**Department of Health and Human Services**

# DEPARTMENTAL APPEALS BOARD

## Civil Remedies Division

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| In the Case of: | ) | |
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| William B. Barham, M.D., | ) | DATE: August 23, 1996 |
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| Petitioner, | ) | |
| | ) | |
| - v. - | ) | Docket No. C-96-025 |
| | ) | Decision No. CR432 |
| The Inspector General. | ) | |
| | ) | |

## DECISION

By letter dated October 27, 1995 (Notice), the Inspector General (I.G.) notified Petitioner that he was being excluded for five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Block Grants to States for Social Services programs. The I.G. alleged that Petitioner was convicted, in the United States Navy, by General Court Martial, of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Social Security Act (Act). The Notice informed Petitioner that section 1128(c)(3)(B) of the Act requires that individuals convicted of such offenses be excluded for at least five years.

On November 13, 1995, Petitioner requested a hearing before an administrative law judge of the Departmental Appeals Board (DAB) to contest his exclusion. In his hearing request, Petitioner argued that he should not be excluded for three reasons: 1) a court martial is not a "conviction" within the meaning of section 1128(i) of the Act; 2) even if a court martial were a conviction, Petitioner's conviction was not related to neglect or abuse of patients, within the meaning of section 1128(a)(2) of the Act; and 3) Petitioner does not pose a threat to patient health or safety.

During the January 24, 1996 telephone prehearing conference, the parties agreed that there were no material facts in dispute. Accordingly, Petitioner

waived his right to an in-person hearing and I set a schedule for the parties to file briefs supported by documentary evidence. The I.G. filed a Brief (I.G. Br.) and four exhibits (I.G. Exs. 1-4). Petitioner filed a Brief (P. Br.) and three exhibits (P. Exs. 1-3). Neither party objected to the admission of the offered exhibits. I admit into evidence I.G. Exs. 1-4 and P. Exs. 1-3.

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

Section 1128(a)(2) of the Act provides that any individual or entity that has been convicted, under federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service, must be excluded from participation in any program under title XVIII, including any State health care program as defined in section 1128(h). Section 1128(c)(3)(B) of the Act makes mandatory an exclusion of at least five years for individuals convicted of such crimes.

Section 1128(i) of the Act provides that an individual will be deemed convicted under any of the following circumstances:

> (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to the criminal conduct has been expunged;
>
> (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
>
> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
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> (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

## PETITIONER'S ARGUMENT

Petitioner contends that his conviction in the U.S. Navy, by General Court Martial, does not meet the requirements of section 1128(i) of the Act because courts martial are not part of the federal judiciary, but are legislative courts with jurisdiction independent of the judicial power created and defined by Article III of the Constitution. He maintains that mandatory exclusion is limited to those persons who have been convicted by an Article III federal court, so that each person so excluded is afforded those rights and protections offered by the federal judiciary system. He asserts also that he could not even have been charged with "indecent assault" in the federal system, since no similar charge exists under federal or applicable State law.

The Petitioner contends also that the offense of which he was convicted did not relate to the abuse or neglect of patients. He asserts that the incidents underlying the offense of which he was convicted were not abuse but were consensual acts between adults, and that the alleged victims made no claim of injury or abuse. Petitioner contends further that he was not convicted of an offense related to the neglect or abuse of patients, since he was charged and convicted under Article 134 of the Uniform Code of Miliary Justice which applies to sexual acts generally.

Finally, Petitioner contends that he does not present a threat to the health or safety of patients. He points out that he has undergone intensive psychotherapy and claims that he has resolved those issues which triggered the violations. In this regard he asserts that it is the opinion of his psychotherapist that he has been fully rehabilitated and no longer presents a threat to his patients. Petitioner maintains that this conclusion is supported by the decision of the Virginia Board of Medicine not to suspend or revoke his medical license, and by the testimony of his current mentor, who has observed Petitioner for over one year.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant herein, Petitioner was a physician and lieutenant commander in the United States Navy Medical Corps.

2. Petitioner was charged with five counts of having committed indecent assaults upon patients in his care. I.G. Ex. 1 at 229-230.

3. Following a court martial, the Petitioner was found guilty on June 30, 1993, of five counts of indecent assault under Article 134 of the Uniform Code of Military Justice, 10 U.S.C. section 934. I.G. Ex. 1 at 13-14, 483.

4. As a result of his conviction, Petitioner was removed from the Navy, fined, and imprisoned. I.G. Ex. 1 at 2, 501.

5. Conviction by court martial is a conviction by a federal court within the meaning of section 1128(i) of the Act.

6. Petitioner was convicted of criminal offenses relating to abuse of patients. Findings 1-3.

7. The offenses for which Petitioner was convicted occurred in connection with the delivery of a health care item or service. Findings 2, 3.

8. Petitioner's exclusion is mandatory pursuant to section 1128(a)(2) of the Act. Findings 5-7.

9. It is irrelevant that the offenses of which Petitioner was convicted do not have a civilian analogue, because the offenses clearly involve the abuse of patients.

10. The I.G. was required to exclude Petitioner from participating in the Medicare and Medicaid programs for a minimum of five years. Act, section 1128(c)(3)(B).

11. Petitioner's alleged rehabilitation and psychotherapy are irrelevant to the statutory requirement that he be excluded for five years.

## DISCUSSION

Under the statutory scheme of sections 1128(a)(2) and 1128(c)(3)(B) of the Act, I must uphold Petitioner's five-year exclusion if the I.G. proves the following elements:

> 1) Petitioner was convicted of a criminal offense, within the meaning of section 1128(i) of the Act; and

2) Petitioner's conviction was for a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service.

Petitioner denies that he was convicted within the meaning of the Act. He further denies that his conviction related to neglect or abuse of patients. Finally, Petitioner argues that he should not be excluded for five years because he has been rehabilitated. I conclude that the I.G. has proved each required element. I have no authority to reduce to less than five years the length of a mandatory exclusion. Therefore, I uphold Petitioner's exclusion.

A. Petitioner was convicted of a criminal offense.

I find that Petitioner was convicted of a criminal offense, within the meaning of sections 1128(i)(1) and (2) of the Act. Petitioner acknowledges that he was convicted of indecent assault, after trial by general court martial. P. Br. at 1, 10. Petitioner argues, however, that a court martial is not a federal court within the meaning of section 1128(i). I disagree.

Petitioner argues that Congress did not intend to include courts martial when it used the term "federal court" in section 1128(i). According to Petitioner, Congress intended to limit the term "federal court" to courts established pursuant to Article III of the Constitution. Therefore, Petitioner contends, section 1128(i) does not apply to courts martial because they are established under Article I of the Constitution, rather than under Article III. I reject this argument. Neither the plain language of section 1128 nor its legislative history makes any distinction between Article I and Article III federal courts. I do not share Petitioner's view that, because the statute does not specifically include Article I courts, it should be construed as excluding them from consideration as federal courts. On the contrary, the legislative history of section 1128(i) makes clear that Congress intended to define the term "conviction" broadly. See S. Rep. No. 109, 100th Cong., 1st Sess. 2, reprinted in 1987 U.S.C.C.A.N. 682, 694-95. Indeed, a broad interpretation of the term "conviction" is consistent with the remedial purpose of section 1128, which is to protect federal programs and their beneficiaries and recipients from persons who have been shown to be untrustworthy. Thus, the legislative history and purpose of section 1128 favor a broad and inclusive interpretation of the term "federal court."

My conclusion that courts martial are federal courts within the meaning of section 1128(i) is further reinforced by decisions of the Supreme Court and United States Courts of Appeals. The Supreme Court has held that the judgment of a court martial having jurisdiction to try an officer or soldier for a crime is entitled to the same finality and conclusiveness as are the judgments of a civil court. Grafton v. U.S., 206 U.S. 333, 345 (1907); see also U.S. v. Price, 258 F.2d 918 (3d Cir. 1958); U.S. v. Lee, 428 F.2d 917, 920 (6th Cir. 1970). Indeed, U.S. v. Lee involved facts analogous to those in this case.

The defendant in Lee argued that a conviction by court martial should not subject him to prosecution for transporting a firearm in interstate commerce. At issue in Lee was a statute that made transporting a firearm in interstate commerce a crime if a person had previously been convicted of a crime punishable by imprisonment for a term exceeding one year. As Petitioner argues here, the defendant in Lee argued that, because a court martial was not part of the judicial branch of the federal government, its judgment was not a "conviction." The court of appeals rejected that argument:

> The language of the statute is not limited to judgments rendered by Article III courts. Courts martial are authorized under Article I of the Constitution. [Citations omitted] In cases in which courts martial have jurisdiction, their judgments are to 'be accorded the finality and conclusiveness of a civil court in a case of which it may legally take cognizance.' [Citing Grafton] Jurisdiction of the military court is not challenged in this case.... The finding of the court martial that Lee had committed a crime, and the judgment of sentence in excess of one year are entitled to the conclusiveness of the judgment of an Article III court.

428 F.2d at 920. The court's statements in Lee are equally applicable here. The language of section 1128(i) is not limited to Article III courts.[1] Petitioner has

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[1] Petitioner argues that section 1128(i) is distinguishable from the statute at issue in Lee. According to Petitioner, the phrase "by a Federal, State, or local court" is meant to limit the types of convictions covered by section 1128. As I have discussed above, I do not agree that the phrase is meant to limit the definition of conviction.

made no suggestion that the court martial which convicted him lacked jurisdiction. Here, I find that it is appropriate to accord the judgment of the court martial in Petitioner's case the same finality and conclusiveness that I would accord the judgment of a civil court.

Additional support for this view is found in Article 76 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 876, which provides:

> [T]he proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed ...are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant t those proceedings are binding upon all departments, courts, agencies, and officers of the United States....

This statute underscores that the Petitioner's conviction by court martial is sufficient to bind the Department of Health and Human Services to a determination that Petitioner stands convicted of a criminal offense under section 1128(i) of the Act.

I reject as unfounded also Petitioner's argument that it is unfair to exclude him on the ground that he was not afforded in the court martial procedure all of the constitutional protections granted defendants in federal or State criminal proceedings. It is well-established that petitioners cannot use these administrative proceedings to collaterally attack the substantive determinations or procedural safeguards of their criminal proceedings. Peter J. Edmonson, DAB 1330, at 4-5 (1992).

Even if I could consider such an equitable argument, I would find no merit in it. Clearly Petitioner was afforded substantial protection of his constitutional rights in the trial phase of the court martial. For example, he was represented by counsel (both civilian and military)(I.G. Ex. 1 at 86, 225-26), he had the opportunity to cross-examine the witnesses against him (e.g I.G. Ex. 1 at 327, 376), and the members of the court martial were instructed that they could not convict unless each element of Petitioner's offenses were proved beyond a reasonable doubt (I.G. Ex. 1 at 472-73).

Moreover, an elaborate post-trial procedure and review process has been established by Congress to review courts martial and assure their fairness, as detailed in the UCMJ at 10 U.S.C. §§ 859-876a. A court martial conviction receives an intermediate level of review by the Court of Criminal Appeals under Article 66 of the

UCMJ, 10 U.S.C. section 866. Sections 867 and 941 of the UCMJ provide that courts martial convictions receive an additional level of review by the United States Court of Appeals for the Armed Forces. Section 867a provides for review of decisions of the United States Court of Appeals for the Armed Forces by the United States Supreme Court on writ of certiorari. Part of the responsibility of the court in conducting the post-trial review process of courts martial includes the protection and preservation of the constitutional rights of persons in the armed forces. U.S. v. Frischholz, 16 U.S.C.M.A. 150, 152, 36 C.M.R. 306, 308 (1966). After conviction, Petitioner was advised of and exercised his rights to appellate review of his court martial conviction. I.G. Ex. 1 at 6-12. The Court of Criminal Appeals issued a decision on December 19, 1994 affirming his conviction. I.G. Ex 1 at 4-5.

For the reasons just discussed, I conclude that a court martial is a federal court within the meaning of section 1128(i). Petitioner admits that the court martial convicted him. P. Br. at 1, 10. Therefore, I find that he was convicted within the meaning of section 1128(i)(1). Additionally, the court martial found him guilty of the offenses with which he was charged. I.G. Ex. 1 at 483. Accordingly, Petitioner was convicted also of a criminal offense within the meaning of section 1128(i)(2).

B. Petitioner's conviction was for a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service.

Petitioner contends that the incidents for which he was convicted did not relate to neglect or abuse, but involved consensual acts between adult males. Petitioner implies that he was prosecuted for engaging in homosexual conduct to the discredit of the Navy, rather than for assault. P. Br. at 11. Petitioner points out that one element of the offenses of which he was convicted was that his conduct must be prejudicial to the order and discipline of the service. Because this element would not be present if he had been charged in a non-military court, Petitioner suggests that his conviction cannot be viewed as relating to neglect or abuse of patients, but rather as an offense against military discipline only. Id. This argument ignores the fact that the element involving military discipline was only one of eight elements which the court martial was required to find in order to convict Petitioner. I.G. Ex. 1 at 470. The remaining seven elements of each charge relate solely to

Petitioner's unlawful sexual assaults on his victims.[2] There is nothing unique to the military about the crime of sexual abuse of patients.

Moreover, to the extent that Petitioner is asserting that his victims consented to his conduct, this amounts to a claim that Petitioner did not, in fact, commit the acts of which he was convicted.[3] As I have already stated, Petitioner may not collaterally attack his conviction in this forum. Furthermore, even were I to examine the facts underlying Petitioner's conviction, I would conclude that there is ample evidence that the encounters between Petitioner and his victims were not consensual. The statements of Petitioner's victims clearly show that they did not anticipate Petitioner's improper behavior and that they felt it was humiliating and degrading. I.G. Ex. 1 at 94-109, 321, 323-24, 372-74. The record further reflects that in at least one instance the victim complained immediately thereafter regarding the Petitioner's improper conduct. I.G. Ex. 1 at 375-76. An appellate panel of the DAB has recognized that a conviction for unwanted sexual advances of the sort committed by Petitioner is "related to abuse" within the

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[2] I note that an element of each offense of which Petitioner was convicted was that the acts were done without the victim's consent and against his will. I.G. Ex. 1 at 470-71.

[3] In fact, Petitioner's claim that the acts he was convicted of engaging in were consensual is inconsistent with his own statement, made to the Maryland Board of Physician Quality Assurance in his application for a medical license. In his license application he stated:

> On June 30, 1993, I was convicted at a general court-martial of 5 counts of indecent assault involving two different patients. This became an issue when I fondled and ultimately orally sodomized a patient who was under my care.... Subsequent investigation revealed one other patient who I had fondled and masturbated.... I realize that the behavior that I engaged in with these two patients is repulsive, illegal, unprofessional, and unethical. It can be condoned under no circumstances, and I have taken steps to ensure that it never happens again.

I.G. Ex. 2 at 3.

meaning of section 1128(a)(2) of the Act and, thus, forms a basis for exclusion from the Medicare and Medicaid programs. Bruce Lindberg, D.C., DAB 1280, at 6 (1991).

I find further that the record establishes that the offenses for which Petitioner was convicted involved patients in his care. The record reflects that the victims were enlisted men in the Marines who came to Petitioner for medical treatment of venereal disease, thus establishing a doctor-patient relationship. I.G. Ex. 1 at 94-109, 321, 323-24, 372-74. The record also shows that the assaults were committed in the course of medical examinations by the Petitioner and therefore were in connection with the delivery of a health care item or service under section 1128(a)(2). Id.

The I.G. has proved that Petitioner was convicted of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service. Section 1128(c)(3)(B) of the Act mandates that individuals convicted of such crimes be excluded from participation in Medicare and Medicaid for at least five years. Here, the I.G. has excluded Petitioner for the minimum mandatory period.

Petitioner nevertheless argues that he should not be excluded because he has been rehabilitated through psychotherapy and other means and, thus, no longer presents a danger to his patients. Because Petitioner's exclusion is for the minimum mandatory period, I cannot consider mitigating factors. Peter J. Edmonson, DAB 1330 (1992).

## CONCLUSION

The I.G.'s determination that Petitioner's exclusion for at least five years is mandated by section 1128(a)(2) of the Act and is supported by the applicable law and regulations.

/s/

Joseph K. Riotto
Administrative Law Judge