Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Linda R. Ghaffari
(OI File Number: 6-09-40302-9),

Petitioner

v.

The Inspector General

Docket No. C-10-585

Decision No. CR2268

Date: October 15, 2010

DECISION

This matter is before me in review of the determination by the Inspector General (I.G.) to exclude Petitioner, Linda R. Ghaffari, from participation in Medicare, Medicaid, and all other federal health care programs. The I.G. relies on the discretionary authority to do so conveyed to him by section 1128(b)(4) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(4). The predicate for the I.G.'s action is that Petitioner surrendered her Nursing Home Administrator's (NHA) license and agreed not to apply for a new NHA or similar license in the State of New Mexico or any other United States jurisdiction.

As set forth below, undisputed material facts demonstrate that the I.G. acted within his lawful authority to impose the exclusion. The I.G. has set the period of exclusion to be concurrent with the period during which she remains unlicensed to provide health care as a nursing home administrator in the State of New Mexico, the minimum period of exclusion required by law. For those reasons, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

On January 29, 2010 the I.G. notified Petitioner that she was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs until she should regain her license to provide health care as a nursing home administrator in the State of New Mexico, based on the authority set out in section 1128(b)(4) of the Act. By letter dated March 30, 2010 Petitioner timely filed her request for an Administrative Law Judge (ALJ) hearing on the I.G.'s action.

On April 20, 2010 I conducted a telephone prehearing conference in accordance with 42 C.F.R. § 1005.6(a), in which counsel for Petitioner and the I.G. participated. The same day I issued an order summarizing the discussions. The conference and my Order of April 20, 2010 contemplated that this case could be resolved by summary disposition on the parties' briefs and documentary exhibits. I subsequently granted the I.G.'s unopposed motion for an extension of time on July 6, 2010, amending the briefing schedule for the parties. On August 16, 2010 the record closed for purposes of 42 C.F.R. § 1005.20(c).

Pursuant to my scheduling order, the I.G. filed a Motion for Summary Disposition and supporting Brief-in-Chief (I.G. Br.) accompanied by 17 exhibits (I.G. Exs. 1-17). Petitioner submitted an Answer Brief (P. Br.) accompanied by 12 exhibits (P. Exs. 1-12). The I.G. then filed a Reply Brief (I.G. Reply) with one additional exhibit (I.G. Ex. 18). Petitioner filed a Response Brief (P. Resp.) with one additional exhibit (P. Ex. 13).

Petitioner objects to certain of the I.G.'s exhibits and relies heavily on the Federal Rules of Evidence as the basis for these objections. The admission of evidence in these proceedings, however, is controlled by 42 C.F.R. § 1005.17. Section 1005.17(b) provides that the ALJ will not be bound by the Federal Rules of Evidence except the ALJ may use the Federal Rules of Evidence as a guide. Below, I examine Petitioner's evidentiary objections and discuss my findings on her objections.

- I.G. Ex. 4 is a Notice of Contemplated Action (NOCA) by the New Mexico Nursing Home Administrators Board. Petitioner objects to the admissibility as lacking foundation, authentication, or identification for admission into evidence. P. Br. at 6-7.

  It is well settled in exclusion cases that evidence extrinsic to court records may be considered if that extrinsic material appears to be reliable and credible, and if the material helps to explain or clarify the details surrounding a conviction. *Narendra M. Patel, M.D.*, DAB No. 1736 (2000); *see Vivienne Esty-Fenton*, DAB CR1931 (2009); *Barbara Jean Emerson*, CR1888 (2009); *Alexander Nepomuceno Jamias*, DAB CR1480; *Neitra Maddox*, DAB CR1218; *Mitchel Earl Phillips*, DAB CR965 (2002); and *Salvacion Lee*, DAB CR920 (2002). Although each of these cases involves a criminal conviction as the predicate for the I.G.'s action, I see no reason

that the principle cannot be extended to the present case. The I.G. is required to prove, as one of the essential elements in this exclusion proceeding, the reasons for the State proceedings against Petitioner's NHA license, and therefore anything that helps reliably to elucidate those reasons is relevant. Here, the NOCA is helpful in explaining the background of this case and is therefore relevant.

Although the I.G. Ex. 4 does not include referenced attachments is not signed and does not contain a completed certificate of service, I find it to be reliable and credible. The uncontested Settlement Agreement (I.G. Ex. 6) Petitioner reached with the New Mexico Nursing Home Administrators Board (NHAB) states that Petitioner "does not admit all of the allegations made against her which are contained in the [NOCA]. . . ." Petitioner contends that this recital is "evidence that Petitioner received *a* [NOCA]" but insufficient to establish that she received the *same* NOCA as proffered as I.G. Ex. 4. P. Br. at 2 (emphasis in original).

At no point does Petitioner assert that the NOCA referred to in the Settlement Agreement is not the NOCA presented as I.G. Ex. 4. Petitioner does not contend that she did not receive the same NOCA as I.G. Ex. 4, only that there is not proof of receipt. Petitioner has offered no suggestion that I.G. Ex. 4 is not authentic, nor has she pointed to any objective indicia of I.G. Ex. 4's being counterfeit, fake, or an inaccurate representation of the NOCA referenced in the Settlement Agreement. I accept that Petitioner expressly "did not admit all of the allegations" made in the NOCA, however, the NOCA is proffered primarily as evidence relating to the subject of the disciplinary proceedings, not as conclusive evidence of Petitioner's actions or admissions.

In addition, the uncontested Settlement Agreement (referencing the NOCA) and the NOCA presented as I.G. Ex. 4, share the same case number. Petitioner even references the NOCA by case number in her affidavit: ". . . the New Mexico Nursing Home Administrators Board had initiated a proceeding styled *In the Matter of Linda R. Ghaffari; No. 2004-7*. . . ." P. Ex. 1 at 3. Absent any evidence or argument to shed doubt on the authenticity of I.G. Ex. 4, I see no reason to exclude or decline to rely on it. I overrule Petitioner's objection and admit I.G. Ex. 4.

- I.G. Ex. 5 is the Findings of Fact and Conclusions of Law of the New Mexico state district court (District Court) receivership proceeding issued on September 23, 2004 in *Montoya v. Buena Vista Retirement Center, et al*. Petitioner objects to I.G. Ex. 5 as cumulative because the same document is attached as "Exhibit 1" in the Settlement Agreement uncontested as I.G. Ex. 6. P. Br. at 7; P. Resp. at 3.

  Petitioner is correct in that the seven-page document comprising I.G. Ex. 5 is also included as pages 4 through 10 of I.G. Ex. 6. Petitioner does not offer to explain

why this seven-page repetition of information is prejudicial to her position, and I cannot see how any such claim could be made. Furthermore, even if FED. R. EVID. 403 were applicable to this case, none of the other factors that Rule sets out as a basis for excluding "cumulative" evidence is applicable in this very limited summary-disposition context. Specifically, no confusion of issues is likely to result from admitting I.G. Ex. 5, there is no jury to mislead, and the time expended in reading through the repeated seven pages is trivial. *See* 42 C.F.R. § 1005.17(d). I therefore overrule Petitioner's objection and admit I.G. Ex. 5.

- I.G. Exs. 8, 9, 10, 11, and 12 consist of court filings (complaints, motions, orders, and settlement agreements) regarding two actions against Petitioner and Buena Vista: the United States Attorney for the District of New Mexico intervened in the Qui Tam False Claims Act action and a case brought under the New Mexico Medicaid Fraud Act. Petitioner argues that that the documents, although authentic as public record, are inadmissible because they are "irrelevant and/or unfairly prejudicial." P. Resp. at 4.

  As previously discussed regarding the admission of I.G. Ex. 4, these exhibits too are relevant. The fact that all of these documents were drafted and filed long after the surrender of Petitioner's NHA license is irrelevant. The documents are relevant in the history of events they relate and the light they shed on the reasons for the proceedings against Petitioner's NHA license. Again, Petitioner's machine-like recitation of a claim of prejudice is unsupported by even a trivial effort at pointing out how that prejudice might actually operate.

- I.G. Ex. 15 is a "screen shot" of the NHAB's website on May 11, 2010, and is apparently submitted in support of the NHAB's mission statement. Petitioner objects to this exhibit as hearsay and irrelevant. I.G. argues that the exhibit is self-authenticating and even if hearsay, the document is admissible before me. Although I may admit a document containing hearsay, I agree with Petitioner that this document is irrelevant. I sustain Petitioner's objection and exclude I.G. Ex. 15. 42 C.F.R. § 1005.17(c).

II. Issues

The issues before me are limited to those noted at 42 C.F.R. § 1001.2007(a)(1). In the specific context of this record, they are:

1. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(4) of the Act; and

2. Whether the length of the exclusion is unreasonable.

As detailed below, the undisputed evidence demonstrates that the I.G. had a basis to exclude Petitioner and that the length of the exclusion is reasonable as a matter of law.

III. Controlling Statutes and Regulations

Section 1128(b)(4) of the Act permits the Secretary to exclude any 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, or
>
> (B) who surrendered such a license while a formal disciplinary proceeding was pending before such an authority and that proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity.

The terms of section 1128(b)(4) are restated in similar regulatory language at 42 C.F.R. § 1001.501(a).

Under section 1128(c)(3)(E) of the Act, as amended by the Health Insurance Portability and Accountability Act of 1996, 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.

The terms of 42 C.F.R. § 1001.2007(d) provide that in exclusion appeals in this forum:

> When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by [a] Federal, State or local court, a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made, the basis for the underlying conviction, civil judgment, or determination is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

An exclusion based on section 1128(b)(4)(A) or (B) of the Act is discretionary. If the I.G. exercises his discretion to proceed with the sanction, then the mandatory minimum

period of exclusion to be imposed under section 1128(b)(4)(A) or (B) of the Act "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 . . . ." Act, section 1128(c)(3)(E), 42 U.S.C. § 1320a-7(c)(3)(E). Regulatory language at 42 C.F.R. § 1001.501(b)(1) affirms the statutory provision.

The Departmental Appeals Board (Board) has stated the standard for summary judgment as follows.

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehabilitation & Skilled Nursing Center, DAB No. 2300, at 3 (2010) (citations omitted). The role of an ALJ in deciding a summary judgment motion differs from the ALJ's role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Village at Notre Dame, Inc.*, DAB No. 2291, at 5 (2009).

IV. Findings and Conclusions

Based on the undisputed material facts in the record before me, I find and conclude as follows:

1. At all times relevant to this case, Petitioner was licensed as a NHA in the State of New Mexico, and owned and acted as the Administrator of Record at the Buena Vista Retirement Center (Buena Vista), a skilled nursing facility (SNF), located in Clovis, New Mexico. I.G. Ex. 4 at 4.

2. As Administrator, Petitioner was responsible for the management and operation of Buena Vista. 42 C.F.R. § 483.75. During the relevant period, Petitioner was responsible for administering Buena Vista "in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-

being of each resident." I.G. Ex. 4 at 4.

3. On April 21, 2004, the New Mexico Department of Health's Health Facility Licensing and Certification Bureau conducted a survey of Buena Vista in which numerous deficiencies were identified. I.G. Ex. 4 at 4.

4. During the relevant period, the New Mexico Department of Health received complaints that "[t]he facility cannot make payroll, that the roof was leaking which resulted in toxic black mold throughout the facility and that the facility often runs out of food." I.G. Ex. 5 at 2.

5. During the relevant period the facility's finances were managed in such a way that the facility became "[f]inancially insolvent, had lost its line of credit, had over one hundred and four thousand dollars , ($104,000.00) owed in back taxes, allowed its Workers Compensation Insurance to lapse, had numerous instances of checks being returned for insufficient funds. . . . In May 2004, the state of finance and operations threatened the cessation of provision of services to residents who are frail and vulnerable to harm." I.G. Ex. 5 at 2.

6. During the relevant period, Buena Vista "demonstrated a pattern and practice of substandard care of years of non-compliance with state and federal regulations, and . . . failed to correct those deficiencies." I.G. Ex. 5 at 1.

7. The facility was found not compliant with Medicaid audits and as a result "had not received Medicaid reimbursement from the state since November 2003 because of non compliance." I.G. Ex. 5 at 2.

8. While owned and operated by Petitioner, the "state of operations of Buena Vista, its history and pattern of substandard care and financial insolvency constituted a situation, physical condition, practice and method of operations that presented an imminent danger of death or significant mental or physical harm to its residents." I.G. Ex. 5 at 2.

9. "In May 2004, the method of operations of the Buena Vista Retirement Center constituted a method of operation that presented a situation of imminent danger of death or significant mental or physical harm to its residents, thus involving the authority of the [Secretary of New Mexico Department of Health] to seek appointment of a Receiver. . . ." I.G. Ex. 5 at 7.

10. On May 20, 2004, the District Court placed Buena Vista into receivership,

at which time Petitioner was excluded from the facility. P. Ex. 1 at 2; I.G. Ex. 5 at 3.

11. At the time the Deputy Receiver took over administration of Petitioner's skilled nursing facility: "[T]he facility was filthy. Residents and families complained about cockroaches throughout the facility. . . . The floors throughout the facility were filthy, and there were no cleaning supplies on the premises. . . . Resident rooms were not clean. Mattresses had to be removed to clean bed frames, which were sticky and dirty. . . . The kitchen was very dirty and infested with cockroaches. It was necessary to completely tear the kitchen apart and clean it (superfluous punctuation omitted). . . . All food was on a C.O.D. basis, and there was a scant amount of food in the pantry and freezer. . . . Problems with the hot water heater and mixing valves caused the water temperature at one end of the building to be too low . . . and too hot on the other side. . . . There were numerous leaks in the roof. . . . Rain could run straight down into the premises because there was no flashing on the roof around the facility. . . . There was pervasive growth of toxic black mold in several locations throughout the Buena Vista facility. . . . There was no back-up oxygen for residents of the facility. Mobility for several residents was seriously limited because there were no portable oxygen tanks. . . . A consultant conducted a pharmacy review. . . The review resulted in 35 recommendations, . . . 35 physician recommendations and 47 recommendations for nursing services [for the 29 residents of Petitioner's facility]. . . . [Nine] Buena Vista employees were without required criminal background checks. . . . There is no laundry at the facility, and the only van at Buna Vista is unsafe. . . . Staff usually used their private vehicles to transport residents. . . . [There was] no evidence of tracking and trending of resident incidents. The staff did not know how to make reportable or required incident report[s] to the state and had never been involved in incident reporting. . . . [The] limited accounting and bookkeeping records . . . were incomplete and inaccurate." I.G. Ex. 5 at 3-5.

12. On May 28, 2004, June 7, 2004, and June 14, 2004 the District Court continued Buena Vista in temporary receivership. I.G. Ex. 5 at 3.

13. The temporary receivership ended and Buena Vista closed on July 14, 2004. I.G. Ex. 5 at 3.

14. On September 23, 2004 the District Court judge filed his Findings of Fact and Conclusions of Law in *Montoya v. Buena Vista Retirement Center*, No. D0905-CV-0200400202 (*Montoya*). I.G. Ex. 5.

15. "Following *Montoya*, proceedings with respect to Ms. Ghaffari's [NHA] license were initiated before the New Mexico Board of Nursing Home Administrators in *In the Matter of Linda R. Ghaffari; No. 2004-7*." I.G. Ex. 2 at 4.

16. The NHAB concluded that the District Court in *Montoya* "identified numerous deficiencies in standard of care provided and in the operation of the facility." I.G. Ex. 4 at 4. The NHAB issued a Notice of Contemplated Action (NOCA), *In the Matter of Linda R. Ghaffari*, No. 2004-7, (*NHAB Ghaffari Matter*) explaining that "[u]nless rebutted or explained, the evidence before the [NHAB] is sufficient to justify suspension or revocation of [Ms. Ghaffari's NHA] license . . . because she has demonstrated gross incompetence in performing nursing home administrator functions." *Id*.

17. On August 25, 2005, Petitioner reached a settlement agreement with the NHAB regarding the *NHAB Ghaffari Matter*, by which Petitioner agreed to surrender her New Mexico NHA license and agreed never to apply for a NHA license or comparable license in the State of New Mexico or any other state or jurisdiction in the United States. I.G. Ex. 6 at 2.

18. On January 29, 2010, the I.G. notified Petitioner that she was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs as defined in section 1128B(f) of the Act until she should regain her license as a Nursing Home Administrator in the State of New Mexico, based on the authority set out in section 1128(b)(4) of the Act. I.G. Ex. 1.

19. Petitioner timely perfected this appeal from the I.G.'s action by filing her hearing request on March 30, 2010.

20. Because Petitioner surrendered her NHA license and lost the right to apply for a new NHA license for reasons bearing on her professional competence, professional performance or financial integrity, as set out in Findings 1-16 above, a basis exists for the I.G.'s exercise of his discretionary authority, pursuant to section 1128(b)(4)(A) of the Act, to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

21. Because Petitioner surrendered her NHA license while a formal disciplinary proceeding was pending before the State licensing authority concerning Petitioner's professional competence, professional performance, or financial integrity, as set out in Findings 1-16 above, a basis exists for the

I.G.'s exercise of his discretionary authority, pursuant to section 1128(b)(4)(B) of the Act, to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

22. The exclusion of Petitioner for a period concurrent with the remedy imposed by the State licensing authority is for the minimum period prescribed by law and is therefore as a matter of law not unreasonable. Act, section 1128(c)(3)(E); 42 C.F.R. § 1001.501(b)(1).

23. There are no remaining disputed issues of material fact and summary disposition is appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

Resolution of a case by summary disposition is appropriate when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367. It is insufficient for the nonmoving party to rely upon mere allegations or denials to defeat the motion and proceed to hearing. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The material facts in this case are undisputed, clear, and unambiguous, and support summary disposition as a matter of law.

1. The undisputed evidence establishes that the I.G. had a basis to exclude Petitioner pursuant to section 1128(b)(4)(A) and (B) of the Act.

The undisputed evidence shows that the I.G. had a basis to exclude Petitioner under both section 1128(b)(4)(A) and (B) of the Act. I shall first address section 1128(b)(4)(A) of the Act, with reference to which section the undisputed evidence shows both elements to support the exclusion. Then I shall discuss section 1128(b)(4)(B) of the Act, with reference to which the undisputed evidence reveals the three essential elements to support an exclusion.

The two over-arching facts in this case are that Petitioner surrendered her license while a formal disciplinary proceeding was pending before the NHAB, and that those proceedings were for reasons bearing on and concerning her professional competence and performance. That is all that the I.G. requires as a predicate for the exercise of his discretion to exclude Petitioner under section 1128(b)(4)(A) or (B) of the Act. "Once the

I.G. has proven that there is that nexus of fact and law by which Petitioner became subject to exclusion, an ALJ is without jurisdiction to evaluate on any basis whatsoever the propriety of the I.G.'s exercise of discretion in deciding to proceed with imposition of the exclusion." *Calvin Ramsey, M.D.*, DAB CR2237, at 7-8 (2010); citing *Michael J. Rosen, M.D.*, DAB No. 2096; *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Tracey Gates, R.N.*, DAB No. 1768 (2001); *Wayne E. Imber, M.D.*, DAB No. 1740 (2000); *see also* 42 C.F.R. § 1005.4(c)(5).

A. 1128(b)(4)(A) of the Act

Two essential elements must be proven in order to support an exclusion based on section 1128(b)(4)(A) of the Act. First, the I.G. must prove that the license to provide health care of the individual to be excluded has been revoked or suspended by a State licensing authority or who otherwise lost such a license or the right to apply for or renew such a license. Second, the I.G. must prove that the license was revoked or suspended for reasons bearing on the individual's professional competence, professional performance, or financial integrity. *Leonard R. Friedman, M.D.*, DAB No. 1281 (1991); *Mark C. Sorensen, M.D.*, DAB CR1664 (2007); *Thomas I. DeVol, Ph.D.*, DAB CR1652 (2007); *Sherry J. Cross*, DAB CR1575 (2007); *Michele R. Rodney*, DAB CR1332 (2005); *Edmund B. Eisnaugle, D.O.*, DAB CR1010 (2003); *Marcos U. Ramos, M.D.*, DAB CR788 (2001); *Allison Purtell, M.D.*, DAB CR781 (2001). The undisputed evidence establishes both essential elements conclusively.

The first element is established in that Petitioner "otherwise lost [her NHA] license" and "the right to apply for or renew [her NHA] license." Section 1128(b)(4)(A) of the Act. This element is exhibited in the Settlement Agreement by which Petitioner agreed to surrender her license and "to never apply for a [NHA] license in the State of New Mexico or any other state or jurisdiction of the United States." I.G. Ex. 6 at 2.

The undisputed evidence likewise establishes the second essential element: Petitioner lost her license and the right to apply for a new license for reasons bearing on her professional competence, professional performance, or financial integrity. The circumstances in *Brian Bacardi, D.P.M.*, DAB No. 1724 (2000), mirror those in the present case and the Board determined that the I.G. had a basis to exclude Petitioner under section 1128(b)(4)(A) and (B). In *Bacardi*, Petitioner contended that he did not sign the settlement agreement for reasons bearing on his professional competence, professional performance, or financial integrity. Specifically, Dr. Bacardi contended that the agreement did "not contain any findings that he lacked professional competence, professional performance, or financial integrity, but merely makes reference to a notice of charges against Petitioner." *Bacardi*, at 3. Dr. Bacardi argued that in signing the agreement, he did not admit the truth of the charges which was also stated in the settlement agreement. In *Bacardi*, the Board upheld the ALJ's decision finding that Dr. Bacardi's contentions were without merit. The Board held:

> The 1996 agreement specifically refers to the Tennessee Board's March 13, 1995 Notice of Charges. . . . Petitioner did not except to the ALJ's finding that those charges related to Petitioner's professional competence, professional performance, or financial integrity. Clearly, but for the existence of the charges, Petitioner would have had no reason to sign the agreement. Thus, notwithstanding that Petitioner's stated reason for signing the agreement rather than contesting the charges was that he no longer wished to practice in the state, Petitioner signed the agreement (and in so doing, "otherwise lost" his license) "for reasons bearing on" his professional competence, professional performance, or financial integrity. Contrary to Petitioner's argument, this language does not require that *findings* be made with respect to an individual's professional competence, professional performance, or financial integrity.

Bacardi, DAB No.1724, at 3-4 (citations omitted).

In the present case as in *Bacardi*, the Settlement Agreement specifically referred to the NOCA issued in the like-captioned case. As in *Bacardi*, but for the existence of the charges, Petitioner would have had no reason to sign the Settlement Agreement. Petitioner here similarly argues that she had no reason to maintain her NHA license and no longer wished to practice as an administrator. Further, Petitioner contends that she did not admit the facts as established in the NOCA, however, she too signed the agreement (and therefore, "otherwise lost" her license) "for reasons bearing on" her professional competence, professional performance, or financial integrity. Petitioner contends that the I.G. is not entitled to summary judgment because the I.G. has not demonstrated that the NHAB proceeding was “for reasons bearing on” her professional competence, performance or financial integrity because she did not admit nor was she specifically found to have conducted herself in a manner that evidenced her gross incompetence or performance below the standard for NHAs, or her lack of financial integrity. P. Br. at 4. However, as explained by the Board, the statute “does not require that *findings* be made with respect to an individual's professional competence, professional performance, or financial integrity.” *Bacardi*, DAB No. 1724, at 3. The undisputed evidence, therefore, establishes that Petitioner surrendered or otherwise lost her NHA license for reasons bearing on her professional competence, professional performance, or financial integrity.

The reference to the NOCA in the Settlement Agreement alone is sufficient to establish a basis to exclude under 1128(b)(4)(A), however, unlike *Bacardi*, in Petitioner’s Settlement Agreement, she expressly stipulates to the facts as established in *Montoya*. I.G. Ex. 6 at 1. In *Montoya*, there is no doubt that Petitioner's professional competence, professional performance, and financial integrity were at issue, whether specifically named or not. As the licensed NHA, Petitioner was responsible for a facility with a history of non-compliance with state and federal regulations to such a degree that the District Court

placed the facility into Receivership. The District Court found and Petitioner concedes that "the *method of operations* of the Buena Vista Retirement Center constituted a *method of operation* that presented a situation of imminent danger of death or significant mental or physical harm to its residents." I.G. Ex. 5 at 7 (emphasis added). As Administrator, Petitioner was directly responsible for the conduct of operations at the facility, and those operations were of a character to present conditions of "imminent danger of death or significant mental or physical harm" to the residents she was directly responsible for the health and safety thereof. *See* 42 C.F.R. § 483.75; *see* Findings and Conclusions 1-11, *supra*. It is clear that Petitioner's surrender of her NHA license and her agreement not to reapply for that or a similar license in the State of New Mexico or any other state or jurisdiction in the United States was for reasons bearing upon her competence, performance, and financial integrity.[1]

B. 1128(b)(4)(B) of the Act

There are three essential elements necessary to support an exclusion based on section 1128(b)(4)(B) of the Act. First, the I.G. must prove that the individual to be excluded has surrendered her or his license to provide health care to a State licensing authority. Second, the I.G. must prove that the license was surrendered while a formal disciplinary proceeding against the individual was pending before the State authority. Third, the I.G. must prove that the pending proceeding concerned the individual's professional competence, professional performance, or financial integrity. *James Latimer, M.D.*, DAB CR1578 (2007); *Julia Maria Nash*, DAB CR1277 (2005); *Maureen Felker*, DAB CR1110 (2003); *April Ann May, P.A.*, DAB CR1089 (2003); *Djuana Matthews Beruk, D.D.S.*, DAB CR950 (2002).

Petitioner concedes that she surrendered her NHA license to the State licensing authority. P. Br. at 3-4. The first essential element is not in contention. The second element, that Petitioner's license was surrendered while a formal disciplinary proceeding against her was pending before the State authority, is also not disputed by Petitioner. *See* I.G. Ex. 2

[1] I also note that Petitioner's submission of claims to Medicare and Medicaid during a period when the residents of the facility were so clearly not cared for as billed, likewise bears on her financial integrity, and indeed in the two subsequent actions and settlements ending in Petitioner's agreement to repay the State of New Mexico $100,000.00 related to false claims submitted for Medicaid payment, and $1,000,000.00 to the United States related to false claims submitted for Medicare payment, indicates that the relative federal and State authorities agreed. Moreover, the facts established in *Montoya* related to the mismanagement of funds describe a state of financial affairs inconsistent with the standards of financial integrity required of a licensed NHA. The claim that Petitioner used some of her own funds in an attempt to maintain the facility does not cure her financial wrongs; rather the fact that her mismanagement created such a state lends further support to such a finding.

at 4; I.G. Ex. 4; I.G. Ex. 6. Rather, Petitioner's contentions focus on the third element, that the pending proceeding concerned Petitioner's professional competence, professional performance, or financial integrity. P. Br. at 14-20; P. Resp. 6-8.

Petitioner argues that although in the Settlement Agreement she stipulated to the Findings of Facts and Conclusions of Law in *Montoya*, her "stipulation does not constitute an admission concerning Petitioner's professional competence, professional performance or financial integrity as a [NHA]." P. Br. at 15. Petitioner appears to rely on the argument that *Montoya* did not specifically make a finding of fact regarding her professional competence, performance or financial integrity and that she was not personally named as a party in the receivership action. But precisely like subpart A of section 1128(b)(4), subpart B "does not require that *findings* be made regarding an individual's professional competence, professional performance, or financial integrity as a necessary prerequisite to conferring authority on the I.G. to exclude that individual. It requires only that a formal disciplinary proceeding *concern* the individual's professional competence, professional performance, or financial integrity." *Maureen Felker*, DAB CR1110, at 4. But for *Montoya*, the NHAB would have had no reason to institute the proceedings against Petitioner at that time or specifically to name *Montoya* in the subsequent agreement. Here, the proceeding against Petitioner unquestionably concerned her professional competence and performance. *See* I.G. Exs. 4, 5, 6; P. Ex. 1 at 2-3.

C. The timing of the I.G.'s action

Petitioner complains of what she calls an "unreasonable delay" in the I.G.'s determination to exclude her, asserting that "the I.G. only notified Ms. Ghaffari he was contemplating exclusion in May 2009, nearly four (4) years after she surrendered her license." P. Br. at 24. The Board has repeatedly and firmly rejected arguments based on similar complaints, holding that the I.G.'s decision as to when to begin the process of exclusion is discretionary and non-reviewable. *Kailash C. Singhvi, M.D.*, DAB No. 2138 (2007); *Lisa Alice Gannt*, DAB No. 2065 (2007); *Thomas Edward Musial*, DAB No. 1991 (2005).

2. The length of the exclusion is reasonable as a matter of law.

Section 1128(c)(3)(E) of the Act requires that any period of exclusion based on section 1128(b)(4) must not be less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered. Petitioner contends that because Petitioner agreed to not reapply for the NHA license that the exclusion is in essence, perpetual. Petitioner further argues that the effect of the exclusion is to also exclude her from practice as a licensed pharmacist, for which her license, although inactive, is in good standing, and also from her role as the CEO of her personal-care-services business that she says *does not* provide health care but *does* receive payments from Medicaid. These arguments are, however, irrelevant. If, as here, the I.G. is

authorized to impose an exclusion pursuant to section 1128(b)(4), that exclusion is reasonable as a matter of law if it is concurrent with the period during which the individual's license to provide health care is revoked, suspended, or surrendered. *Tracey Gates, R.N.*, DAB No. 1768. That is the period of exclusion the I.G. proposes in this case, and it is reasonable as a matter of law. Moreover, Petitioner's status as a licensed or registered pharmacist, or as the owner of a personal-care-services business, is irrelevant to the existence of a predicate for the I.G.'s exclusion action. That predicate has been established. Whether Petitioner's ability to practice as a pharmacist or to operate her business is limited by that exclusion is not before me, except to the extent that those activities must not include her participation in Medicare, Medicaid, and all other federal health care programs as defined at section 1128B(f) of the Act.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Linda R. Ghaffari from participation in Medicare, Medicaid, and all other federal health care programs is SUSTAINED, pursuant to the terms of section 1128(b)(4)(A) and (B) of the Act, 42 U.S.C. § 1320a-7(b)(4). That exclusion remains in effect, by operation of section 1128(c)(3)(E) of the Act, 42 U.S.C. § 1320a-7(c)(3)(E), until she regains her license to practice as a nursing home administrator in the State of New Mexico.

/s/
Richard J. Smith
Administrative Law Judge