Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Anthony Cerrone, D.M.D.,	Date: May 3, 1995
Petitioner,	
- v. -	Docket No. C-95-009 Decision No. CR373
The Inspector General.	

DECISION

On August 12, 1994, the Inspector General (I.G.) notified Petitioner that he was being excluded from participating in the following programs: Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services. The I.G. advised Petitioner that she had determined that the exclusion was authorized by section 1128(b)(4) of the Social Security Act (Act). She informed Petitioner that the exclusion specifically was based on Petitioner's surrender of his license to provide health care in the State of New York while a formal disciplinary proceeding was pending in that State relating to Petitioner's professional competence, professional performance, or financial integrity. Petitioner was told that he would not be eligible to apply for reinstatement to the programs until he obtained a valid license to provide health care in New York.

Petitioner requested a hearing. In his request, Petitioner did not deny that he had surrendered his New York license to practice dentistry during the pendency of formal disciplinary proceedings. Petitioner asserted that the reasons he surrendered his license in New York were expedience and convenience. He averred that the reasons for his surrender did not involve his professional competence, professional performance, or financial integrity. However, Petitioner did not deny that the proceedings in New York involved allegations concerning his professional competence, professional performance, or financial integrity.

Petitioner averred also that, since 1987, he had been licensed to practice dentistry in the State of Pennsylvania. Petitioner stated that the Pennsylvania licensing authorities were fully aware of the New York proceeding but had not placed any impediment, sanctions, or restrictions on his license to practice dentistry in Pennsylvania.

At a prehearing conference, Petitioner advised me that he desired an in-person hearing. I concluded from Petitioner's request for a hearing that there existed disputed issues of material fact in this case. I scheduled an in-person hearing.

However, shortly before the scheduled hearing date, the I.G. moved to cancel the hearing on the ground that there existed no issues which involved disputed material facts. The I.G. asserted that, contrary to Petitioner's previous assertion, the State of Pennsylvania had expressed an intent to take action against Petitioner's license to practice dentistry in Pennsylvania, based on the outcome of the New York proceeding.

I postponed the in-person hearing in order to allow the I.G. the opportunity to move for summary disposition of the case. I advised the parties that I would reschedule the in-person hearing if I decided that there existed disputed material facts which could not be established without a hearing.

The I.G. moved for summary disposition. Petitioner opposed the motion. I have carefully considered the facts alleged by the parties, their arguments, and the law. I conclude that there exist no disputed material facts in this case. I conclude also that the I.G. had authority, pursuant to section 1128(b)(4)(B) of the Act, to exclude Petitioner. Finally, I conclude that, under the regulations which govern exclusions imposed under section 1128(b)(4) of the Act, the exclusion in this case must remain in effect until Petitioner obtains a valid license to practice health care in the State of New York. Therefore, I sustain the exclusion imposed against Petitioner by the I.G.

I. Issues, findings of fact, and conclusions of law

There are two issues in this case. The first issue is whether the I.G. had authority to exclude Petitioner under section 1128(b)(4) of the Act. The second issue is whether the length of the exclusion -- coterminous with the term of the surrender of Petitioner's license to practice dentistry in New York -- is reasonable.

In concluding that the I.G. had authority to exclude Petitioner and that the length of the exclusion is reasonable, I make the following findings of fact and conclusions of law. After each finding or conclusion, I state the page or pages of this decision at which I discuss the finding or conclusion in detail.

1. Petitioner surrendered his license to practice dentistry in New York during the pendency of formal disciplinary proceedings which concerned his professional competence or performance. Pages 5 - 8.

2. The I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act. Pages 3 - 9.

3. Petitioner has not offered evidence to support his contention that the State of Pennsylvania was fully informed of the New York proceedings, but decided to take no action against Petitioner's license to practice dentistry in Pennsylvania. Pages 8 - 9.

4. The exclusion which the I.G. imposed against Petitioner is reasonable. Pages 3 - 9.

II. Analysis of the law and facts

A. Analysis of the law

The I.G. excluded Petitioner pursuant to section 1128(b)(4) of the Act. This section authorizes the Secretary (or her delegate, the I.G.) to exclude an individual or entity:

> (A) whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license or the right to apply for or renew such a license, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity, or
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> (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.

The Secretary has published a regulation which governs the length of exclusions which are imposed pursuant to section 1128(b)(4) of the Act. 42 C.F.R. § 1001.501. This regulation provides, generally, that an exclusion imposed pursuant to section 1128(b)(4) will be for the same length of time as the State revocation, suspension, surrender or other loss of a license to provide health care which is the basis for the exclusion. 42 C.F.R. § 1001.501(b)(1). However, the regulation states an exception permitting an exclusion to be for less than a coterminous period. Under 42 C.F.R. § 1001.501(c)(1), an exclusion may be for less than a coterminous period if, prior to the date of the I.G.'s notice of exclusion to the excluded individual or entity:

> the licensing authority of a State (other than the one in which the individual's or entity's license had been revoked, suspended, surrendered or otherwise lost), being fully apprised of all of the circumstances surrounding the prior action of the licensing board of the first State, grants the individual or entity a license or takes no significant adverse action as to a currently held license, ...

Neither the Act nor the regulations which govern exclusions imposed pursuant to section 1128 of the Act allocate the burden of persuasion on the issues of whether an exclusion is authorized or whether the length of an exclusion is reasonable. Instead, the regulations which govern a hearing in an exclusion case under section 1128 provide that the administrative law judge shall have the authority to allocate the burden of persuasion as is appropriate. 42 C.F.R. § 1005.15(c).

Generally, administrative law judges allocate to the I.G. the burden of proving both that an exclusion is authorized and that the length of an exclusion is reasonable. However, the burden usually shifts to a petitioner where a petitioner advocates an affirmative exception to a general rule governing the length of an exclusion. The guiding principle is that the party which is most likely to be in possession of evidence which would establish a contested fact bears the burden of persuasion as to that fact.

In this case, the I.G. has the burden of proving that an exclusion is authorized under section 1128(b)(4) of the Act. Although the I.G. has also the burden of proving the exclusion is reasonable, that burden will be met in this case by proving that the authority exists to exclude

Petitioner. No additional evidence is required here to establish a prima facie case that the coterminous exclusion imposed by the I.G. is reasonable. This is because, assuming that the I.G. proves she was authorized to exclude Petitioner, a coterminous exclusion is presumed to be reasonable. 42 C.F.R. § 1001.501(b)(1).

The existence of this presumption arguably imposes a lesser burden on the I.G. in a case involving section 1128(b)(4) of the Act than in a case involving other subsections of section 1128. In some cases involving other subsections of section 1128 of the Act, the I.G.'s burden of proving that an exclusion is reasonable might consist of proving that the petitioner is so untrustworthy as to necessitate the exclusion that has been imposed.

Petitioner has the burden of proving any affirmative argument he offers to rebut the presumption of reasonableness contained in 42 C.F.R. § 1001.501(b)(1). In this case, Petitioner's burden of proof consists of establishing that, prior to the date of the I.G.'s notice of exclusion, the State of Pennsylvania, being fully apprised of the events that transpired in New York, decided not to take action with respect to Petitioner's license to practice dentistry in Pennsylvania. Imposing this burden on Petitioner is reasonable, because Petitioner is the party most likely to be in possession of evidence concerning the reaction of Pennsylvania authorities to the events in New York.[1]

B. Analysis of the evidence

Summary disposition sustaining Petitioner's exclusion is appropriate. There exists no reason for me to conduct an in-person hearing. The undisputed material facts of this case establish that the I.G. was authorized to exclude Petitioner for a period which is coterminous with the term of his license surrender in New York. Petitioner surrendered his license to practice dentistry in New York during the pendency of formal disciplinary proceedings concerning that license. These proceedings concerned Petitioner's professional competence or performance.

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[1] Of course, Petitioner assumes this burden only if the I.G. proves the elements of her case. Petitioner is not obligated to allege or prove an affirmative basis for a less-than coterminous exclusion unless the I.G. can prove that there is a basis for imposing such an exclusion.

Petitioner has not offered any evidence which would support the contention, made in his hearing request, that, prior to the date of the I.G.'s exclusion notice, the licensing authority in Pennsylvania, being fully apprised of the circumstances surrounding the surrender of Petitioner's license in New York, decided to take no action with respect to Petitioner's Pennsylvania license to practice dentistry. Indeed, evidence offered by the I.G. suggests the opposite to be true.

The undisputed material facts of this case are as follows. On November 30, 1992, the New York State Education Department, Office of Professional Discipline, State Board for Dentistry (New York licensing authority) issued a statement of charges against Petitioner. I.G. Ex. 1.[2] The statement of charges alleged five specifications of professional misconduct, consisting of negligence, incompetence, gross negligence, gross incompetence, and unprofessional record keeping. I.G. Ex. 1 at 1 - 4. On December 3, 1993, Petitioner executed

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[2] On three occasions, the I.G. offered exhibits to support her positions in this case. On January 25, 1995, the I.G. submitted exhibits, which she designated as I.G. Ex. 1 and 2, to support her motion to cancel the in-person hearing. On January 27, 1995, the I.G. submitted I.G. Ex. 1 - 7 as her prehearing exchange of exhibits. On March 6, 1995, the I.G. submitted four exhibits, which she designated I.G. Ex. 1 - 4, in connection with her motion for summary disposition. Many of the exhibits in one or more of the three submissions appear to be identical to exhibits offered by the I.G. in her other submissions. Because of the obvious confusion which results from submitting more than one set of exhibits bearing the same exhibit numbers, I directed the I.G. to advise me and Petitioner which of the exhibits she was relying on to support her motion for summary disposition. By letter dated April 18, 1995, the I.G. advised me and Petitioner that she intended to rely on I.G. Ex. 1 - 7 which she had submitted as part of her prehearing exchange. Petitioner has not objected to the authenticity or contents of any of these exhibits, and I hereby admit them into evidence. I do not admit the exhibits which the I.G. submitted at other times.

I note, however, that in a motion for summary disposition, it is not, strictly speaking, necessary to admit exhibits into evidence. Indeed a party need not offer exhibits to support that party's allegations of material fact, so long as those allegations are not disputed.

an application to surrender his New York license to practice dentistry. I.G. Ex. 2. In this application, Petitioner acknowledged the pendency of a formal disciplinary proceeding concerning his license to practice dentistry in New York. Id. at 1 - 2. He stated that he was applying for permission to surrender his license on the ground that he did not contest the charges pending against him in New York. Id. On March 18, 1994, the New York licensing authority accepted Petitioner's offer to surrender his license. I.G. Ex. 3.

Petitioner asserts that he surrendered his New York license for reasons of expediency. He asserts also that his reasons for surrendering that license did not constitute an acknowledgement by him that the charges that were pending in New York were true. Petitioner asserts further that the facts which underlie the charges made against him in New York do not substantiate those charges. Finally, Petitioner denies generally that the I.G. has established facts which authorize the exclusion or which establish the exclusion to be reasonable.

None of Petitioner's assertions refute the material facts alleged by the I.G. What has not been contested by Petitioner is that: (1) formal disciplinary proceedings were instituted in New York concerning Petitioner's license to practice dentistry in that State; (2) these proceedings concerned Petitioner's professional competence and performance; and (3) Petitioner surrendered his license during the pendency of these proceedings. Those uncontested facts comprise the necessary elements of the I.G.'s case, both as to the I.G.'s authority to exclude Petitioner and as to the reasonableness of the exclusion.

Petitioner's general denial of the facts is only that. He has not raised any facts which call into question the veracity of the I.G.'s assertions.

I accept, for purposes of this decision, that Petitioner surrendered his license for reasons of expediency. It is apparent also from the exhibits produced by the I.G. that, in surrendering his license, Petitioner did not admit that the charges made against him in New York were true. See I.G. Ex. 2 - 3. However, under section 1128(b)(4)(B), it is unnecessary for the I.G. to prove that an individual or entity admits to the truth of the charges made in a disciplinary proceeding, or that the charges are true, in order to establish a basis for an exclusion. The I.G. is authorized to exclude a party under section 1128(b)(4)(B) where the party surrenders his or her license to provide health care during the

pendency of formal disciplinary proceedings that concern that party's professional competence, professional performance, or financial integrity.

Petitioner has not offered any facts to support his contention that the State of Pennsylvania decided not to take action against his license to practice dentistry in Pennsylvania, after being fully apprised of the proceeding against Petitioner in New York. As I hold above, Petitioner has the burden of persuasion on this issue. His failure to allege material facts to support his contention is, in and of itself, sufficient for me to conclude that there are no material facts which Petitioner might prove. However, there exists also evidence which suggests that Petitioner's contention is not correct.

On June 6, 1994, the Chief Prosecutor of the Commonwealth of Pennsylvania Bureau of Professional and Occupational Affairs (Pennsylvania licensing authority) advised Petitioner that the Pennsylvania licensing authority would take action concerning Petitioner's Pennsylvania license, based on the New York charges, should Petitioner return to practice dentistry in Pennsylvania. I.G. Ex. 5.[3]

The date of this letter predates the I.G.'s August 12, 1994 exclusion notice to Petitioner. It refutes Petitioner's assertion that, prior to the date of the I.G.'s exclusion notice, the State of Pennsylvania, being fully apprised of the New York proceeding, decided to take no action with respect to Petitioner's Pennsylvania license.

On December 30, 1994, the Pennsylvania licensing authority sent Petitioner notice that a formal disciplinary action had been filed against him. I.G. Ex. 7. An accompanying order to show cause asserts that, based on the charges made against Petitioner in New York, Petitioner had violated Pennsylvania laws governing the practice of dentistry. Id. at 2 - 5.

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[3] On June 28, 1994, Petitioner responded to this notification. I.G. Ex. 6. The fact that Petitioner responded indicates that he was aware that the Pennsylvania licensing authority was contemplating taking action with respect to his Pennsylvania license. Id.

These exhibits establish that, contrary to Petitioner's assertion, the Pennsylvania licensing authority expressed an intent to take action concerning Petitioner's Pennsylvania license, based on the New York charges. They rebut squarely Petitioner's argument that the facts in this case would establish that an exception exists under 42 C.F.R. § 1001.501(c)(1) to the presumption contained in 42 C.F.R. § 1001.501(b)(1) that the coterminous exclusion imposed by the I.G. is reasonable.

III. Conclusion

I conclude that the undisputed material facts of this case establish that the I.G. was authorized to exclude Petitioner under section 1128(b)(4) of the Act, and that the exclusion imposed by the I.G. is reasonable. Petitioner has not offered any evidence to either rebut the facts asserted by the I.G. or to establish that the exclusion is not reasonable. Therefore, I enter summary disposition sustaining the I.G.'s exclusion determination.

/s/

Steven T. Kessel
Administrative Law Judge