

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

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In the Case of:)	
)	
Maurice Labbe,)	Date: August 5, 1997
)	
Petitioner,)	
)	
- v. -)	Docket No. C-97-212
)	Decision No. CR488
The Inspector General.)	
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DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Maurice Labbe, from participating in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs (Medicare and Medicaid), until Petitioner obtains a valid license to practice medicine or provide health care in the State of Maine. I base my decision on evidence which proves that Petitioner surrendered his Nursing Home Administrator's license during the pendency in that State of a formal disciplinary proceeding related to his professional competence, professional performance, or financial integrity. I further base my decision on evidence which proves that Petitioner lost such license, and the right to apply for or renew it, for reasons bearing on his professional competence, professional performance, or financial integrity. Additionally, I find that when an exclusion imposed by the I.G., as here, is concurrent with the remedy imposed by a State licensing authority, then no issue of reasonableness exists and such an exclusion is mandated by law.

BACKGROUND

By letter dated January 13, 1997, the I.G. notified Petitioner that he was being excluded from participating in the Medicare and Medicaid programs. The I.G. explained that Petitioner's exclusion was authorized under section 1128(b)(4) of the Social Security Act (Act) because Petitioner's "license to practice medicine or provide health care in the State of Maine was revoked, suspended, or otherwise lost or was surrendered while a

formal disciplinary proceeding was pending before the licensing authority 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 until he obtained a valid license to practice medicine or provide health care in the State of Maine.

Petitioner requested a hearing and the case was assigned to me for decision. The parties agreed that the case could be decided based on their written submissions, and that an in-person hearing was not necessary. The parties have each submitted written arguments and proposed exhibits.

The I.G. submitted six proposed exhibits (I.G. Ex. 1-6). Petitioner did not object to these exhibits. Petitioner submitted two exhibits labelled Ex. A and B with his February 24, 1997 request for a hearing. I have re-marked these exhibits as P. Ex. 1 and 2. Petitioner also submitted six exhibits with his response (P. Br.) to the I.G.'s brief in support of exclusion (I.G. Br.). I have re-marked these exhibits (originally designated P. Ex. 1-6) as P. Ex. 3-8. Petitioner submitted also the affidavit of Peter D. Lowe. I have designated Mr. Lowe's affidavit as P. Ex. 9. The I.G. did not object to Petitioner's exhibits or to Mr. Lowe's affidavit. Thus, in the absence of objection, I am admitting I.G. Ex. 1-6 and P. Ex. 1-9 into evidence in this case. I base my decision in this case on these exhibits, the applicable law, and the arguments of the parties.

APPLICABLE LAW

Pursuant to section 1128(b)(4) of the Act, the I.G. may exclude "[a]ny 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 the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity."

Pursuant to section 1128(c)(3)(E) of the Act, as amended by section 212 of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104-191), 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 the entity is excluded or suspended from a Federal or State health care program." Prior to 1996, the Act provided no criteria for establishing the length of exclusions for individuals or entities excluded pursuant to section 1128(b)(4). The 1996 amendments require, at section 1128(c)(3)(E), that an individual or entity who is excluded under section 1128(b)(4) be excluded for not less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered. Under the 1996 amendments, no issue of reasonableness exists where the exclusion imposed by the I.G. is concurrent with the loss, suspension, or revocation of a State license. A concurrent exclusion, as in Petitioner's case, is the mandated minimum required by law.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCL)

1. At all times relevant to this case, Petitioner was the owner of Medical Care Management Corporation, which owned and operated Russell Park Manor, a nursing home licensed in the State of Maine. I.G. Br. 2, para. 1; P. Br. 2, fn. 1.
2. Petitioner held the Nursing Home Administrator's license for Russell Park Manor. I.G. Br. 2, para. 2; P. Br. 2, fn. 1.
3. As Administrator, Petitioner was responsible for the management and operation of Russell Park Manor. I.G. Br. 2, para. 3; P. Br. 2, fn. 1.
4. Following a survey of Russell Park Manor completed on August 4, 1995, the Maine Department of Human Services ("DHS") issued a statement of deficiencies report (DHS survey report) citing a number of violations at Russell Park Manor involving patient care. I.G. Ex. 1; I.G. Br. 2, para. 4; P. Br. 2, fn. 1.

¹ An issue of reasonableness will arise only if the I.G. imposes an exclusion for a longer term than the sanction which has been imposed by a State licensing authority. In that event, the administrative law judge will hear and decide the issue of whether the period of exclusion which extends beyond the concurrent exclusion term is reasonable.

5. On August 4, 1995, in a case brought by DHS against the owners and operators of Russell Park Manor, the Superior Court of Androscoggin County, Maine (Superior Court), placed Russell Park Manor into receivership. I.G. Ex. 2.
6. In settlement of the DHS action, Petitioner, as reflected in a Superior Court Consent Order dated September 6, 1995, agreed to surrender his Maine Nursing Home Administrator's license and not to re-apply for an Administrator's license in the State of Maine. I.G. Ex. 2.
7. The Maine Nursing Home Administrators Board (Board) received a copy of the August 4, 1995 DHS survey report. I.G. Ex. 1; I.G. Ex. 3 at 1; I.G. Ex. 4 at 1.
8. The Board notified Petitioner that at its September 20, 1995 meeting, it had "found that reasonable grounds exist to believe that (Petitioner) may have violated Board statutes or rules which govern (his) license as a Nursing Home Administrator." I.G. Ex. 3.
9. By letter dated September 20, 1995, the Board agreed to allow Petitioner to resolve the complaint by entering into a consent agreement whereby he would agree to surrender his Nursing Home Administrator's license and not apply for any presently offered or future offered category of license in the State of Maine. I.G. Ex. 3; see I.G. Ex. 6.
10. In its September 20, 1995 letter, the Board further stated that it would place the issue of Petitioner's alleged violations on the agenda of its next meeting for "appropriate action by the Board." I.G. Ex. 3; see I.G. Ex. 6.
11. On November 14, 1995, Petitioner entered into a Consent Agreement with the Board whereby he agreed to indefinitely surrender his license and not apply for future licensure. I.G. Ex. 4.
12. On January 13, 1997, the I.G. notified Petitioner of his indefinite exclusion from participation in the Medicare and Medicaid programs. I.G. Ex. 5.
13. Section 1128(b)(4)(A) of the Act authorizes the I.G. to exclude an individual 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 professional competence, professional performance, or financial integrity.

14. Section 1128(b)(4)(B) of the Act authorizes the I.G. to exclude an individual who surrenders his or her license to provide health care during the pendency of formal disciplinary proceedings by a State's licensing authority which concern the individual's professional competence, professional performance, or financial integrity.

15. The consent agreement Petitioner entered into with the Board resulted in the loss of his right to apply for or renew his Nursing Home Administrator's license, within the scope of section 1128(b)(4)(A) of the Act. I.G. Ex. 4; See I.G. Br. 4, para. 13; P. Br. 2, fn. 1.

16. Petitioner surrendered his Nursing Home Administrator's license during the pendency of a formal disciplinary proceeding, within the scope of section 1128(b)(4)(B) of the Act. I.G. Ex. 3, 4, 6.

17. Petitioner's loss or surrender of his Nursing Home Administrator's license was for reasons bearing on or concerning his professional competence, professional performance, or financial integrity, within the scope of section 1128(b)(4) of the Act. FFCL 1-16.

18. The I.G. was authorized to exclude Petitioner pursuant to sections 1128(b)(4)(A) and 1128(b)(4)(B) of the Act. FFCL 1 - 17.

19. Where an exclusion is imposed pursuant to section 1128(b)(4) of the Act, the period of the exclusion shall not be less than the period during which the individual's license to provide health care is revoked, suspended, or surrendered. Act, section 1128(c)(3)(E).

20. When an exclusion is imposed pursuant to section 1128(b)(4) of the Act and the period of exclusion is concurrent with the loss, suspension, revocation, or surrender of a State license, then no issue of reasonableness concerning the length of the exclusion exists.

21. The exclusion imposed by the I.G. against Petitioner, which will remain in effect until Petitioner obtains a valid license to practice medicine or provide health care in the State of Maine, was authorized under sections 1128(b)(4) and 1128(c)(3)(E) of the Act.

PETITIONER'S ARGUMENTS

Petitioner's primary argument is that he did not surrender his license as specified in section 1128(b)(4) of the Act. Rather, he argues that he relinquished his license prior to the institution of formal disciplinary proceedings against him. He asserts that he did this on August 28, 1995, before he received notification of the September 20, 1995 Board proceedings against him.

Petitioner also contends that he relinquished his license to negotiate a settlement of litigation with the State of Maine, and that he did not admit any of the allegations made against him in the DHS survey report. Thus, Petitioner argues that his license was not surrendered or lost for reasons bearing on his professional competence, professional performance, or financial integrity.

Petitioner also contends that for the I.G. to now take action against him is against the intent of the settlement agreement entered into between his company and DHS.

DISCUSSION

The record in this case establishes that Petitioner surrendered his Nursing Home Administrator's license while a formal disciplinary proceeding was pending before the Board which related to his professional performance, professional competence, or financial integrity. I specifically reject Petitioner's contention that he voluntarily relinquished his license prior to such disciplinary proceeding. Such contention does not comport with the facts in his case. Petitioner was the licensed Nursing Home Administrator of the Russell Park Manor Nursing Home. In 1995, DHS conducted a survey of the facility and found its operation deficient in a number of areas, including the quality of patient care. DHS then generated the August 4, 1995 survey report. I.G. Ex. 1.

The DHS survey report was forwarded to the Board. I.G. Ex. 1, 3, 4. The allegations raised in the DHS survey report relate to Petitioner's professional performance and competence as they pertain to his ability to properly manage Russell Park Manor. The same DHS survey report was relied upon in the Superior Court action filed by DHS against Petitioner's medical management company. This action was resolved through a Consent Order, in which Petitioner agreed to permanently relinquish his State of Maine administrator's license and his company agreed to cease managing Russell Park Manor. I.G. Ex. 2.

During its September 20, 1995 meeting, based on the DHS survey report and the Superior Court Consent Order, the Board found reasonable grounds to believe Petitioner may have violated its rules or statutes governing his license as a Nursing Home Administrator. I.G. Ex. 3, 6. The Board sent a letter dated September 20, 1995, to Petitioner informing him of its findings and proposed action. I.G. Ex. 3. This letter indicated that the Board had begun a formal investigation of the allegations against Petitioner and offered him the opportunity to enter into a consent agreement with it whereby he would permanently surrender his license and not apply for future licensure. On November 14, 1995, Petitioner signed such agreement, which was accepted by the Board on November 29, 1995. I.G. Ex. 4.

The decisions of Departmental Appeals Board (DAB) administrative law judges (ALJ) establish that a chronology such as occurred in Petitioner's case constitutes a license surrender within the scope of section 1128(b)(4)(B) of the Act. An ALJ found the I.G.'s indefinite exclusion of a provider who violated section 1128(b)(4) to be reasonable in Dillard P. Enright, DAB CR138 (1991). In that case, the petitioner alleged that his license was not surrendered while a formal disciplinary proceeding was pending. Enright involved a petitioner who surrendered his nursing license to a Nursing Board before formal findings were made as to the allegations in a complaint filed against him. In this decision, the ALJ found that the petitioner's license surrender at an informal meeting was a surrender while a formal disciplinary proceeding was pending. The ALJ found that "[i]f Petitioner had not surrendered his license, the Nursing Board would have had a responsibility to resolve the issues raised by the claims . . . The Nursing Board, in the absence of Petitioner's surrender of his license, was fully prepared to go forward." Enright, at 9. Likewise, in this case, the Board was prepared to go forward, as Petitioner's failure to enter into a consent agreement would result in the matter being "placed on the agenda of the next meeting of the Board . . . for appropriate action." I.G. Ex. 3.

In John W. Foderick, M.D., DAB CR43 (1989), an ALJ found that legislative history defines a formal disciplinary proceeding as "a license proceeding which places a party's license in jeopardy and which provides that party with an opportunity to defend against charges which might result in license suspension or revocation." Foderick at 6. This decision further states that "[t]he law presumes that an individual or entity who surrenders a health care license in the face of charges, and in the circumstance

where he has the opportunity to defend himself, is as likely to be untrustworthy as the individual or entity who loses a license after litigating the issue . . ." Id. at 7.

In the present case, Petitioner surrendered his license in the wake of the Board's investigation of a complaint filed against him. I.G. Ex. 3, 4. A letter from the Board dated September 20, 1995, notified Petitioner of the complaint and provided him with the opportunity to respond. I.G. Ex. 3. If Petitioner had not surrendered his license, the Board would have continued its investigation of the allegations which could have led to sanctions including license suspension or revocation. Petitioner was subject to the jurisdiction of the Board, was notified of the complaint pending against him, and was afforded the opportunity to respond to the complaint. I.G. Ex. 3. Prior to the completion of formal proceedings, Petitioner entered into a consent agreement with the Board. I.G. Ex. 4. Petitioner agreed to surrender physical possession of his wallet and wall licenses to the Board. Petitioner also agreed that the surrender of his licenses would be indefinite, and that he would not be granted licensure in any existing or future classification governed by the Board. In exchange, the Board agreed to make no formal findings as to the DHS survey report and to refrain from issuing any media statements regarding Petitioner or his management company. I.G. Ex. 4.

Contrary to Petitioner's assertions, the chronology in his case does not support his claim that he voluntarily relinquished his license prior to commencement of formal disciplinary proceedings. Petitioner relies on his letter to the Board, dated August 28, 1995, to support his claim that he voluntarily relinquished his license. However, in such correspondence, he merely states that he wished to "relinquish my State of Maine Administrator's license effective immediately." P. Ex. 2. He did not, in fact, surrender such license until he entered into the consent agreement with the Board on November 14, 1995, at which time he physically surrendered his license as required by the Board. This action, however, was in direct response to the Board complaint dated September 20, 1995. I.G. Ex. 3. Correspondence from Board personnel also shows that the Board did not view Petitioner's August 28, 1995 correspondence as constituting a surrender of his license. In a letter dated September 18, 1995, acknowledging receipt of Petitioner's August 28, 1995 letter, Gregory Girardin, Case Compliance Coordinator of the Maine Division of Licensing and Enforcement, states that he would present

Petitioner's request to the Board at its next meeting, an action which, in fact, resulted in the issuance of the September 20, 1995 complaint. P. Ex. 7. From such response, it can be concluded that the Board did not view Petitioner's action as sufficient, without more, to constitute a relinquishment. Indeed, the Board issued a formal complaint on September 20, 1995. I.G. Ex. 3, 6.

As an alternative ground for sustaining the I.G., I note that the agreement entered into by Petitioner with the Board resulted in the loss of his license and precludes him from ever applying for a license in the State of Maine. I.G. Ex. 4. I therefore find that this agreement also equates to a loss of a license or right to apply for or renew a license under section 1128(b)(4)(A) of the Act.

Petitioner also contends that his license was not lost or surrendered for reasons bearing on or concerning his professional competence, professional performance or financial integrity. I note that the DHS survey report of Russell Park Manor, which was completed on August 4, 1995, was conducted while that facility was under Petitioner's ownership and operation, and cited deficiencies which, if sustained, would constitute mismanagement or poor quality of care at the facility (examples of which, among many other cited deficiencies, include deficiencies regarding the protection of resident funds, where the Administrator's written, signed statement of self-assurance did not meet the requirements of either a purchase of a security bond or an acceptable alternative to a security bond; as well as the 19 separate allegations based on surveyor observations that residents at the facility did not receive care in a manner and in an environment that maintained or enhanced each resident's dignity). I.G. Ex. 1. The deficiencies cited in the survey report are directly related to Petitioner's responsibilities as a Nursing Home Administrator, as they relate to the management and care of the residents of Russell Park Manor. It was this survey report upon which the Superior Court and Board actions were based. It is not necessary under the Act that the I.G. prove that the allegations in the survey report are true. It is necessary only that Petitioner's license was lost or surrendered for reasons bearing on or concerning his professional competence, performance, or financial integrity. I agree with the I.G. (I.G. Response to Petitioner's Brief at 8) that it can hardly be disputed that charges against a Nursing Home Administrator regarding management of a nursing home facility (such as those made in the DHS survey report) directly relate to that administrator's or that

facility's professional competence or performance (and here, with regard to the protection of resident funds, perhaps Petitioner's financial integrity as well). Thus, I conclude that the loss or surrender of Petitioner's license was for reasons bearing on or concerning his professional competence, professional performance, or financial integrity.

Finally, Petitioner contends that for the I.G. to take action against him is against the intent of the settlement entered into between DHS and Medical Care Management. I.G. Ex. 2. An examination of the Superior Court Consent Order, however, shows no merit to this claim. This agreement specifically provides that Petitioner relinquish and not be allowed to reapply for his Nursing Home Administrator's license. The I.G.'s action in excluding Petitioner until he regains his Maine license is entirely consistent with this intent.

CONCLUSION

I conclude that the I.G. was authorized to exclude Petitioner pursuant to sections 1128(b)(4)(A) and (B) of the Act. I conclude also that the term of exclusion imposed by the I.G. is mandated by section 1128(c)(3)(E) of the Act.

/s/

Joseph K. Riotto
Administrative Law Judge