

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

In the Case of:	)	
	)	
Ricardo Beltran,	)	Date: December 30, 2004
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-04-503
	)	Decision No. CR1266
The Inspector General.	)	
	)	

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Ricardo Beltran (Petitioner) from participation in Medicare, Medicaid, and all federal health care programs, as defined in section 1128B(f) of the Social Security Act (Act), until Petitioner's license to provide health care in the State of California is reinstated. I base my decision upon evidence which proves that Petitioner's nurse assistant certification in the State of California was revoked and the revocation concerned Petitioner's professional competence, professional performance, or financial integrity, within the meaning of section 1128(b)(4) of the Act. Moreover, having concluded that the I.G. is authorized to exclude Petitioner based on the loss of his nurse assistant certification, I am required by statute to sustain the I.G.'s determination that Petitioner remain excluded until his license is reinstated by the State of California.

**I. Background**

By letter dated June 30, 2004, the I.G. notified Petitioner that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs. The letter explained that Petitioner's exclusion was authorized under section 1128(b)(4) of the Act because Petitioner's "certified nurse assistant certificate to practice medicine or provide health care in the State of California was revoked . . . for reasons bearing on [his]

professional competence, professional performance, or financial integrity.” Additionally, the I.G. advised Petitioner that his exclusion would remain in effect “as long as [his] certified nurse assistant certificate is revoked, suspended, or otherwise lost.”

By letter dated August 11, 2004, Petitioner requested a hearing before an administrative law judge. The case was assigned to me for hearing and decision. A telephonic pre-hearing conference was held on October 13, 2004, which was memorialized in my Order of October 15, 2004. During the conference, Petitioner was informed that he could be represented by counsel. Petitioner decided to proceed with this appeal without counsel. The parties agreed this case could be decided based on their written submissions and that an in-person hearing was unnecessary. Thereafter, the parties submitted written arguments and proposed exhibits.

On November 15, 2004, the I.G. submitted its Motion for Summary Affirmance and two proposed exhibits (I.G. Exs. 1-2). On December 10, 2004, Petitioner submitted a response (P. Response). On December 21, 2004, counsel for the I.G. informed me that he would not be requesting leave to file a reply brief. Petitioner did not object to the I.G.’s proposed exhibits. In the absence of objection, I admit into evidence I.G. Exs. 1-2.

## **II. Applicable Law**

Pursuant to section 1128(b)(4) of the Act, the I.G. may exclude an individual or entity—

(A) 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 professional competence, professional performance, or financial integrity . . . .

Pursuant to section 1128(c)(3)(E) of the Act, the length of an exclusion under section 1128(b)(4)—

shall not be less than the period during which the individual’s or entity’s license to provide health care is revoked, suspended, or surrendered, or the individual or entity is excluded or suspended from a Federal or State health care program.

### III. Analysis

I make the following findings of fact and conclusions of law. My findings and conclusions are set forth as lettered headings in bold type. My legal analysis in reaching each finding and conclusion is set out in the paragraphs which follow each lettered finding and/or conclusion.

**A. The I.G. properly excluded Petitioner pursuant to section 1128(b)(4) because his nurse assistant certificate to provide health care in the State of California was revoked for reasons bearing on Petitioner's professional competence or professional performance.**

Petitioner was a certified nurse assistant in the State of California. I.G. Ex. 1. On June 30, 2003, the California Department of Health Services, Licensing and Certification Program, Professional Certification Branch, Investigation Section (CDHS Investigation Section) issued a letter to Petitioner revoking Petitioner's nurse assistant certificate because Petitioner's actions constituted unprofessional conduct under California Health and Safety Code § 1337.9(c)(1). *Id.* This revocation was based on a substantiated allegation that, during January and February 2003, Petitioner had engaged in sexual intercourse with a resident at Sylmar Health and Rehabilitation Center (Sylmar Center) in Sylmar, California where Petitioner was employed as a Certified Nurse Assistant.

The CDHS, Office of Administrative Hearings and Appeals (OAHA) upheld the revocation made by the CDHS Investigation Section on November 7, 2003. I.G. Ex. 2. In California, one cannot use the title "certified nursing assistant" and provide certified nursing assistant services without an active CDHS-issued certificate to practice. California Health & Safety Code § 1337.2(e) (2004). The revocation of Petitioner's certificate by the California Investigation Section, upheld by the OAHA, is a revocation of Petitioner's license to provide health care services, specifically, certified nursing assistant services. *See, Patricia Gilpin*, DAB CR925 (2002); *Owen C. Gore*, DAB CR1070 (2003).

The I.G. has shown the first requirement for a section 1128(b)(4) exclusion in that the CDHS revoked Petitioner's license to provide health care services. Additionally, however, to sustain an exclusion under section 1128(b)(4) of the Act, the revocation of one's license to provide health care services must be for reasons bearing on one's professional competence, professional performance, or financial integrity.

The OAHA determined that Petitioner's behavior constituted unprofessional conduct under California Health and Safety Code § 1337.9(c)(1). I.G. Ex. 2. The OAHA concluded that Petitioner's behavior with Resident A, his failure to report the resident's behavior to management or nursing staff and his violation of facility policies were a sufficient basis to revoke Petitioner's certification. *Id.* The OAHA hearing included testimony from several people, in addition to Petitioner's own testimony. The OAHA found that Petitioner's testimony regarding the allegation provided "clear and convincing evidence of unprofessional conduct and sufficient grounds for the revocation of [Petitioner's] nurse assistant certification." *Id.* The OAHA decision stated that Petitioner:

testified that he was alone in a male resident's room with Resident A [a female resident], behind closed privacy curtains, for a period of ten minutes, while the male resident stood guard outside . . . [and] admitted that he was aware of Resident A's history of sexual promiscuity. He also admitted that, although Resident A had made sexual advances toward him on many occasions, he did not report this behavior to management or nursing staff . . . [and] admitted making purchases for residents, which he knew was a violation of the facility's policy. *Id.*

In his response Petitioner admits to all the findings made by OAHA except the actual act of having sexual intercourse. In Petitioner's response he states:

It's true that in some occasions I made some purchases for the residents, and is true that I gave a kiss to "resident A", and after this I, told her that's it, I can't go any further . . . I admit that was something improper on my part . . . I know, I failed to report her behavior to management, to protect myself.

P. Response at 1.

I conclude that the findings of unprofessional conduct made by the OAHA do bear on Petitioner's professional competence or professional performance.

**B. The I.G. properly excluded Petitioner until his nurse assistant certificate is reinstated by the State of California.**

Section 1128(c)(3)(E) of the Act requires that an individual excluded pursuant to section 1128(b)(4) remain excluded for no less than the period during which the individual's license is revoked, suspended, or surrendered. *See also* 42 C.F.R. § 1001.501(b)(1); *Tracey Gates, R.N.*, DAB No. 1768, at 9 (2001). Thus, there is no issue regarding the reasonableness of the period of exclusion as it is mandated by section 1128(c)(3)(E) of

the Act. In the present case, the I.G. has excluded Petitioner until he regains his nurse assistant certificate. This is the minimum period of exclusion prescribed by law. Accordingly, I must conclude that the term of the exclusion is reasonable and proper.

#### **IV. Conclusion**

For the reasons stated, I conclude that the I.G. was authorized to exclude Petitioner because his nurse assistant certificate was revoked by the State of California for reasons concerning his professional competence or professional performance, within the meaning of section 1128(b)(4) of the Act. Because Petitioner was properly excluded pursuant to section 1128(b)(4), his exclusion must remain in effect until the CDHS again grants him a nurse assistant certification.

/s/ Anne E. Blair  
Administrative Law Judge