Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Roger W. Ihrig, M.D.,	DATE: December 5, 1994
Petitioner,	
- v. -	Docket No. C-93-021 Decision No. CR346
The Inspector General.	

DECISION

This case is before me on Petitioner's request for a hearing to contest his exclusion from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.[1] In a letter dated October 21, 1992 (Notice), the Inspector General (I.G.) notified Petitioner of his exclusion. The I.G. alleged that Petitioner's license to practice medicine or provide health care in the State of Massachusetts had been revoked by the Massachusetts Board of Registration in Medicine (Massachusetts Board) for reasons bearing on Petitioner's professional competence, professional performance, or financial integrity. The I.G. told 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 Massachusetts and that his exclusion was authorized by section 1128(b)(4) of the Social Security Act (Act).

Initially, Petitioner contested both the I.G.'s authority to exclude him based on the Massachusetts Board's action and also the reasonableness of the length of his exclusion. However, once into the hearing phase of this case, Petitioner determined that he had no legal or factual basis to challenge the I.G.'s authority to

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[1] In this Decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as Medicaid.

exclude him based on the Massachusetts Board's action. Moreover, absent the I.G. alleging any aggravating factors, Petitioner determined that he had no basis upon which to challenge the minimum period of exclusion mandated by 42 C.F.R. § 1001.501(b) (which minimum period of exclusion the regulations mandate will continue until Petitioner's license to practice medicine or provide health care is reinstated by the State of Massachusetts).

Petitioner currently resides and practices medicine in the State of Arizona and has no apparent interest in returning to medical practice in Massachusetts. Further, Petitioner has no apparent interest in regaining his Massachusetts medical license. During the course of this proceeding, Petitioner's federal active medical license was renewed by the Kansas State Board of Healing Arts (Kansas Board), the State licensing authority in Kansas. The Kansas Board renewed Petitioner's federal active medical license without any restrictions. Petitioner asserts that he has met the prerequisite conditions for consideration of early reinstatement under 42 C.F.R. § 1001.501(c)(2), because he has fully and accurately disclosed the circumstances surrounding the Massachusetts Board's action to the Kansas Board and the Kansas Board has taken no significant adverse action against his Kansas medical license. The I.G. disagrees.

For the reasons discussed below, I find that Petitioner has fully and accurately informed the Kansas Board concerning the action of the Massachusetts Board in his case. Further, I find that the Kansas Board has taken no significant adverse action against Petitioner's Kansas medical license, as evidenced by the Kansas Board's renewal of Petitioner's Kansas medical license. Thus, I find that Petitioner has met the conditions set forth in 42 C.F.R. § 1001.501(c)(2). The I.G. must consider a request by Petitioner for early reinstatement.

I make no determination here as to whether Petitioner qualifies for reinstatement. I am deciding **only** whether the factual predicate to 42 C.F.R. § 1001.501(c)(2) has been met. Thus, I am making findings **only** as to whether, based on the record before me, Petitioner has satisfied the conditions contained in this exception such as to warrant consideration by the I.G. of a request for early reinstatement. 42 C.F.R. §§ 1001.501(c)(2), 1001.3001. Whether such reinstatement is granted is governed by 42 C.F.R. § 1001.3002, and I have no authority to intervene in that process. 42 C.F.R. § 1001.3002(f).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was licensed to practice medicine by the Massachusetts Board. I.G. Ex. 2 at 11.[2]

2. In December 1989, Petitioner was hospitalized for substance abuse (chemical dependency). P. Ex. 10; I.G. Ex. 2 at 12.

3. In January 1990, the Massachusetts Medical Society's Committee on Physician Health (Committee) reported to the Massachusetts Board that Petitioner was very ill and would require a long period of treatment and rehabilitation. The Committee recommended that Petitioner should not practice medicine for the foreseeable future. I.G. Ex. 2 at 12.

4. In January 1990, Petitioner requested, due to his hospitalization for substance abuse, that his certificate of registration to practice medicine in Massachusetts (Massachusetts medical license) be suspended. P. Ex. 10.

5. Petitioner agreed that his suspension would remain in effect unless, and until such time as, the Massachusetts Board determined that the health, safety, and welfare of the public no longer necessitated the suspension. P. Ex. 10 at 2.

6. To regain his Massachusetts medical license following this suspension, Petitioner was required to petition the Massachusetts Board for reinstatement. P. Ex. 10 at 1 - 2.

7. On April 16, 1991, the Massachusetts Board wrote to Petitioner at his last known home address in order to obtain information about his condition. The letter was returned to the Massachusetts Board, because Petitioner

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[2] The transcript of the testimony of Lawrence T. Buening, Jr. (taken by telephone on July 13, 1994) will be referred to in this Decision as Tr. (page). The parties' posthearing briefs will be referred to as I.G. or P. Br. (page). The parties' posthearing reply briefs will be referred to as I.G. R. or P. R. Br. (page). The exhibits submitted by the parties, which I admitted into evidence by telephone on July 28, 1994 (the I.G.'s exhibits numbered 1 through 4 and Petitioner's exhibits numbered 1 and 9 through 17), will be referred to as I.G. or P. Ex. (number) at (page). My Findings of Fact and Conclusions of Law will be referred to as Finding(s) (number).

had left Massachusetts to practice medicine with the Indian Health Service. Petitioner did not provide the Massachusetts Board with a forwarding address when he moved. I.G. Ex. 2 at 12 - 13.

8. In a Statement of Allegations dated December 18, 1991, the Massachusetts Board ordered Petitioner to show cause why he should not be disciplined for conduct which placed in question his competence to practice medicine, specifically citing his substance abuse and his having left Massachusetts without informing the Massachusetts Board that he had done so. I.G. Ex. 2 at 11 - 15.

9. Petitioner did not receive, and, thus, did not respond to, the Massachusetts Board's Statement of Allegations. I.G. Ex. 1 at 6.

10. Since Petitioner did not respond to the Massachusetts Board's Statement of Allegations, in an April 4, 1992 Recommended Decision, a Hearing Officer for the Massachusetts Board adopted the allegations contained in the Statement of Allegations and recommended that sanctions be imposed against Petitioner. I.G. Ex. 2 at 8 - 10.

11. In a May 13, 1992 Final Decision and Order, the Massachusetts Board adopted the Hearing Officer's Recommended Decision and revoked Petitioner's inchoate right to renew his Massachusetts medical license by simply re-registering (Petitioner's Massachusetts medical license having lapsed during the pendency of the Massachusetts Board's proceeding against him). I.G. Ex. 2 at 5 - 7.

12. In its Final Decision and Order, the Massachusetts Board concluded: a) that Petitioner was guilty of conduct placing his competence to practice medicine in question; and b) that Petitioner was guilty of being addicted to, dependent on, or a habitual user of, narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects. I.G. Ex. 2 at 5 - 6.

13. The basis for the Massachusetts Board's conclusion in its Final Decision and Order was that, given Petitioner's history of substance abuse, and given that Petitioner had not cooperated with the Massachusetts Board's investigation (such that there was no evidence in the Massachusetts Board's records regarding Petitioner's then current condition), the Massachusetts Board was unable to find that Petitioner was then fit to practice medicine. I.G. Ex. 2 at 5 - 7.

14. In its Final Decision and Order, the Massachusetts Board stated that it would entertain a reinstatement petition from Petitioner properly documenting his fitness to practice medicine. I.G. Ex. 2 at 7.

15. The revocation of Petitioner's inchoate right to renew his medical license did not alter Petitioner's actual position with respect to his ability to practice medicine under a Massachusetts medical license. After voluntarily petitioning to have his Massachusetts medical license suspended, Petitioner could regain his Massachusetts medical license and, thus, practice medicine under a Massachusetts medical license only by convincing the Massachusetts Board of his fitness to practice medicine. Equally, following the revocation of his inchoate right to renew his medical license, Petitioner could have his Massachusetts medical license reinstated only by convincing the Massachusetts Board of his fitness to practice medicine. Findings 5, 6, 14.

16. The record does not reflect that Petitioner has ever requested that the Massachusetts Board reinstate him. I.G. Ex. 2 at 2.

17. By letter of June 1, 1992, Petitioner received notice of the Massachusetts Board's revocation of his inchoate right to renew his license. In that letter, the Massachusetts Board informed Petitioner that the I.G.'s office had provided the Massachusetts Board with Petitioner's address. P. Ex. 12.

18. The Secretary of the United States Department of Health and Human Services (Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21,662 (1983).

19. Section 1128(b)(4)(A) of the Act and the regulations promulgated pursuant to the Act (as set forth at 42 C.F.R. § 1001.501(a)(1)) permit the I.G. to exclude an individual whose license to provide health care has been revoked or suspended by a State licensing authority for reasons bearing on the individual's professional competence, professional performance, or financial integrity.

20. Regulations at 42 C.F.R. § 1001.501(b) provide that an exclusion imposed under section 1001.501(a)(1) will never be for a period of time less than the period during which the individual's license is revoked, suspended, or otherwise not in effect as a result of, or in connection with, a State licensing agency action.

21. With regard to an individual excluded pursuant to section 1001.501, the I.G. must consider that individual's request for early reinstatement if that individual fully and accurately discloses the circumstances surrounding a prior State's revocation of that individual's license to a licensing authority of a different State and that State either grants the individual a new license or takes no significant adverse action against a currently held license. 42 C.F.R. § 1001.501(c)(2).

22. For purposes of exclusion under the Act and applicable regulations, the revocation by a State licensing authority of an individual's inchoate right to renew a medical license is equivalent to the revocation of an individual's medical license. 42 C.F.R. § 1001.501(a)(1).

23. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(b)(4) of the Act. Findings 11, 12, 19; Act, section 1128(b)(4)(A); 42 C.F.R. § 1001.501(a)(1).

24. On October 21, 1992, based on the Massachusetts Board's May 13, 1992 revocation of Petitioner's inchoate right to renew his Massachusetts medical license, the I.G. excluded Petitioner until such time as Petitioner obtained a valid license to practice medicine or provide health care in Massachusetts. October 21, 1992 Notice.

25. The indefinite nature of Petitioner's exclusion is lawful. Findings 20, 23; 42 C.F.R. § 1001.501(b)(1).

26. Since 1976, Petitioner has held a medical license issued to him by the Kansas Board. Tr. 38; P. Ex. 15.

27. Beginning in 1976, the Kansas Board required all physicians practicing medicine in Kansas to have mandatory professional liability insurance. Tr. 15.

28. The Kansas Board established the license category of the "federal active license" to allow physicians employed by the federal government to practice under a Kansas medical license without having to purchase professional liability insurance. Tr. 15.

29. A federal active license in Kansas requires everything of a physician that an active license would require, including the same renewal and continuing education requirements. Tr. 15 - 16.

30. Physicians working for the federal government must hold a good, valid, current, and unrestricted license in some State jurisdiction. Tr. 15.

31. Petitioner holds a federal active license from the Kansas Board. P. Ex. 15; Tr. 21.

32. Petitioner resides and practices medicine in the State of Arizona, and is currently employed as a physician by the Phoenix Indian Medical Center, Department of Emergency Medicine, Indian Health Service, which is a part of the Public Health Service of the United States Department of Health and Human Services. Petitioner's November 9, 1992 Hearing Request.

33. Under his federal active license, Petitioner can practice medicine in Kansas in a federal or military facility. If Petitioner moved to Kansas to practice medicine in a federal or military facility, Petitioner would have to provide the Kansas Board with a change of address, but he would not have to apply to or formally report to the Kansas Board before doing so. Tr. 21 - 22, 68.

34. To deny renewal to an individual holding a federal active license, the Kansas Board would have to initiate an action to revoke, suspend, or otherwise limit the license. Tr. 33.

35. If Petitioner wanted to return to private practice in Kansas, he would be required to apply for a status change from a federal active license to an active license. Tr. 23.

36. The Kansas Board would review Petitioner's current situation to determine whether giving him an active license without restrictions would be appropriate. Tr. 23 - 24.

37. As part of its review, the Kansas Board would look at the documentation Petitioner submitted with his application to change his status with regard to Petitioner's recovery from prior substance abuse. Tr. 23.

38. The Kansas Board would probably require Petitioner to meet with the Medical Advocacy Program of the Kansas Medical Society. Tr. 23 - 24.

39. Following, and depending upon, the results of its review, the Kansas Board might or might not place restrictions on Petitioner's license. Tr. 24.

40. The Kansas Board would subject Petitioner to an inquiry into his recovery process that another physician holding a federal active license and seeking a status change would not undergo, but the standard against which Petitioner would be reviewed would not be different from that of any other physician requesting a status change. Tr. 23 - 24, 68 - 70, 87 - 89.

41. If Petitioner returned to the State of Kansas to practice (either under his federal active license in a federal or military facility or as a physician in private practice requesting a status change), the Kansas Board staff would make inquiries to ascertain Petitioner's recovery status and make a report to the Kansas Board. Pursuant to that report, the Kansas Board would determine whether disciplinary action would or would not be called for. Tr. 50, 68 - 70, 87 - 89.

42. Documents in the Kansas Board's files regarding Petitioner and the revocation of Petitioner's license by the Massachusetts Board include: 1) the Final Decision and Order of the Massachusetts Board, accompanied by the Recommended Decision and Statement of Allegations; 2) Petitioner's May 28, 1993 application for renewal of his federal active license in Kansas; 3) Petitioner's letter of May 26, 1993 to the Kansas Board, accompanying his application; 4) a letter of September 5, 1992 to Petitioner from the American Board of Family Practice stating that he had been recertified; 5) Petitioner's Petition for Restrictions to the Massachusetts Board, accompanied by a January 3, 1990 letter to Petitioner from a Massachusetts Board Investigator regarding the Petition; 6) Petitioner's November 9, 1992 Hearing Request in this action; 7) a letter from the I.G.'s counsel of May 26, 1993 transmitting the I.G.'s list of proposed exhibits and witnesses for a hearing scheduled in this case and a copy of the exhibit and witness list prepared for that hearing; 8) the declaration of William M. Libercci, the I.G.'s Deputy Director of the office of Health Care Administrative Sanctions; 9) a letter from Petitioner to the I.G. dated August 25, 1992, responding to the I.G.'s Notice of exclusion; 10) a June 23, 1992 letter from the I.G. to Petitioner, informing Petitioner of his proposed exclusion and asking him to provide information; 11) Petitioner's October 21, 1992 Notice of exclusion; 12) a May 3, 1982 stipulation between Petitioner and the Kansas Board; 13) minutes of Kansas Board meetings between 1982 and 1984, regarding Petitioner; 14) a November 3, 1993 letter to the Kansas Board from Petitioner informing the Kansas Board of the I.G.'s exclusion and attaching the I.G.'s October 21, 1992 Notice letter; 15) a June 1, 1992 letter to

Petitioner from the Massachusetts Board, enclosing a copy of the Massachusetts Board's Final Decision and Order, Recommended Decision, and Statement of Allegations; 16) a June 23, 1992 letter from the I.G. to Petitioner; and 17) letters supporting Petitioner's character written by Judith E. Dixon, M.D., William D. Brown, M.D., and Wayne R. Keene, R.N. P. Ex. 16, 17.

43. Based on the information currently in the files of the Kansas Board, the Kansas Board staff has determined to take no adverse action against Petitioner's Kansas medical license. Whether the Kansas Board would take any adverse action against Petitioner's Kansas medical license if he returned to Kansas to practice is speculative, and would depend upon what additional information the Kansas Board received. Tr. 87 - 89.

44. A decision made by the Kansas Board staff acting in their properly delegated role not to take adverse action against a physician's license constitutes a decision by the Kansas Board. Tr. 50 - 52.

45. The preponderance of the evidence convinces me that Petitioner included the Massachusetts Board's Final Decision and Order, Recommended Decision, and Statement of Allegations, with the material Petitioner submitted to the Kansas Board in May 1993 with regard to the renewal of his Kansas medical license. P. Ex. 16, 17; Tr. 78 - 86.

46. Petitioner fully informed the Kansas Board with regard to the Massachusetts Board's action when he applied to renew his Kansas medical license on May 28, 1993, by indicating on his application that a disciplinary action had been taken against him and by attaching documents regarding the Massachusetts Board's action (including the Massachusetts Board's Final Decision and Order) with his May 26, 1993 letter to the Kansas Board. Finding 45; P. Ex. 16, 17; Tr. 78 - 86.

47. The Kansas Board (via the properly delegated determination of the Kansas Board staff) believes that it has been fully informed with regard to the action taken against Petitioner's Massachusetts medical license by the Massachusetts Board. Tr. 26, 44 - 46, 70 - 76.

48. Petitioner's characterization of the Massachusetts Board's action as a suspension at Petitioner's request (P. Ex. 16 at 15) did not mislead the Kansas Board as to the nature of the Massachusetts action. I.G. Ex. 4 at 1.

49. Kansas Board statistics show that an individual who has had a substance abuse problem, has gone through an appropriate recovery process, and has not relapsed within two to five years returns to the same risk as the general population. Petitioner last experienced a relapse in 1989, five years ago. Tr. 19.

50. In determining not to take any adverse action against Petitioner's Kansas medical license, the Kansas Board staff considered: 1) that Petitioner was not practicing within Kansas; 2) that his relapse occurred in 1989; 3) evidence of his current fitness to practice, consisting of letters written by his co-workers in Arizona; and 4) the fact that no difficulties with Petitioner's practice had been brought to the Kansas Board's attention following the Massachusetts Board's action. Tr. 53 - 55.

51. The Kansas Board has not placed any restrictions on Petitioner's federal active license, nor has it taken any adverse action against Petitioner's federal active license based on Petitioner's history of substance abuse and the revocation of Petitioner's inchoate right to renew his Massachusetts medical license. Tr. 22, 27, 44 - 46, 49 - 52, 86.

52. Petitioner's federal active license from the Kansas Board is a good, current, and unrestricted license, because the only difference between a federal active Kansas license and an active Kansas license goes to whether or not a physician has liability insurance, not to a physician's qualifications, character, medical condition, or ability to practice. Findings 27 - 29.

53. Petitioner meets the prerequisite conditions for consideration of early reinstatement under 42 C.F.R. § 1001.501(c)(2). Findings 1 - 52.

54. The regulations at 42 C.F.R. § 1001.501 require the I.G. to consider for reinstatement any individual or entity who meets the prerequisite conditions for consideration of early reinstatement under 42 C.F.R. § 1001.501(c)(2). Alan R. Bonebrake, D.C., DAB CR279, at 46 - 47 (1993).

55. The I.G. must consider an application by Petitioner for early reinstatement. Findings 1 - 54.

ANALYSIS

In this case, Petitioner is not contesting the basis for his exclusion or whether the indefinite exclusion imposed by the I.G. is reasonable. The only issue before me in this case is whether the factual predicate to the exception at 42 C.F.R. § 1001.501(c)(2) has been met.

Petitioner is currently an employee of the United States Department of Health and Human Services' Indian Health Service (a part of the Department of Health and Human Services' Public Health Service) and is practicing medicine at the Indian Health Service's Phoenix Indian Medical Center in Phoenix, Arizona, under a license from the Kansas Board.[3] In December 1989, Petitioner, who was then practicing medicine in Massachusetts, suffered a relapse of a substance abuse problem. Petitioner voluntarily surrendered his Massachusetts medical license to the Massachusetts Board, with the stipulation that he could not regain his Massachusetts medical license until he was able to demonstrate his fitness to practice medicine. Petitioner did not practice medicine for a year. Petitioner then left Massachusetts to practice medicine with the Indian Health Service, first in South Dakota, and then in Arizona. Petitioner did not inform the Massachusetts Board of his change of address.

As the Massachusetts Board was unable to find that Petitioner was fit to practice medicine (Petitioner being then absent from the State and the Massachusetts Board apparently unable to discover his address), the

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[3] I note here the anomaly that Petitioner is employed, and, thus, paid for his services, by one arm of the Department of Health and Human Services (and has been so employed since the commencement of his exclusion), while another arm of the Department of Health and Human Services has excluded him from reimbursement for his services by Medicare and Medicaid. In essence, apparently Petitioner is fit to practice medicine as a Departmental physician and serve individuals eligible for treatment at Indian Health Service (IHS) facilities, but Petitioner is not fit to seek reimbursement for program-related items or services. In short, by excluding Petitioner, the I.G. is prohibiting IHS from getting reimbursed for Petitioner's work when treating individuals eligible for Medicare or Medicaid coverage. As of September 18, 1993, over one year ago, Petitioner estimated that IHS had lost approximately $250,000 due to his exclusion. P. Ex. 1 at 1. By now, IHS likely has lost at least double this amount.

Massachusetts Board revoked Petitioner's inchoate right to renew his Massachusetts medical license. In October 1992, the I.G. excluded Petitioner from Medicare and Medicaid based on the Massachusetts Board's action. Petitioner has never applied to have his Massachusetts medical license reinstated.

Petitioner has held a Kansas medical license since 1976. Currently, Petitioner holds a federal active license in Kansas. In May of 1993, Petitioner applied for a renewal of this license. Petitioner answered "yes" to the question on his renewal application which asked "[h]as any disciplinary action been taken or initiated against you by a State licensing agency or other State or federal agency, peer review organization or professional association or surrendered or consented to limitation of license to practice in any State?" P. Ex. 16 at 14. Petitioner submitted a letter of explanation with his application, characterizing the Massachusetts Board's action not as a revocation of his license, but as a suspension of his license at his request. Petitioner noted also that the I.G. had excluded him from participating in Medicare and Medicaid based on the Massachusetts Board's action.[4] However, with his application for renewal, Petitioner submitted documentation regarding the Massachusetts Board's action, including the Massachusetts Board's Final Decision and Order. The Kansas Board renewed Petitioner's federal active license.[5]

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[4] By letter of November 3, 1992, Petitioner previously had notified the Kansas Board of his exclusion.

[5] The Kansas Board's files contain a psychiatric evaluation of Petitioner dated December 28, 1990, which was submitted to the Kansas Board by Petitioner, and was in the Kansas Board's possession when the Kansas Board renewed Petitioner's Kansas medical license. Tr. 58 - 59. The I.G. has asked to see this document. The Kansas Board does not want to release it to the I.G. without Petitioner's consent, and Petitioner does not now want the Kansas Board to release it to the I.G. I am not drawing an adverse inference in this case from Petitioner's decision not to allow the Kansas Board to release this document to the I.G. I note that the contents of this document apparently did not persuade the Kansas Board staff to go to the Kansas Board in an effort to take adverse action against Petitioner's Kansas medical license.

I. If the prerequisite conditions set forth at 42 C.F.R. § 1001.501(c)(2) are met, the I.G. must consider early reinstatement of an individual excluded under the authority of section 1128(b)(4)(A) of the Act.

The regulations at 42 C.F.R. § 1001.501(c)(2) specifically provide:

> (2) Consideration of early reinstatement. If an individual or entity that has been excluded in accordance with this section fully and accurately discloses the circumstances surrounding this action to a licensing authority of a different State, and that State grants the individual or entity a new license or takes no significant adverse action as to a currently held license, the OIG will consider a request for early reinstatement.

In Alan R. Bonebrake, D.C., DAB CR279, at 45 - 49 (1993), I examined this section of the regulations in detail. I stated that, if circumstances warranting application of this exception exist, the exception set forth at section 1001.501(c)(2) mandates early consideration of reinstatement by the I.G. and the I.G. must consider an individual's request for early reinstatement. However, this section does not mandate that the I.G. must reinstate a petitioner, only that the I.G. must consider a petitioner's reinstatement (emphasis added).[6]

Specifically, a determination by a State licensing authority to grant an individual a new license, or take no significant adverse action against an individual's current license, provides a basis for a conclusion that: 1) a petitioner is apparently trustworthy to be a program provider; 2) consideration should be given to ending the petitioner's exclusion; and 3) the I.G. must consider the petitioner's reinstatement. In short, the provision defines what a reasonable period of exclusion is under section 1001.501, and that any period of exclusion beyond

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[6] While the language at 42 C.F.R. § 1001.501(c)(2) makes it mandatory for the I.G. to consider a petitioner's request for early reinstatement ("the OIG will consider a request for early reinstatement" (emphasis added)), not "may" or "might" consider such a request, Medicare and Medicaid are still protected. This is because, in evaluating a petitioner's reinstatement application, the I.G. has the opportunity to determine a petitioner's trustworthiness by extensively reviewing the petitioner's past and current condition. 42 C.F.R. § 1001.3002(b).

the licensing authority's determination would arguably be excessive or unreasonable.[7]

When considering whether a petitioner meets the factual predicate for consideration under this exception, a number of preliminary conditions must be met. A petitioner, as the moving party seeking application of the exception, has the burden of proof to show that the circumstances envisioned in the exception have been met. Following the petitioner's showing, a determination must be made as to whether the factual predicate for applying the exception is present in the petitioner's case.

Whether the exception applies when a State licensing authority takes no adverse action against a petitioner's license[8] turns on what information a petitioner has provided to such State licensing authority. Specifically, there must have been a full and accurate disclosure to the State licensing authority of the circumstances surrounding the prior license revocation, surrender, or loss. The requirements for the exception at section 1001.501(c)(2) will have been met: 1) where a petitioner has made a good faith attempt to supply a State with all the information in his or her possession concerning a prior licensing disciplinary action; and 2) where the petitioner responds to all reasonable requests

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[7] The preamble to the regulations at 42 C.F.R. § 1001.501 suggests that the I.G. considers her authority to exclude pursuant to this section to be based on the actions of "derivative agencies," i.e., agencies other than the Department of Health and Human Services. 57 Fed. Reg. 3304 (1992). By relying on the subsequent actions of these "derivative agencies" in granting a new license or not taking significant adverse action against a current license, the I.G. is treating the State licensing authority's action as a surrogate determination that a petitioner no longer poses a threat to Medicare or Medicaid. Id. at 3304 - 3305.

[8] The I.G. recognizes that the Kansas Board has of yet taken no adverse action against Petitioner's federal active license. I.G. Br. 18. However, the I.G. argues that I am charged with the responsibility of examining whether the Kansas Board adequately considered Petitioner's fitness to practice when it made its determination not to take any adverse action against his license. As will be discussed more fully below, the Act and the regulations impose no such obligation on an administrative law judge.

from another State's licensing authority for information about his license revocation, surrender, or loss.

The preamble to the exception at section 1001.501(c)(2) couches the test whether the exception is met not on what information a petitioner supplies to a State licensing authority, but on whether the licensing authority is "fully apprised of the circumstances surrounding the loss of the license." 57 Fed. Reg. 3304 - 3305. Thus, if a petitioner has supplied sufficient information to a new State licensing authority such that, with reasonable diligence and effort, the State licensing authority can be fully apprised of the circumstances surrounding a license revocation, surrender, or loss, then that petitioner has met the predicate to the exception.

Depending on the nature of the circumstances surrounding the loss of a petitioner's license, each State licensing authority will decide how much information (additional to the bare fact of the license revocation, surrender, or loss) it needs to protect the public from a potentially untrustworthy medical practitioner. By relying on State licensing authorities to trigger consideration of early reinstatement, the I.G. has given State licensing authorities latitude with regard to the investigation of a practitioner whose license was revoked, surrendered, or otherwise lost. However, the ultimate determination as to whether to reinstate a petitioner under the exception resides with the I.G.

II. Petitioner has met the prerequisite conditions for consideration of early reinstatement under 42 C.F.R. § 1001.501(c)(2).

The I.G. argues that Petitioner has not met the prerequisite conditions for consideration of early reinstatement under the exception at 42 C.F.R. § 1001.501(c)(2) because: 1) the evidence does not establish that Petitioner fully and accurately disclosed the circumstances surrounding the Massachusetts Board's action to the Kansas Board, nor that the Kansas Board was "fully apprised" of all relevant circumstances regarding Petitioner's fitness to practice as a result of their own investigation; and 2) the Kansas Board has simply deferred any decision with respect to a possible adverse action against Petitioner until he returns to Kansas to practice medicine. For the reasons set forth below, I disagree with the I.G. on both issues and find that Petitioner has, indeed, met the prerequisite conditions for consideration of early reinstatement as set forth at section 1001.501(c)(2).

A. Petitioner has fully and accurately disclosed to the Kansas Board the circumstances surrounding the Massachusetts Board's action.

The I.G. asserts that Petitioner has not fully and accurately disclosed to the Kansas Board the circumstances surrounding the revocation of his Massachusetts medical license. The I.G. acknowledges that the Kansas Board knew of the Massachusetts Board's action before renewing Petitioner's Kansas medical license and considered itself fully informed about the Massachusetts Board's action. I.G. Br. 13. The I.G. contends, however, that the record does not show that Petitioner himself made a good faith effort to fully and accurately disclose the Massachusetts Board's action to the Kansas Board. Rather, the I.G. argues that Petitioner mischaracterized the nature of the Massachusetts Board's action in his communication with the Kansas Board, stating that he had voluntarily requested a suspension of his license, not that the Massachusetts Board had revoked his inchoate right to renew his license.[9] I disagree.

Petitioner's characterization of the Massachusetts Board's action is not determinative for the purposes of meeting the exception at section 1001.501(c)(2). The determinative factor with regard to this exception is whether or not Petitioner's actions fully and accurately informed the Kansas Board with regard to the Massachusetts Board's action. The preponderance of the evidence supports a determination that Petitioner's actions did fully and accurately inform the Kansas Board.

The record of this case convinces me that Petitioner fully and accurately informed the Kansas Board with regard to the nature of the Massachusetts Board's action. Petitioner is not an attorney. As a layperson, Petitioner legitimately may have believed that the Massachusetts Board's action was based on his voluntary license suspension given that: 1) Petitioner voluntarily

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[9] The I.G. notes that Petitioner made these alleged mischaracterizations in his November 3, 1992 letter to the Kansas Board (P. Ex. 17 at 6) and in his May 26, 1993 letter accompanying his application for license renewal (P. Ex. 16 at 15). The I.G. notes further that Petitioner's assertion contradicts the declaration of Debra Stoller (I.G. Ex. 2 at 1 - 2) in which Ms. Stoller states that the Massachusetts Board's action was not based on Petitioner's voluntary surrender of his Massachusetts medical license.

had his license to practice medicine in Massachusetts suspended in 1990; 2) the revocation of Petitioner's inchoate right to renew his license was based on the same relapse of a substance abuse problem which led him to request that his license be suspended; and 3) the practical effect of either the license suspension or the revocation is exactly the same (i.e., that Petitioner could not regain his Massachusetts medical license until he demonstrated his current fitness to practice medicine). Moreover, Petitioner fairly characterized the Massachusetts Board's action in his letter to the Kansas Board in November 1992. P. Ex. 17 at 6. Specifically, Petitioner noted that the I.G. took her exclusion action against him based upon what the I.G. termed his license revocation in Massachusetts. Petitioner stated that this characterization of events was not totally correct and then went on to describe the situation as he saw it. Petitioner noted that he had requested and received a voluntary suspension, noted that he left Massachusetts without attempting to have his license reinstated, and then stated that, based on the information the Massachusetts Board had, the Massachusetts Board informed Petitioner that he could not renew his license without reapplying. Petitioner attached a copy of the Notice with this letter.

The Kansas Board has stated (via its delegated representative, Lawrence T. Buening) that it has been fully informed with regard to the Massachusetts Board's action against Petitioner and has elected, based on the information currently in its possession, not to take adverse action against Petitioner's Kansas medical license. Further, the Kansas Board does not believe any mischaracterization on Petitioner's part regarding the nature of the Massachusetts Board's action misled the Kansas Board. Petitioner provided information to the Kansas Board (including, as I found above, the Final Decision and Order of the Massachusetts Board in his case) documenting the events surrounding the revocation of his inchoate right to renew his Massachusetts medical

license.[10] Thus, Petitioner has fully and accurately disclosed the circumstances surrounding the Massachusetts Board's action to the Kansas Board.[11]

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[10] The I.G. asserts that the May 17, 1993 declaration of Debra Stoller (I.G. Ex. 2 at 1 - 2), which stated that Petitioner's license revocation in Massachusetts was not premised upon his voluntary suspension, was not sent with Petitioner's license renewal application. The I.G. argues that it was Petitioner's duty to make a good faith effort to make the Kansas Board fully aware of all pertinent circumstances, including this declaration. First, I note that Petitioner provided the Kansas Board with a copy of the I.G.'s exhibit list, which refers to this declaration. Thus, the Kansas Board was aware of the existence of this document and could have obtained it. Second, the Kansas Board had the Final Decision and Order of the Massachusetts Board and was able to draw its own conclusion as to the nature of the action. I do not believe Ms. Stoller's declaration would materially add to the Kansas Board's knowledge as to the nature of the action the Massachusetts Board took against Petitioner. Thus, as the Kansas Board was not misled by Petitioner's characterization of the Massachusetts Board's action, and, as the Kansas Board was notified of the existence of the declaration, I do not draw an inference adverse to Petitioner for his not providing the Kansas Board with this document.

[11] The I.G. argues that consideration for reinstatement is not the automatic result of a licensing decision. Further, the I.G. argues that it is impossible to conclude that the Kansas Board has been fully apprised of (or has conducted its own review of) all relevant circumstances as to Petitioner's disciplinary history. I disagree. I have found that there is ample evidence (based on the extensive testimony of Mr. Buening, who testified concerning the Kansas Board's actions regarding Petitioner, and based on the documents contained in the files of the Kansas Board) that the Kansas Board was fully and accurately apprised of the nature of Petitioner's problems and the reasons why the Massachusetts Board took their action. Based on such information, the Kansas Board renewed Petitioner's Kansas medical license without taking any adverse action against his license. On its face, the regulation at 42 C.F.R. § 1001.501(c)(2) does not require a licensing authority to actually do anything with regard to investigation. The regulation merely requires that the excluded individual

(continued...)

B. The Kansas Board has renewed Petitioner's Kansas medical license.

The I.G. contends that, although the Kansas Board has not yet taken adverse action against Petitioner's Kansas medical license,[12] the Kansas Board has not determined that Petitioner is fit to practice medicine, but has simply deferred a decision on Petitioner's license until he returns to Kansas. With regard to meeting the conditions for consideration of early reinstatement under the exception at section 1001.501(c)(2), however, this argument is irrelevant.

Section 1001.501(c)(2) requires only that a State take no significant adverse action as to a petitioner's currently held license. The regulation does not contemplate denying a petitioner who meets the conditions predicate to the exception the opportunity to apply for consideration of early reinstatement because at some unspecified time in the future a State licensing authority might take action against a petitioner's license. Further, the regulation does not set forth what type of investigation a State must undertake before the I.G. can rely on a State action. While the assumption behind the exception may be that a State has determined a petitioner to be trustworthy by granting a petitioner a license, the exception gives a petitioner only the opportunity to apply for reinstatement. The I.G. is given the power to test this assumption, as the exception leaves to the I.G. the decision as to whether a

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[11] (...continued)
fully and accurately disclose the circumstances surrounding an adverse licensing action and that a State licensing authority either grant the individual a new license or take no significant adverse action against an existing license. Petitioner met these requirements here.

[12] The I.G. has contended also that the Kansas Board has never reviewed Petitioner's case, inferring that the regulation contemplates action by the full Kansas Board, not Kansas Board staff. I disagree. In this case, the Kansas Board staff, acting in their delegated capacity, made a decision not to recommend that adverse action be taken against Petitioner's license. I have found that the record supports a finding that the Kansas Board staff is empowered to make such a determination.

petitioner is sufficiently trustworthy to be reinstated.[13]

In this case, a fully informed State licensing authority not only took no significant adverse action against Petitioner's license, it took no action at all against Petitioner's license. While Mr. Buening did suggest that, if Petitioner returned to Kansas to practice, the Kansas Board staff would require him to meet with the Kansas Medical Advocacy Program of the Kansas Medical Society (and suggested also that the Kansas Board staff would report to the Kansas Board the results of any investigation they did of Petitioner), Mr. Buening testified that the Kansas Board would sanction Petitioner only if new information came to light outside of what was in the record before them. Tr. 87 - 89. What is clear from Mr. Buening's testimony is that, based on the information in its files concerning Petitioner, the Kansas Board took no adverse action against Petitioner's existing federal active license and, in fact, renewed such license without any restrictions other than those placed on all federal active licenses.

III. Allowing Petitioner to apply for early reinstatement does not leave the programs or their beneficiaries and recipients unprotected.

The I.G. notes that one purpose of exclusion under section 1128(b)(4) is to prevent practitioners who lose their license in one State from moving and continuing their practice elsewhere. See S. Rep. No. 109, 100th Cong., 1st Sess. 1 - 2 (1987), reprinted in 1987 U.S.C.C.A.N. 682. The I.G. argues that considering Petitioner for early reinstatement would thus defeat the

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[13] I note that for any exclusion imposed under section 1128 of the Act based upon a derivative action (such as a conviction or a license revocation), neither an administrative law judge nor the I.G. is permitted to look behind the conviction or revocation to decide whether the facts support the court's or the licensing authority's determination to convict or to revoke a license. Equally, in determining whether a petitioner has met the prerequisite conditions to be considered for reinstatement at 42 C.F.R. § 1001.501(c)(2), I do not believe that either an administrative law judge or the I.G. is authorized to look behind a fully and accurately informed licensing authority's decision to either grant a petitioner a new license or to take no significant adverse action against a petitioner's currently held license.

primary purpose of the Act, which is to promote the safety and well-being of Medicare beneficiaries and Medicaid recipients. The I.G. asserts that this is because the I.G. cannot rely on the Kansas Board's actions in this case to ensure that Petitioner is currently fit to treat Medicare and Medicaid patients. However, section 1001.501(c)(2) does not require that a petitioner be declared fit by a State licensing authority. As I stated above, section 1001.501(c)(2) requires only that a fully informed State licensing authority grant a petitioner a license or take no significant adverse action against a currently held license.

Moreover, even if it is determined that a petitioner has met the requirements for consideration of early reinstatement as set forth at section 1001.501(c)(2), this does not mean that the I.G. is required to reinstate a petitioner or that the programs are not protected from an untrustworthy provider. Once a petitioner is found eligible for consideration of early reinstatement under the programs, it is up to the I.G. to investigate and determine that petitioner's fitness to practice. An administrative law judge does not have the authority to order a petitioner reinstated; an administrative law judge can only find a petitioner eligible to be considered for early reinstatement.

In this case, once I have found Petitioner eligible to be considered for early reinstatement, to accomplish reinstatement, Petitioner must first make a written request to the I.G. for reinstatement. 42 C.F.R. § 1001.3001(a)(3). Once Petitioner makes his request, as the I.G. acknowledges (I.G. R. Br. 2 - 3), the I.G.'s duty is to fully investigate Petitioner before determining whether he should be reinstated. The I.G. stated in her reply brief that she would require Petitioner to furnish specific information and authorization to obtain information from private health insurers, peer review bodies, probation officers, professional associates, investigative agencies, and such other sources as may be necessary to determine whether reinstatement should be granted. 42 C.F.R. § 1001.3001(a)(3). Based upon evaluation of all of the information gathered (and taking into account the considerations addressed at 42 C.F.R. § 1001.3002), the I.G. will make a determination as to whether Petitioner should be reinstated. Thus, the I.G. has the opportunity to determine whether Petitioner is currently fit (and trustworthy enough) to provide services to Medicare and

Medicaid.[14]

Finally, the I.G. has suggested that I should not find Petitioner eligible to apply for early reinstatement because he has other options, such as reapplying for his Massachusetts medical license. Any other options Petitioner may have are immaterial to my decision in this case. Petitioner has met the prerequisite conditions for early reinstatement as set forth at section 1001.501(c)(2). Thus, Petitioner is eligible to apply for early reinstatement under that section.

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[14] Throughout this proceeding, the I.G. gave little weight to the fact that, at the same time Petitioner was being excluded by the I.G., another component of the Department, the IHS, was employing him to treat IHS patients. While I recognize that each component of the Department has separate responsibilities to the public, I suggest that any action taken by the I.G. to continue Petitioner's exclusion be coordinated closely with IHS. Clearly, eligible IHS patients should be entitled to the same protection afforded Medicare and Medicaid beneficiaries and recipients. To do otherwise, leaves the Department open to serious questions of fairness, especially regarding whether the Department is providing equal protection to all individuals receiving benefits administered by the Department.

CONCLUSION

I have found that Petitioner has met the prerequisite conditions for consideration of early reinstatement under the exception at 42 C.F.R. § 1001.501(c)(2). Thus, the I.G. must consider a request by Petitioner for early reinstatement.

/s/

Edward D. Steinman
Administrative Law Judge