

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Glen E. Bandel,	)	DATE: May 6, 1993
Petitioner,	)	
- v. -	)	Docket No. C-93-033
The Inspector General.	)	Decision No. CR261

DECISION

The case has come to me on the request for hearing timely filed by Glen E. Bandel ("Petitioner") under 42 C.F.R. § 1005.2 (1992). Petitioner takes issue with the Inspector General's (I.G.'s) determination under section 1128(a)(2) of the Social Security Act ("Act") that he should be excluded from participating in the Medicare and various federally funded State health care programs<sup>1</sup> for a period of five years due to his conviction for a criminal offense related to the neglect or abuse of patients in connection with the delivery of a health care item or service. Petitioner was notified of the exclusion by letter from the I.G. dated November 20, 1992, and the exclusion is currently in effect.

On January 7, 1993, I held a prehearing conference with the I.G.'s counsel and Petitioner, who was pro se. At that time, the parties indicated their wish to seek summary disposition in this case. Accordingly, a briefing schedule was established and confirmed in the January 15, 1993 Prehearing Order and Schedule for Filing Submissions for Summary Disposition. The parties have

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<sup>1</sup> Section 1128(h) of the Act identifies the various types of State health care plans that receive federal funding and are affected by the exclusion. The Medicaid program, which receives federal funding under Title XIX of the Act, will be used as an abbreviation for all such affected programs.

complied with the scheduling order with their briefs and exhibits in support.<sup>2</sup>

In deciding the case, I reviewed principally the various jurisdictional documents filed by Petitioner; the I.G.'s Motion for Summary Disposition with Memorandum in Support ("I.G. Memo."); the nine exhibits ("I.G. Ex.") appended to the I.G.'s Memorandum in Support; Petitioner's Response to the Inspector General's Motion for Summary Disposition ("P. Resp."); the nine exhibits ("P. Ex.") appended to Petitioner's brief; and the reply brief from the I.G. The parties have not specifically objected to the authenticity, reliability, or materiality of each other's exhibits. Their disagreements pertain to the weight and legal significance of the exhibits.

I have reviewed all of the appended exhibits in the context of the parties' respective motions for summary disposition. Despite some duplications in the exhibits and some problems with materiality in certain portions of individual exhibits, they relate as a whole to the substance of the parties' respective briefs, and the parties have cited them in the briefs with use of their current numbers. To cull out the partial duplications and eliminate the immaterial portions of otherwise relevant exhibits from this record may undercut the clarity of the parties' positions. Therefore, I have excluded no proffered evidence from the record on which I now issue this summary disposition decision.

Based on the undisputed facts of this case material to section 1128(a)(2), I find that I must uphold the five-year exclusion despite my personal sympathy for Petitioner's circumstances.

#### ISSUE

The only issue in this case is whether the I.G. had a basis for imposing the exclusion under section 1128(a)(2) of the Act. 42 C.F.R. § 1001.2007(a)(2) (1992). Under this issue, I must resolve the following questions:

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<sup>2</sup> Petitioner has not filed a document entitled a motion. However, inasmuch as Petitioner's brief has asked that the exclusion be overruled (Petitioner's Response at 10) and given his reasons in support, I construe his efforts as the equivalent of a motion within the meaning of 42 C.F.R. § 1005.13(a) (1992).

a. whether Petitioner was "convicted" of a criminal offense; and

b. if so, whether Petitioner's conviction was related to neglect or abuse of patients and in connection with the delivery of a health care item or service.

Where the foregoing statutory conditions have been met, the I.G. has the basis for imposing an exclusion, and the Act requires him to impose an exclusion lasting not less than five years. Therefore, Petitioner, who received the minimum five-year exclusion, cannot challenge the length of his exclusion.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the time period relevant to these proceedings, Petitioner was the administrator at the Americana Health Care Center. I.G. Exs. 1, 2.

2. On October 24, 1991, the State of Iowa filed a Complaint (Docket No. 74596) under section 235B.1(7) of the Iowa Code (1991) charging Petitioner, as the head of an institution within the meaning of said law, with failure to report to the State on or about "April 31 [sic], 1991," the suspected abuse of a dependent adult that had been personally reported to him by staff members or employees of his institution. P. Ex. 7 at 2; I.G. Ex. 4.

3. Also on October 24, 1991, the State of Iowa filed another Complaint (Docket No. 74597) charging Petitioner with the same violation under the same circumstances for his failure to report to the State on or about March 31, 1991, suspected abuse of a dependent adult. P. Ex. 7 at 4; I.G. Ex. 4.

4. The violations alleged in both Complaints constituted simple misdemeanors under Iowa law. P. Ex. 7 at 2, 4.

5. On December 16, 1991, Petitioner pled guilty to the charge specified in Docket No. 74596 concerning his failure to have made a report to the State on or about "April 31, 1991." P. Ex. 7; I.G. Ex. 7.

6. The court accepted Petitioner's plea of guilty in Docket No. 74596. Id.

7. The charge contained in Docket No. 74597, concerning Petitioner's alleged failure to have made a report to the State on or about March 31, 1991, was dismissed. Id.; see also copy of document containing the State's motion to dismiss and the court's granting of said motion appended to Petitioner's Hearing Request.

8. Petitioner was convicted of a criminal offense, within the meaning of section 1128(i) of the Act. Findings 2 - 6.

9. Petitioner's conviction was in connection with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Act. Section 235B.1 of the Iowa Code.

10. Petitioner's conviction is not related to the abuse of patients, within the meaning of section 1128(a)(2) of the Act. Findings 2 - 6, 9.

11. Petitioner was convicted of a criminal offense relating to neglect of patients, within the meaning of section 1128(a)(2) of the Act. Findings 2 - 6, 8, 9. Section 235B.1 of the Iowa Code.

12. The Secretary of Health and Human Services has delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21,662 (1983).

13. By notice letter dated November 20, 1992, the I.G. had excluded Petitioner from participating in the Medicare and Medicaid Programs for five years pursuant to section 1128(a)(2) of the Act.

14. Summary disposition is appropriate in this case because there exists no disputed issue of material fact.

15. The five-year exclusion imposed and directed against Petitioner by the I.G. is for the minimum period required by section 1128(a)(2) of the Act. Social Security Act, section 1128(c)(3)(B).

16. The exclusion imposed and directed by the I.G. against Petitioner is in accordance with the mandates of the Act. Social Security Act, sections 1128(a)(2) and 1128(c)(3)(B).

## DISCUSSION

A. Petitioner was Convicted within the Meaning of the Act.

For purposes of the Act, "convicted" includes "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court . . . ." Section 1128(i)(3) of the Act.

Petitioner had been charged with having failed to report suspected adult abuse under Iowa law in two cases, Docket Nos. 74596 and 74597. P. Ex. 7. Petitioner was convicted within the meaning of section 1128 when he pled guilty on December 16, 1991 to the charge contained in Docket No. 74596, and his plea was accepted by a court of competent jurisdiction in Cerro Gordo County, Iowa. I.G. Ex. 7.<sup>3</sup> Petitioner's focus on the absence of trial in advance of his guilty plea does not negate the statutory definition of "conviction." The statute gives several alternative definitions for "conviction," including a finding of guilty by a court after trial (section 1128(i)(2)), as well as a plea of guilty that has been accepted by a court without trial. Section 1128(i)(3).

Petitioner has noted that the offense to which he pled guilty was a simple misdemeanor. P. Resp. at 3. However, simple misdemeanor is a form of criminal offense. Since section 1128(a)(2) does not specify a criminal offense of a particular grade, the I.G.'s authority to exclude Petitioner is not affected by the fact that the offense was a simple misdemeanor.

I sympathized with Petitioner's feelings as he criticized the process by which he was convicted. Petitioner said that he had followed the advice of counsel in pleading guilty to Docket No. 74596. P. Resp. at 3. He said he had not put on evidence in his own defense, and he was not supposed to know the names of the alleged victims of suspected abuse in advance of his trial. Hearing Request at 1 - 2.<sup>4</sup> The pre-July 1, 1991 Iowa Code required the

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<sup>3</sup> Also appended to Petitioner's Hearing Request was a copy of another court document showing that Petitioner had pled guilty to the charge in Docket No. 74596 and that the court had ordered the dismissal of the charge in Docket No. 74597.

<sup>4</sup> This contention is supported by P. Ex. 7, which shows that the State filed Complaints for Docket Nos.  
(continued...)

head of a health care institute to relay a health care practitioner's reasonable suspicions of dependent adult abuse without regard for whether he (the institution's head) shared in such suspicions or believed them reasonable. I.G. Ex. 4; see also Complaints at P. Ex. 7.<sup>5</sup> Petitioner believes that the State's training tapes instructed him to make his own assessment concerning the existence of a reasonable basis for suspecting abuse before filing a report.<sup>6</sup> Petitioner said that he thought

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<sup>4</sup>(...continued)

74596 and 74597 on October 24, 1991 with the names of the alleged victims deleted in compliance with Iowa privacy laws. The docket sheet for these cases shows that only the October 24, 1991 Complaints (i.e., the ones without the alleged victims' names) had been served on Petitioner. I.G. Ex. 7. Petitioner said in his Hearing Request that he found out the identities of the individuals due to the State's poor "white-out" efforts on his copy (Hearing Request at 2), although he has not said whose names he saw on his copy.

<sup>5</sup> Petitioner was convicted under section 235B.1 (7)(a) of the Iowa Code as it existed prior to July 1, 1991. The date of the offense for Docket No. 74596, the case to which he pled guilty, is "April 31, 1991." P. Ex. 7 at 2. The version of section 235B.1 that was effective until July 1, 1991 imposed the following duties:

A health practitioner . . . who examines, attends, or treats a dependent adult and who reasonably believes the dependent adult has suffered dependent adult abuse, shall report the suspected abuse to the department of human services. If the health practitioner examines, attends, or treats the dependent adult as a member of the staff of a hospital or similar institution, the health practitioner shall immediately notify the person in charge of the institution . . . and the person in charge . . . shall make the report.

<sup>6</sup> The summary of the videotape stated, for example:

As mandatory reporters . . . [w]e need to be aware of all the signs that have been given in other areas of this tape and just watch for them. If we see something that we think substantiates abuse or looks like its [sic] (continued...)

he had acted lawfully by failing to file a report with the State because his independent investigation revealed no reasonable basis for suspecting adult abuse. P. Resp. at 4, 5; I.G. Ex. 2.

Nevertheless, Petitioner's having pled guilty and having been convicted within the meaning of section 1128(i)(3) of the Act now bind me to the fact of his conviction for purposes of adjudicating his current exclusion. See Peter J. Edmonson, DAB 1330, at 4 (1992). I am not authorized to decide his guilt or innocence on the State's charge, and I cannot invalidate or find deficient any State's rules of procedure in federal exclusion cases. Nor can I allow Petitioner to collaterally attack his conviction in the proceedings before me. 42 C.F.R. § 1001.2007(d) (1992). Petitioner must look to his State remedies if he wishes to set aside the conviction that underlies his present exclusion under section 1128(a)(2) of the Act.

B. Petitioner's Conviction was in Connection with the Delivery of a Health Care Item or Service.

Petitioner was the administrator of Americana Health Care Center in Mason City, Iowa, from June 29, 1986 until June 24, 1991. I.G. Ex. 2 at 1. According to the court documents already discussed, Petitioner pled guilty to having failed on or about "April 31, 1991," to report the suspected adult abuse which had been "reported to him as the person in charge of the facility . . . ." P. Ex. 7 at 2. Nothing in the parties' arguments and documentary submissions leaves any doubt that Americana Health Care Center was in the business of providing health care services to its residents during the entire period Petitioner was its administrator. Even though the record before me does not directly establish the identity or status of the victim of suspected abuse in the case to

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<sup>6</sup>(...continued)  
 suspicious then we need to call in the  
 investigators and have them do the  
 investigating.

P. Ex. 2 at 2.

As soon as you become suspicious or as soon as  
 you become certain that you need to make a  
 report, telephone the DHS.

Id. at 3.

which Petitioner had pled guilty,<sup>7</sup> I can reasonably conclude from the elements of the State law used to convict him that the victim of suspected abuse was at Americana Health Care Center for the receipt of health care items or services.

The Iowa law under which Petitioner was convicted had imposed a reporting duty on any "health practitioner who examines, attends, or treats a dependent adult," any "member of the staff of a hospital or similar institution" who is such a "health practitioner," and any "person in charge of the institution" where such a "health practitioner" is on staff. Section 235B.1(7)(a). The Iowa law, by its clear terms, regulated the actions of those who delivered health care services. The subject of the law's protection were "dependent adults," who were defined as those unable to protect their own interests or unable to adequately perform or obtain the services necessary to meet their essential human needs "as a result of a physical or mental condition which requires assistance from another. . . ." Section 235B.1(3); I.G. Ex. 4. Since Petitioner had pled guilty to a charge of "failure to report suspected adult abuse" under said law in his capacity as "the person in charge of the facility" (P. Ex. 7 at 2), I

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<sup>7</sup> The I.G. submitted a copy of a Complaint containing the name of a victim of suspected abuse at Petitioner's facility (I.G. Ex. 7 at 1) for the contention that Petitioner had pled guilty for having failed to report the suspected abuse of that patient at his facility. I.G. Memo. at 3. There is inadequate evidence to support the I.G.'s conclusions. The I.G.'s version of the Complaint containing the victim's name does not give any indication that it was filed in court, and it does not contain Docket No. 74596. I.G. Ex. 5 at 1. Nor does the court's docket sheet for No. 74596 show that such a Complaint was filed. I.G. Ex. 7. The court's docket sheet shows that the Complaint was filed on October 24, 1991, and only said Complaint was served. Id. The October 24, 1991 Complaint that was filed and served in Docket No. 74596 is different from the I.G.'s version; the former contains no name of any alleged victim but does show the date of the alleged occurrence, which had been left blank in the I.G.'s version. P. Ex. 7 at 2; I.G. Ex. 5 at 1. Similarly, the undated report from the Iowa Department of Inspections and Appeals (I.G. Ex. 1 at 1) does not require the conclusion that Petitioner had been charged in accordance with the report's recommendation to use the named patient's suspected abuse as a basis for the complaint.



can conclude only that -- even without knowing the identity of the victim of suspected abuse and without having direct proof that he/she was a resident at Americana Health Care Center -- Petitioner's conviction was "in connection with the delivery of health care item or service" as required by section 1128(a)(2) of the Act.

C. Petitioner's Conviction was Unrelated to the Abuse of Patients.

Petitioner argued that there is no evidence of harm to any nursing home resident. P. Resp. at 6, 7. I agree, and thus I conclude that Petitioner's conviction was not related to patient abuse.

Section 1128(a)(2) specifies a conviction "relating to the . . . abuse of patients" whereas Petitioner's conviction relates to suspected abuse of a patient. In our system of laws, the modifier "suspected" is significant and is controlling on whether the individual should be excluded for reasons of patient abuse. Like the plain language of the statute itself, the agency's implementing regulations also emphasize the actual occurrence of some event that constitutes abuse. Offenses "related to the . . . abuse of patients" specifically include, for the agency, those that "entailed, or resulted in . . . abuse of patients." 42 C.F.R. § 1001.101(b) (1992). Nothing in the statute or the regulations suggests that an individual should be excluded for a conviction of a criminal offense "related to the . . . abuse of patients" where, as here, no abuse has been proven, no abuse victim has been established, no suspected perpetrator has been charged, and Petitioner was not even the one who suspected that any patient had been abused. Petitioner was simply the one who had failed to pass on to the State someone else's suspicion. Moreover, the elements of the criminal offense under which Petitioner was convicted did not require the existence of an actual crime of patient abuse; it just required that a health care provider had to have suspected it and reported it to an individual in Petitioner's position, who was under a statutory duty to relate it to the State but failed to do so.

D. Petitioner's Conviction was Related to Neglect of Patients.

I conclude, however, that the offense for which Petitioner was convicted is related to the neglect of patients within the meaning of section 1128(a)(2) of the

Act. I do so only on the basis of the statutory duty that the Iowa legislature had placed on him as the head of an institution that was providing health care to those who were unable adequately to care for their own essential human needs or protect their own interests. See section 235B.1 of Iowa Code. Again, for reasons already noted, I do not associate Petitioner's neglect with any patient specifically identified by the I.G.

Each state has the right to regulate the health care services that are delivered within its own borders and to protect the safety of its dependent adult citizens. The State of Iowa had chosen to impose certain reporting duties on health care providers and heads of institutions as a part of the health care that they must deliver to dependent adult patients. I take judicial notice that the delivery of health care services, especially to dependent adults residing in long-term nursing facilities, entails the dispensing of what is tangible as well as the safeguarding of the patients' safety and well-being. By virtue of their status, dependent adult patients have a need for others to be vigilant so that actions may be taken on behalf of the patient. The law Petitioner violated reflected, among other things, the State's determination of how health care institutions must care for their dependent adult patients' safety and well-being.

Iowa chose to have its own investigators determine whether health care providers' suspicions of abuse are founded. That is why it imposed a duty on heads of institutions to pass on reports of suspected abuse instead of authorizing the heads of institutions to conduct their own investigations in lieu of making a report to the State. In failing to comply with the mandatory reporting requirements of the law, Petitioner neglected a dependent adult patient's right to certain specific aspects of care especially recognized and required by law. For these reasons, Petitioner's conviction is related to patient neglect.

I am mindful that Petitioner said he had conducted his own investigations when suspicions of abuse were made known to him, and he said he had found the others' suspicions unfounded. E.g., I.G. Ex. 2. His statements suggest that he was trying not to be neglectful of his patients' care. Such intentions are commendable, and Petitioner's omission might not relate to patient neglect in jurisdictions without laws similar to Iowa's section 235B.1(7). However, Iowa law controls here in determining what is related to the neglect of patients within its own boundaries. The federal exclusion at

issue is wholly derivative of the State conviction. The wisdom and benefit of what Petitioner did instead of filing a report with the State are beyond the scope of this adjudication.

#### CONCLUSION

For the foregoing reasons, I have concluded that there exists no genuine issue of fact on the sole issue before me: whether the I.G. had authority to impose the five-year exclusion mandated by law due to a conviction for a criminal offense related to patient abuse or neglect in the delivery of health care services or items. The record before me contains all the facts necessary for resolving this issue. Petitioner, who opposed the I.G.'s motion and asked that his exclusion be set aside, created no legally cognizable issues of law or fact that would entitle him to prevail even when the evidence was viewed in a light most favorable to him. Petitioner's professionalism in his own representation has persuaded me that the record he helped create does not lack for other information that may be favorable to his position. Consequently, I see no legitimate interest that can be served by proceeding to an in-person hearing. I find that the I.G. is entitled to summary judgment as a matter of law.

/s/

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Mimi Hwang Leahy  
Administrative Law Judge