

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Loretta Chee,	)	DATE: January 9, 1995
Petitioner,	)	
- v. -	)	Docket No. C-94-351
The Inspector General.	)	Decision No. CR351

DECISION

By letter dated February 8, 1994, Loretta Chee, the Petitioner herein, was notified by the Inspector General (I.G.), of the U.S. Department of Health & Human Services (HHS), that it had been decided to exclude her for a period of five years from participation in the Medicare program and from participation in the State health care programs described in section 1128(h) of the Social Security Act (Act), which are referred to herein as "Medicaid."

The reason given for this action was that exclusion, for at least five years, is mandated by sections 1128(a)(2) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense related to the neglect or abuse of patients, in connection with the delivery of a health care item or service.

Petitioner filed a timely request for review of the I.G.'s action by an administrative law judge (ALJ) of the Departmental Appeals Board (DAB). The I.G. moved for summary disposition. Petitioner agreed that the case could be decided on the documentary record and that no in-person hearing was necessary. Petitioner then moved for summary disposition in her favor.

Because I determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided in this case are the legal implications of the undisputed facts, I have granted the

requests for summary disposition and decided the case on the basis of the parties' written arguments and evidence. 42 C.F.R. § 1005.4(b)(12).

I find no reason to disturb the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

#### APPLICABLE LAW

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

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

1. During the period relevant to this case, Petitioner was a nurse's aide at San Juan Manor Nursing Home, a health care facility, located in New Mexico. I.G. Exs. 1, 6.
2. While employed at San Juan Manor Nursing Home, Petitioner participated in caring for a patient and resident named James Smith. I.G. Exs. 1 - 6; P. Ex. 1.
3. Petitioner attests that, on November 15, 1992, while she was attempting to bathe Mr. Smith prior to his bedtime, "he became very combative." P. Ex. 1.
4. Petitioner contends that, because Mr. Smith had kicked and hit her, she then "restrained" Mr. Smith by tying him to the bed. P. Ex. 1.

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<sup>1</sup> Petitioner and the I.G. each submitted motions for summary disposition and briefs. The I.G. submitted a reply brief. The I.G. also submitted evidence in the form of eight documentary exhibits. I cite the I.G. exhibits as "I.G. Ex(s). (number) at (page)." I admit I.G. exhibits 1 - 8. Petitioner submitted her affidavit in opposition to the I.G.'s motion for summary disposition. I am admitting this in the record as Petitioner's exhibit and cite it as "P. Ex. 1."

5. Based upon the incident involving Mr. Smith, a criminal complaint was filed in the Magistrate's Court, San Juan County, New Mexico, on or about March 9, 1993, charging Petitioner with false imprisonment -- i.e., that Petitioner intentionally restrained another person without his consent and with knowledge that she had no lawful authority to do so. I.G. Ex. 1.

6. The complaint stated further that Petitioner "did restrain James Smith, a resident of the San Juan Manor Nursing Home, a care facility, by tying him to a bed immobilized and leaving him unattended and said restraint was without the consent of James Smith and not authorized by the facility nor any doctor or nurse, and the defendant knew she had no lawful authority to restrain James Smith." I.G. Ex. 1.

7. Petitioner entered into a plea bargain with the State whereby she pled nolo contendere to a misdemeanor charge of having committed battery upon Mr. Smith. I.G. Exs. 2, 3.

8. By order issued May 26, 1993, the court "accepted the plea as an admission of guilt for purposes of this action only," but ruled that sentencing was to be "deferred 90 days on the condition no similar charges during this time [sic]." I.G. Ex. 4.

9. On October 4, 1993, the court dismissed the case against Petitioner. The reason for its action was that Petitioner ". . . did not receive any similar charges during the deferral period." I.G. Ex. 5.

10. To justify excluding an individual pursuant to section 1128(a)(2) of the Act, the I.G. must prove: (1) that the individual has been convicted of a criminal offense; (2) that the conviction is related to the neglect or abuse of patients; and (3) that the patient neglect or abuse to which an excluded individual's conviction is related occurred in connection with the delivery of a health care item or service.

11. The court's acceptance of Petitioner's nolo contendere plea constitutes a conviction within the meaning of section 1128(i)(3) of the Act.

12. The court's deferral of a formal finding of guilt against Petitioner is a deferred adjudication or other arrangement or program where judgment of conviction has been withheld, constituting a conviction within the meaning of section 1128(i)(4) of the Act.

13. The conviction of the criminal offense at issue here relates to the neglect or abuse of a patient, and is connected with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Act.

14. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for five years, as required by the minimum mandatory exclusion provisions of sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

15. Neither the I.G. nor an administrative law judge is authorized to reduce the length of a mandatory five-year period of exclusion.

16. The determination of the I.G. to impose and direct a five-year exclusion in this case does not violate the prohibition against double jeopardy under the United States Constitution because the sanction imposed is reasonably related to a legitimate remedial objective -- i.e., protecting consumers of health care -- and because such exclusion was preceded by a State conviction.

#### PETITIONER'S POSITION

In documents filed in this proceeding, Petitioner acknowledges that she "restrained" Mr. Smith.<sup>2</sup> She states also that she "does not dispute" that such crime related to patient abuse in connection with the delivery of a health care item or service.

Petitioner contends, nevertheless, that the law does not require her exclusion. In particular, she maintains that the dismissal of the case against her by the court is not a deferred adjudication encompassed by section 1128(i)(4) of the Act, which section classifies deferred adjudication as a form of conviction. Evidence of the absence of deferred adjudication, she says, is that certain policies or practices, allegedly indispensable to deferred adjudication -- forbidding a defendant from withdrawing a guilty or nolo plea and requiring a

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<sup>2</sup> In her Brief in Opposition, Petitioner, through her counsel, stated that she "admits and adopts the material facts submitted by respondent in his [first] brief." Because there is some ambiguity as to just what this stipulation encompasses, I have tried to independently show a factual or legal basis for the reasoning and holdings of this Decision.

defendant to pay fines, expenses, or restitution before commencing a deferral-of-adjudication period -- were not applied to her, thereby showing that her case was not a deferred adjudication. Instead, she maintains that what occurred in her case was a deferred prosecution which does not mandate her exclusion. Petitioner cites Travers v. Shalala, 20 F.3d 993 (9th Cir. 1994) as supporting her position.

Additionally, Petitioner argues that the length of the exclusion makes it disproportionate and punitive. Being punitive in nature, she continues, an exclusion would amount to her being twice punished for the same offense, in violation of the Eighth Amendment. Finally, and also with regard to proportionality, she suggests that for the government to do something as drastic as taking away her ability to earn a living, in a case like this, where the government suffered no initial financial loss, violates the Constitution. Petitioner cites United States v. Halper, 490 U.S. 435 (1989).

#### DISCUSSION

The law relied upon by the I.G. to exclude Petitioner requires, initially, that the person being excluded have been "convicted" of a crime. In the case at hand, Petitioner, a nurse's aide, arranged a plea bargain with the prosecution. She entered a plea of nolo contendere (meaning she did not dispute the State's allegations) to the charge that she had used unlawful violence against Mr. Smith.

The State judge accepted the nolo plea "as an admission of guilt for purposes of this action only" but ruled sentencing was to be "deferred 90 days on the condition no similar charges during this time [sic]." When Petitioner completed the required period of good behavior, the charges against her were dropped.

Section 1128(i) of the Act provides four definitions of the term "convicted." Specifically: a court could enter a judgment of conviction pursuant to section 1128(i)(1); a court could make a formal finding of guilt pursuant to section 1128(i)(2); a court could accept a guilty or nolo contendere plea pursuant to section 1128(i)(3); or, a court could allow the individual or entity to enter into a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld pursuant to section 1128(i)(4).

Two of these definitions of "convicted" are relevant here. For purposes of mandatory exclusion under subsections 1128(a) and (b), a person will be regarded as having been "convicted" if, inter alia, he has entered a plea of nolo contendere to a criminal charge and the court accepts such plea, or if (notwithstanding the court's acceptance of a plea or determination of guilt) a formal judgment of conviction is deferred or withheld, as might occur in a first offender program. Thus, in the case at hand, two independent statutory bases apparently are present which establish that Petitioner was "convicted" -- i.e., the State court's acceptance of Petitioner's plea and the presence of Petitioner's deferred adjudication.

Petitioner, though, believes that the State court's action was not a deferred adjudication within the meaning of section 1128(i)(4) of the Act. She argues that it was a deferred prosecution, which does not mandate her exclusion. She is of the opinion that the Travers case supports her position in that it shows that, in a genuine deferred adjudication, the accused cannot withdraw a guilty or nolo plea, and that a defendant must pay fines, expenses, or restitution before being allowed to commence the deferral period. I, however, cannot agree that these factors support her position.

Travers, like the present case, arose out of the I.G.'s imposition of the five-year mandatory exclusion provided in section 1128(a) upon a health care worker who had been convicted of a relevant criminal offense. The Court of Appeals, among other things, affirmed that a deferred prosecution was not the equivalent of a conviction, but that deferred adjudication was.

The Travers decision noted that "the heart of a deferred prosecution is an agreement by the prosecutor to delay bringing or prosecuting charges. In a deferred adjudication, there is no such deferral by the prosecutor." The decision further states that "[i]f the defendant [in a deferred prosecution] does not live up to the terms of his agreement with the prosecutor, he may be free to enter or persist in a plea of not guilty and proceed to trial. In a deferred adjudication, on the other hand, if the defendant does not live up to the terms of his agreement, he is not free to set aside his plea or proceed to trial -- the court may simply enter a judgment of conviction. . . . because the defendant has irrevocably committed himself to a plea of guilty or no contest which cannot be unilaterally withdrawn."

These holdings from Travers are consistent with the conclusion that what occurred in the case at hand was indeed a deferred adjudication. First, there is no indication that the prosecution entered into an agreement with anybody to delay Petitioner's case. Next, it must be emphasized that the New Mexico judge characterized his own ruling as deferred sentencing. Third, Petitioner was clearly advised that her nolo plea meant that she surrendered her right to a trial; that no future trials could be expected; and that all that remained was sentencing. This indicates that no prosecutorial action was being reserved for the future. Likewise, the prosecution was not free to change its mind and recharge or try Petitioner. The prosecutor gave up this option by signing the "Plea and Disposition Agreement," which provides that the original charges (arising out of the Smith incident) may not again be brought against Petitioner. I.G. Ex. 2. Thus, the prosecution was not "deferring" action against Petitioner. Rather, it had negotiated the plea bargain, and, from that time, its role was, essentially, over.

As to Petitioner's references to a defendant's inability to withdraw a plea, Travers simply makes it clear that, in a deferred adjudication, the defendant's guilt has usually been established (by plea or otherwise) well before the judge must decide upon sanctions, deferrals, or the like.

Petitioner insists that certain policies or practices, allegedly characteristic of deferred adjudication (forbidding a defendant from withdrawing a guilty or nolo plea and requiring a defendant to pay fines, expenses, or restitution before commencing a deferral-of-adjudication period) were not applied to her, thereby proving that her case was not a deferred adjudication. The evidence, however, does not show that Petitioner had a genuine opportunity to change her plea. There were some references in court documents to withdrawal of pleas, but these were multipurpose documents and the language did not apply to Petitioner. The contention that there must be substantial financial penalties prior to a deferral of adjudication has not been shown to have any legal basis.

The law imposes the further requirement (in subsection 1128(a)(2)) that the criminal conviction at issue be related to the neglect or abuse of patients in connection with the delivery of a health care item or service.

This criterion is readily satisfied in the instant case. San Juan Manor Nursing Home, where Petitioner worked, was a facility whose purpose was providing health care

services. It is undisputed that Petitioner's job -- nurse's aide -- directly involved her in patient care and the delivery of health care services to individuals at San Juan Manor Nursing Home. Indeed, she was personally and directly caring for Mr. Smith when she used unlawful force on him.

As to whether Petitioner's misconduct constituted "abuse" or "neglect," neither of these terms is defined in the Act, but it is self-evident that a health care worker's use of unauthorized force and "restraint" on an individual entrusted to her amounts to abuse. Furthermore, Petitioner entered her nolo plea to a charge of battery. Battery, by definition, involves the intentional use of unlawful force, in a harmful or offensive manner,<sup>3</sup> and, is inherently violative of section 1128(a)(2).

As to Petitioner's constitutional arguments, inasmuch as the sanction imposed herein is reasonably related to a legitimate remedial objective -- i.e., protecting consumers of health care -- such civil sanction does not violate the prohibition against double jeopardy. Manocchio v. Kusserow, 961 F.2d 1539, 1542 (11th Cir. 1992).

It is also well established that the constitutional prohibition against double jeopardy does not apply to exclusions from the Medicare or Medicaid programs arising out of a State conviction. Kahn v. Inspector General, 848 F. Supp. 432, 437 (E.D. N.Y. 1994).

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<sup>3</sup> See I.G.'s brief at page 10. See also Black's Law Dictionary.



## CONCLUSION

Sections 1128(a)(2) and 1128(c)(3)(B) of the Act mandate that the Petitioner herein be excluded from the Medicare and Medicaid programs for a period of at least five years because of her State criminal conviction.

/s/

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Joseph K. Riotto  
Administrative Law Judge