

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Wilhelmina K. Rote, R.N.,	)	DATE: November 10, 1992
Petitioner,	)	
- v. -	)	Docket No. C-92-116
The Inspector General.	)	Decision No. CR242

DECISION

By letter dated April 10, 1992, Wilhelmina K. Rote, R.N., the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that it had been decided to exclude her for a period of five years from participation in the Medicare program and from participation in the the State health care programs mentioned in section 1128(h) of the Social Security Act (Act). (Unless the context indicates otherwise, I use the term "Medicaid" in this Decision when referring to the State programs.) The I.G. explained that the five-year exclusion was mandatory under sections 1128(a)(2) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense related to patient abuse.

Petitioner filed a timely request for review of the I.G.'s action, and the I.G. moved for summary disposition. Because I conclude that there are no material and relevant factual issues in dispute, I have granted the I.G.'s motion and have decided the case on the basis of written submissions in lieu of an in-person hearing. I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

## APPLICABLE LAW

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act make it mandatory for any individual who has been convicted of a criminal offense related to the neglect or abuse of patients, in connection with the delivery of a health care item or service, to be excluded from participation in the Medicare and Medicaid programs for a period of at least five years.

## ARGUMENT

Petitioner denies committing any abuse and asserts she was wrongfully convicted. In this regard, she alleges that she was denied her rights when arrested; that the accusations against her were inconsistent and unbelievable; that she was falsely accused because of her union activities; and that the State Department of Health, which had investigated her case, found no proof of misconduct.

She contends also that the I.G. unreasonably prolonged her exclusion by waiting so long to act against her.

FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>1</sup>

1. It is undisputed that, at all times relevant to this case, Petitioner was a registered nurse employed at the Georgian Court Nursing Home (the "Home"), Buffalo, New York.
2. In a criminal information dated July 12, 1990, Petitioner was charged with four misdemeanor counts of physically abusing patient/residents of the Home, in willful violation of sections 12-b(2) and 2803-d of the New York Public Health Law. Specifically, each count of the information alleged that Petitioner had struck or pushed a different elderly female patient/resident of the Home. I.G. Exhibit (Ex.) 3, 8, 9.
3. Count Three of the information charged that, on October 25, 1989, Petitioner slapped the left side of a patient/resident's face. I.G. Ex. 3, at 2.

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<sup>1</sup> Petitioner and the I.G. both submitted argument and documentary evidence. I admitted all of the exhibits.

4. In an affidavit attached to and incorporated by reference in the information, a witness stated that, on October 25, 1989, she had observed Petitioner yelling at the patient/resident described in Count Three to take her medication. The witness stated that she then observed Petitioner slap the left side of the patient/resident's face. The witness testified to these facts at Petitioner's trial. I.G. Ex. 3, at 12; Petitioner's Exhibit 1E.

5. Petitioner was tried before a jury in the Buffalo City Court and was convicted as to Counts One, Three, and Four of the information. I.G. Ex. 4.

6. Petitioner was fined \$3000 by the Court, placed on probation for a period of three years -- during which she would not be allowed to work "anywhere in the health care field" -- and was obliged to surrender her nursing license. I.G. Ex. 5, 6.

7. The Secretary of HHS delegated to the I.G. the authority to impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21,662 (May 13, 1983).

8. Sections 1128(a)(2) and 1128(c)(3)(B) of the Act mandate the exclusion, for a minimum period of five years, of any person who has been convicted of a criminal offense relating to the neglect or abuse of patients in connection with the delivery of a health care item or service.

9. Section 1128(a)(2) contains three requirements: (i) Petitioner must have been convicted of a criminal offense; (ii) that offense must have been related to neglect or abuse of patients; and (iii) the abuse or neglect must have occurred in connection with the delivery of a health care item or service.

10. Petitioner's conviction as to Count Three of the information was related to abuse of a patient in connection with the delivery of a health care item or service.

11. Petitioner cannot use the HHS administrative appeal process to collaterally attack her prior criminal conviction and, thus, is not entitled to relief in this proceeding based on her contention that she was falsely accused.

12. An administrative law judge has no authority to alter the effective date of exclusion designated by the I.G. as a remedy for the latter's alleged tardiness.

13. The Act requires persons convicted of offenses within the meaning of section 1128(a)(2) of the Act to be excluded for a minimum of five years, which period cannot be waived or lessened.

#### DISCUSSION

The evidence shows that Petitioner was charged with unlawfully slapping and shoving elderly patient/residents of the Home, where Petitioner was employed as a registered nurse, and that, following a jury trial, she was convicted of these offenses. Three requirements must be met in order to justify an exclusion pursuant to section 1128(a)(2) of the Act: (i) Petitioner must have been convicted of a criminal offense; (ii) that offense must have been related to neglect or abuse of patients; and (iii) the abuse or neglect must have occurred in connection with the delivery of a health care item or service.

In certain localities, of course, medical care might not be continuous or intensive. However, I regard it as reasonable that, while a person is confined to or residing at an institution in which the provision of health care (either remedial or maintenance) is the primary and essential basis for admission, such individual is a "patient" for the purposes of section 1128(a)(2) of the Act, even if he or she is not receiving formal treatment at a given moment. Since the entire course of a patient's stay in a facility of this sort is determined by his medical condition, when the patient is subjected to violence or abuse by an individual employed or directed by the facility to care for patients, at a time when such individual is expected to be performing his professional duties, such mistreatment must be regarded as having occurred in the context of the delivery of health care. The evidence adduced as to Petitioner's conviction on Count Three of the information is sufficient to establish that her exclusion is required under the Act.

Petitioner was convicted by a jury of three misdemeanor counts of violating the New York Public Health Law. The statutory provision Petitioner was convicted of violating provides:

[A]ny person who commits an act of physical abuse, neglect or mistreatment, or who fails to report such an act . . . , shall be deemed to have violated this section and shall be liable for a penalty

. . . .

N.Y. Pub. Health Law § 2803-d(7)(I.G. Ex. 9, at 9). Thus, there is no real dispute that Petitioner was convicted or that her convictions related to abuse or neglect. Moreover, as to the incident described in Count Three of the information, it is clear that the victim of Petitioner's abuse was a patient and that the abuse occurred in connection with the delivery of a health care item or service. The information alleged that Petitioner slapped an individual who had refused to take her medication. The fact that the person whom Petitioner slapped was receiving medication indicates that she had some medical condition for which she was being treated during her stay at the home. This is sufficient to demonstrate that she was a patient within the meaning of the Act. Further, the delivery, or attempted delivery, of the medication constitutes the delivery of a health care item or service within the meaning of the Act. For these reasons, the I.G. was required to exclude Petitioner pursuant to section 1128(a)(2).

The I.G. alleged that Petitioner's convictions as to Counts One and Four of the information also satisfy the criteria of section 1128(a)(2) and thus also would require Petitioner's exclusion. However, I conclude that the record before me contains insufficient evidence to establish that the individuals described in Counts One and Four were patients within the meaning of the Act or that they were abused in connection with the delivery of a health care item or service. The record contains no evidence that would prove that either of the women mentioned in Counts One and Four were receiving any medical care. The information refers to them sometimes as "residents" and sometimes as "patients." If they were merely residents of the Home who were not admitted for medical reasons and did not receive medical treatment, it appears that they would not be patients within the meaning of the Act. Additionally, the record contains no evidence as to the nature of the Home itself.<sup>2</sup> Had there been evidence, for example, that the Home provided care exclusively to persons requiring a skilled or intermediate level of care, it might have been possible to conclude that Petitioner's convictions as to all three counts were related to patient abuse and occurred in

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<sup>2</sup> I note that section 2803-d of the N.Y. Public Health Law, which Petitioner was convicted of violating, specifies that victims of the abuse must be persons "receiving care or services in a residential health care facility." I.G. Ex. 9, at 7. However, the I.G. did not explain how the term "residential health care facility" is defined under New York law.

connection with the delivery of a health care item or service.

I have concluded that Petitioner's conviction as to Count Three of the information requires her exclusion pursuant to section 1128(a)(2). Section 1128(a)(2) is controlling wherever it is shown that an appropriate criminal conviction has occurred. Dewayne Franzen, DAB 1165 (1990). I do not look beyond the fact of conviction and an excluded provider may not utilize this administrative proceeding to collaterally attack the criminal conviction by seeking to show that the excluded provider did not do the act charged or that there was no criminal intent. Richard G. Philips, D.P.M., DAB CR133 (1991). If Petitioner believes that her criminal conviction was improperly tainted, she may have recourse within the State court system, but not here. Peter J. Edmonson, DAB 1330 (1992).

Once section 1128(a)(2) is determined to be applicable, the statute requires that the convicted individual be excluded for a minimum period of five years. The law proscribes an administrative law judge from waiving or reducing this minimum sanction.

As to Petitioner's contention that the I.G. did not act within a reasonable time to effect her exclusion, I, as an administrative law judge, have no authority to alter the effective date of exclusion designated by the I.G. as a remedy for the latter's alleged tardiness. Samuel W. Chang, M.D., DAB 1198 (1990); Christino Enriquez, DAB CR119 at 7 - 9 (1991). Exclusion from the Medicare and Medicaid programs is compelled by statute, once there has been a relevant criminal conviction, and neither the I.G. nor a judge is authorized to reduce the five-year minimum mandatory period of exclusion. Jack W. Greene, DAB CR19 at 12 - 14 (1989).

#### CONCLUSION

Petitioner's conviction of a criminal offense involving patient abuse mandates her exclusion from the Medicare and Medicaid programs for a period of five years.

/s/

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Joseph K. Riotto  
Administrative Law Judge