to practice in a State where he does not want to practice. Tr. at 16. He feels that since he lost his family (through divorce) and his private practice and has had financial difficulties, he "has been punished enough for that particular incident [sexual contact with patient]." Tr. at 14; I.G. 13/42-43.

The determination of when a health care provider should be trusted and allowed to reapply to the I.G. for reinstatement as a provider in the Medicare and Medicaid programs is a difficult issue. It involves consideration of multiple factual circumstances. An appellate panel of the DAB, in adopting criteria previously outlined by ALJs in section 1128 cases, has provided a listing of some of these factors, which include:

> the nature of the offense committed by the provider, the circumstances surrounding the offense, whether and when the provider sought help to correct the behavior which led to the offense, how far the provider has come toward rehabilitation, and any other factors relating to the provider's character and trustworthiness.

Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327, at 12 (1992). It is evident that in evaluating these factors I must attempt to balance the seriousness and impact of the offense with existing factors which may demonstrate trustworthiness. The totality of the circumstances of each case must be evaluated in order to

reach a determination regarding the appropriate length of an exclusion.

In weighing these factors, I conclude that the I.G. has failed to show a meaningful remedial basis for an indefinite exclusion until Petitioner regains a valid license to practice medicine in either Wisconsin or South Dakota.

In light of Petitioner's intention not to resume the practice of medicine in Wisconsin or South Dakota, there is no rational basis to condition reinstatement on his obtaining a license in either Wisconsin or South Dakota. In order for an exclusion so conditioned to be reasonable, the evidence would have to demonstrate that there is little or no possibility that Petitioner would become trustworthy unless and until he changed his mind and chose to return to one of those two States. See Bilang, DAB CR141, at 11 n.6 (1991). The I.G. has presented no such evidence.

On the other hand, an exclusion clearly is warranted by the evidence. Section 1128(b)(4)(A) authorizes the exclusion of providers whose license is revoked or suspended by a State licensing authority for reasons bearing on the individual's professional competence, professional performance, or financial integrity. The crux of the problem here is that Petitioner allowed his medical judgment to be clouded when he entered into a relationship with his patient. Sexual contact between a doctor and his patient is considered unethical. Tr. at 29. Petitioner's lapse of judgment indicates a lack of trustworthiness. This lapse of judgment by Petitioner could have endangered his patient's health. Petitioner's behavior demonstrates that he lacks the ability to distinguish between his duties as a doctor and his personal needs. Petitioner's behavior shows a propensity to engage in acts or practices which could endanger the health or safety of program beneficiaries or recipients. When referring to his improper sexual contact with a patient, Petitioner contends that "this was an unfortunate incident" which took place from approximately 1983 to 1985.[8] Tr. at 12-13. There is no evidence in the record that Petitioner ever did this with any other

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[8] When he appeared at the hearing before the Virginia Board of Medicine, Petitioner testified that "I got romantically involved with a patient of mine, who also worked for me for about from 1984 'til '85 and we had contemplated and considered marriage at a certain time." I.G. Ex. 13/39.

patient. Nevertheless, based on the evidence presented, I find Petitioner to be an untrustworthy provider of care.

Petitioner points out that the hearing officer for the Virginia Board of Medicine found that even though Petitioner had failed to comply with the terms of the Stipulation, his behavior was not unprofessional conduct. Tr. at 40; P. Ex. 1/8. However, the hearing officer found also that the conduct giving rise to the Stipulation -- improper sexual contacts with a patient -- constituted unprofessional conduct under the Code of Virginia. P. Ex. 1/8. The hearing officer submitted proposed findings of fact and conclusions of law in which he made these additional findings: (1) the restrictions placed on Petitioner's license by the Stipulation constituted a violation of the Code of Virginia; (2) the prescribing of medicine by Petitioner without a proper DEA certificate constituted a violation of the Code of Virginia; (3) the treatment given the patient who received Haldol was simple negligence. P. Ex. 1. Petitioner's reliance on the hearing officer's finding is misplaced, however, because the Virginia Board of Directors disagreed with the hearing officer and found that Petitioner's noncompliance with the Stipulation, together with his misconduct while at Southwestern -- prescribing medicine without the proper DEA certificate and prescribing of Haldol to a patient when the medication is contraindicated -- did violate Virginia law. Tr. at 40; I.G. Ex. 7. I find that despite having entered into a Stipulation with South Dakota which imposed certain conditions on his license to practice, Southwestern had given Petitioner another chance. Petitioner violated Southwestern's trust by engaging in inappropriate conduct while at Southwestern. I find that Petitioner, when given the opportunity to redeem himself, again demonstrated that he was untrustworthy.

Petitioner contends that before Southwestern hired him, he fully briefed it about his Stipulation with South Dakota. Tr. at 14. David Alex Rosenquist, the Director at Southwestern when Petitioner applied for a position as a psychiatrist, testified at the hearing before the Virginia Board of Medicine that he had seen a copy of the ruling from South Dakota and that Southwestern made some changes regarding the terms of the Stipulation. I.G. Ex. 11/72-73, 76. Mr. Rosenquist stated also that he was aware that Petitioner was supposed to be evaluated and entered into therapy and he thought it was unrealistic to expect him to commute to Minneapolis to see Dr. Schoener. Id. at 78-79. Mr. Rosenquist left the issue of finding a

substitute therapist for Petitioner to Petitioner and the Medical Director. Id. at 79.

Furthermore, in September 1989, Southwestern wrote the Virginia Board of Medicine indicating that Petitioner was going to be employed there and that, because of his Stipulation with South Dakota, there also would be certain conditions on his employment at Southwestern. Tr. at 26. Southwestern told the Virginia Board that there were two provisions in the Stipulation that they determined that Petitioner did not have to follow: one involved his engaging in direct patient care and the other was his treating female patients. With regard to these two provisions, Southwestern decided that Petitioner would be supervised by its Medical Director. Tr. at 26-27. Southwestern did not submit this information to the Virginia Board of Medicine for approval but provided it only for information purposes. Tr. at 26-27. Subsequently, the Virginia Board of Medicine conducted its own investigation. Tr. at 26-27. The Virginia Board concluded that Petitioner's noncompliance with the Stipulation, together with the other unprofessional conduct while at Southwestern (Petitioner's gross carelessness in prescribing Haldol and his prescribing medications without the proper DEA certificate) warranted a suspension of his license, which was stayed, with certain conditions being imposed.

Petitioner has not submitted any evidence purporting to show that he is no longer a threat to the Medicare and Medicaid programs and that he is a trustworthy provider. He has not submitted any character witnesses or colleagues who could testify about his qualities and competency as a psychiatrist. Further, Petitioner has not submitted any additional substantive evidence as to his trustworthiness to practice psychiatry. Two State medical boards have revoked Petitioner's medical license because he engaged in unprofessional conduct. Additionally, it is an aggravating factor that the State Board of Virginia found also that Petitioner violated terms of the Stipulation.

Although it appears that Petitioner understands that he displayed inappropriate behavior by engaging in a sexual relationship with a patient, I am not convinced that he fully realizes how serious his acts were. The Stipulation provided that Petitioner was to get an assessment or evaluation of his condition from a psychologist or psychiatrist. I am very concerned that Petitioner has not taken the directive to get counseling more seriously. At the hearing in this case, Petitioner argued that he had his own psychological evaluation with

Dr. Wilfred Abse, his mentor, on an ongoing basis. Tr. at 16. See also I.G. Ex. 12/6-48. However, the I.G.'s witness, Karen Perrine, Deputy Executive Director for Disciplinary Matters for the Virginia Board of Medicine, testified that while Petitioner had some contact with Dr. Abse, there was not an official designation of Dr. Abse by Dr. Schoener to perform the evaluation, as required by the Stipulation. FFCL 8; Tr. at 33. Petitioner further claims that once he is employed, he will have the financial resources to get the evaluation done. Tr. at 17.

In past cases under section 1128(b)(4), appellate panels of the DAB have stated that the I.G. has authority to impose exclusions of an indefinite duration based on relicensure in the State where the original license was revoked, suspended, or surrendered. Leonard R. Friedman, M.D., DAB 1281 (1991); John W. Foderick, M.D., DAB 1125 (1990); Sheldon Stein, M.D., DAB 1301 (1992). As the appellate panel concluded in Friedman, such a remedy is reasonable since that State, in exercising its decision on relicensure, would act in a careful and prudent manner in the best interest of its citizens. Friedman, DAB 1281, at 7. In such circumstances, it is appropriate for the Secretary, in discharging his responsibilities to the Medicare and Medicaid programs, to defer to such State in determining that a provider has demonstrated sufficient trustworthiness to justify seeking application for readmission into the program. Here, however, the States of Wisconsin and South Dakota have no further interest in Petitioner -- he does not intend to practice in those States.

The exclusion, as modified by my decision to set a term of five years, will provide Petitioner with a reasonable period of time within which to reaffirm his trustworthiness as a program provider. Because Petitioner has indicated no interest in returning to Wisconsin or South Dakota, it would be unreasonable to insist that Petitioner and the States of Wisconsin and South Dakota expend their resources to reinstate Petitioner's Wisconsin or South Dakota license simply to enable Petitioner to treat Medicare and Medicaid beneficiaries in another State. See Stephen J. Willig, M.D., CR192 (1992); Charles J. Barranco, M.D., DAB CR187, at 36 (1992). On the present facts, the States of Wisconsin and South Dakota have no further interest in Petitioner -- he does not practice in either of those States and does not treat Wisconsin or South Dakota citizens. Id. at 38.

CONCLUSION

Based on the law and the evidence, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs was authorized by section 1128(b)(4)(A) of the Act. I further conclude than an exclusion until Petitioner regains his license to practice medicine in either Wisconsin or South Dakota is extreme or excessive. I therefore modify the period of exclusion imposed and directed by the I.G. to a five-year exclusion.

/s/

Charles E. Stratton
Administrative Law Judge