

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Michelle Hardy  
(OI File No. H-12-4-3124-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-277

Decision No. CR3230

Date: May 13, 2014

**DECISION**

The Inspector General (I.G.) of the United States Department of Health and Human Services excluded Petitioner, Michelle Hardy, from participation in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(b)(4), effective October 20, 2013. For the reasons stated below, I conclude that the I.G. has a basis for excluding Petitioner from participation in federal health care programs because the Arizona State Board of Nursing (AZ BON) revoked Petitioner's license to provide health care as a Registered Nurse (RN) for reasons bearing on her professional competence or professional performance. The exclusion must last while Petitioner's license remains revoked. 42 U.S.C. § 1320a-7(c)(3)(E).

**I. Background**

By letter dated September 30, 2013, the I.G. notified Petitioner that she was being excluded from Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(b) until she regains her license as an RN in Arizona and is reinstated in the program by the I.G. The I.G. advised Petitioner that the exclusion was because her license to provide health care as an RN was revoked, suspended, or otherwise lost or

surrendered while a formal disciplinary proceeding was pending before the AZ BON for reasons bearing on her professional competence, professional performance, or financial integrity. 42 U.S.C. § 1320a-7(b); 42 C.F.R. § 1001.501. I.G. Exhibit (Ex.) 1.

Petitioner timely filed her request for a hearing (RFH) and this case was assigned to me for hearing and decision. On January 8, 2014, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order) of January 9, 2014. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the I.G. submitted the I.G.'s brief (I.G. Br.) together with two exhibits (I.G. Exs. 1-2). Petitioner submitted a response brief (P. Br.). I admit into evidence I.G. Exs. 1-2, without objection. Although Petitioner indicated that she did not believe that an in-person hearing was necessary, she listed herself as a proposed witness. P. Br. at 3. I provided Petitioner an opportunity to provide additional testimony. March 28, 2014 E-mail (DAB E-File Doc. No. 10). Petitioner responded, providing additional argument and clarifying that she did not propose in-person testimony. March 29, 2014 E-mail (DAB E-File Doc. No. 11). The I.G. did not propose any witnesses. I.G. Br. at 6. Therefore, an in-person hearing is unnecessary and I issue this decision on the basis of the written record.

## **II. Issue**

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(b)(4)(A).

## **III. Jurisdiction**

I have jurisdiction to decide this issue. 42 C.F.R. §§ 1001.2007(a)(1), 1005.2(a); 42 U.S.C. § 1320a-7(f).

## **IV. Findings of Fact, Conclusions of Law, and Analysis<sup>1</sup>**

### ***A. There is a basis for Petitioner's exclusion pursuant to 42 U.S.C. § 1320a-7(b)(4)(A), and the I.G. has proven each required element under the statute.***

The I.G. cites 42 U.S.C. § 1320a-7(b)(4) as the basis for Petitioner's permissive exclusion. I.G. Ex. 1. The statute provides:

(b) PERMISSIVE EXCLUSION. – The Secretary may exclude the following individuals and entities from participation in any Federal health care program

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<sup>1</sup> My findings of fact and conclusions of law are set forth in italics and bold font.

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## (4) LICENSE REVOCATION OR SUSPENSION. – ANY 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. . . .

Thus, the elements that must be proven for exclusion pursuant to section 1320a-7(b)(4) in this case are: (1) a state licensing authority revoked Petitioner's license to provide health care, and (2) for reasons bearing on Petitioner's professional competence, professional performance, or financial integrity.

***1. The Arizona State Board of Nursing, a state licensing authority, revoked Petitioner's license to provide health care as a registered nurse.***

On September 20, 2012, the AZ BON revoked Petitioner's license to practice nursing in the state of Arizona. I.G. Ex. 2 at 4-5. Petitioner concedes that the AZ BON revoked her license. P. Br. at 1-2. The AZ BON is the licensing authority for RNs in Arizona, with the authority to issue RN licenses and to revoke those licenses. Ariz. Rev. Stat. §§ 32-1606(B)(10), 32-1663(A)(5), (D). Thus, I find that the first element under 42 U.S.C. § 1320a-7(b)(4) is satisfied.

***2. The Arizona State Board of Nursing revoked Petitioner's Registered Nurse license for reasons bearing on her professional competence or professional performance.***

On or about February 17, 2012, the AZ BON received information from Yuma County Adult Probation indicating that Petitioner pled guilty to a felony charge. I.G. Ex. 2 at 2. The AZ BON conducted an investigation that led to disciplinary proceedings. Petitioner did not appear at the proceedings.<sup>2</sup> The AZ BON found that on or around May 10, 2011, Petitioner was charged in the Yuma County Superior Court in Yuma, Arizona with

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<sup>2</sup> Under Arizona law, Petitioner was deemed to have admitted the facts alleged against her because she failed to defend herself in that proceeding. I.G. Ex. 2, at 1; Ariz. Rev. Stat. § 32-1663(F)(3).

conspiracy to import into [the state of Arizona] or offer to transport for sale or import into [the state of Arizona], sell, transfer or offer to sell or transfer dangerous drugs, a class two felony; possession of dangerous drugs for sale, to wit: methamphetamine, a class two felony; promoting prison contraband, a class two felony; and assisting a criminal street gang, to wit: importation, transportation, transfer and sale of a dangerous drug, a class three felony . . . .

I.G. Ex. 2 at 2. The AZ BON also found that on or about March 2, 2012, Petitioner was convicted pursuant to her guilty plea of “attempted assisting a criminal street gang, a class four felony.” I.G. Ex. 2 at 2.

The AZ BON concluded that Petitioner’s criminal acts constituted “conduct or practice that is or might be harmful or dangerous to the health of a patient or the public.” I.G. Ex. 2 at 3, *citing* Ariz. Rev. Stat. § 32-1601(22)(d). The AZ BON also admonished Petitioner for failing to report that she was charged with a felony, failing to report that she was convicted of a felony, and failing to furnish a written detailed explanation to the AZ BON, as required. Ariz. Rev. Stat. § 32-1601(22)(j), (l); Ariz. Admin. Code § R4-19-403(25), (28), (29). The AZ BON found that Petitioner’s actions constituted unprofessional conduct as defined in Ariz. Rev. Stat. § 32-1601(22)(b),(d),(j) and (l). The AZ BON found Petitioner’s conduct and circumstances were sufficient cause to revoke her license to practice as an RN in the state of Arizona. Accordingly, the AZ BON revoked Petitioner’s RN license. I.G. Ex. 2 at 3-4; Ariz. Rev. Stat. §§ 32-1606(B)(17), 32-1664(N), 32-1663(A), (D), (E); *see also* Ariz. Rev. Stat. § 32-3208(D).

Petitioner argues that the revocation of her RN license did not bear on her professional competence, professional performance, or financial integrity because the revocation “occurred outside the relm [sic] of my practice.” P. Br. at 2, 3. However, the AZ BON concluded that there were four bases under Arizona law to revoke Petitioner’s license, all of which constituted unprofessional conduct. One basis in particular, (i.e., any conduct or practice that is or might be harmful or dangerous to the health of a patient or the public) is sufficient to conclude on its face that it directly involves professional performance. I.G. Ex. 2 at 3; Ariz. Rev. Stat. § 32-1601(22)(d).

Therefore, I conclude as a matter of law, based on the facts in the record, that the AZ BON revoked Petitioner’s RN license for reasons related to Petitioner’s professional competence and professional performance. Accordingly, I conclude that the second element required for exclusion pursuant to 42 U.S.C. § 1320a-7(b)(4) is satisfied. Therefore, the I.G. has a legal basis to exclude Petitioner.

***C. The length of Petitioner's exclusion is reasonable as a matter of law.***

I conclude that the period of exclusion, which is an exclusion until the AZ BON reinstates Petitioner's RN license, is required by 42 U.S.C. § 1320a-7(c)(3)(E). Although Petitioner asserts that a five-year exclusion is excessive, this is not the length of exclusion in this case. P. Br. at 3; I.G. Ex. 1 at 1. Petitioner is simply not permitted to apply to the AZ BON to have her nursing license reinstated until five years have passed. I.G. Ex. 2 at 5. Petitioner complains that she has no plans to regain her RN license and does not know how the exclusion can be lifted if she does not attempt to get regain her license. RFH at 1. The statute does not provide an exception in such a circumstance. Further, I cannot waive the requirement that Petitioner regain her Arizona RN license in order for the exclusion to end. *See* 42 C.F.R. § 1005.4(c)(1). Petitioner also asserts that she previously "never had a mark" on her license and that she wants to be able to earn a living to provide for her son. RFH at 2; P. Br. at 2, 3. Although I am sympathetic to this argument, it is not relevant here because I have very limited authority to reverse an exclusion under 42 U.S.C. § 1320a-7(b)(4). *See* 42 C.F.R. § 1005.4(c)(5). Although I have the authority to reverse an exclusion, *see* 42 C.F.R. §§ 1001.3005(a)(3), 1005.20(b), I can only do so if the I.G. has failed to prove that there is a basis for the exclusion. 42 C.F.R. § 1001.2007(a); *Keith Michael Everman, D.C.*, DAB No. 1880 (2003). Further, I cannot reverse the I.G.'s decision to impose an exclusion based on equitable grounds. *Donna Rogers, DAB. No. 2381*, at 6 (2011).

Pursuant to 42 U.S.C. § 1320a-7(c)(3)(E), the period of exclusion "shall not be less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered . . ." Petitioner has not presented any evidence to support that she has been reinstated as an RN in Arizona. Accordingly, I conclude that there are currently no facts that raise an issue before me requiring interpretation or application of 42 U.S.C. § 1320a-7(c)(3)(E). Therefore, I conclude that the period of exclusion is mandated by law under 42 U.S.C. § 1320a-7(c)(3)(E), based on the facts in the record.

**V. Conclusion**

For the foregoing reasons, I sustain the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(b)(4)(A).

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/s/  
Scott Anderson  
Administrative Law Judge