

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Dr. William I. Cooper,	)	DATE: June 7, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-024
	)	Decision No. CR381
The Inspector General.	)	
	)	

DECISION

On October 19, 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. notified Petitioner that he was being excluded pursuant to the provisions of section 1128(b)(4) of the Social Security Act (Act). The I.G. asserted that the exclusion was based on the fact that Petitioner's license to practice medicine or provide health care in the State of Pennsylvania, or the right to renew that license, had been suspended, or was otherwise lost, due to actions taken by the Pennsylvania State Board of Medicine for reasons bearing on Petitioner's professional competence, professional performance, or financial integrity. The I.G. told Petitioner that he would be excluded until he obtained a valid license to practice medicine or provide health care in Pennsylvania.

Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision. I scheduled an in-person evidentiary hearing, based on Petitioner's request to present in-person testimony. Petitioner then moved for summary disposition. The I.G. opposed the motion. On February 21, 1995, I denied Petitioner's motion.<sup>1</sup> Petitioner then submitted his list of proposed witnesses. Based on this submission, the I.G. moved to cancel the in-person hearing,

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<sup>1</sup> Ruling Denying Motion for Summary Disposition, February 21, 1995.

arguing that there existed no disputed issues of material fact in the case. On March 16, 1995, I ordered that the in-person hearing be continued, and I afforded the I.G. the opportunity to file a motion for summary disposition.<sup>2</sup> The I.G. then moved for summary disposition. Petitioner opposed the motion.

I have considered the I.G.'s motion, Petitioner's opposition to the motion, the exhibits submitted by the parties, and the relevant law.<sup>3</sup> I conclude that there exist no disputed issues of material fact in this case. I conclude also that, based on the undisputed material facts and the law, the I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act. Finally, I conclude that the length of the exclusion -- coterminous with Petitioner's loss of his license to practice medicine in Pennsylvania -- is authorized by applicable regulations.

#### 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 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.

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<sup>2</sup> Order Continuing Hearing, March 16, 1995.

<sup>3</sup> The I.G. submitted two exhibits (I.G. Ex. 1 and 2) in support of her motion for summary disposition. Petitioner submitted one exhibit (P. Ex. 1) in opposition to the I.G.'s motion for summary disposition. Neither party objected to the admission into evidence of the other party's exhibits. Therefore, I admit into evidence I.G. Ex. 1 and 2, and P. Ex. 1.

I note, however, that it is not necessary for a party to offer, or for me to receive, exhibits in support of or in opposition to a motion for summary disposition where there are no disputed issues of material fact. Where facts are truly not in dispute, then a party need only aver those facts which that party believes to be dispositive of an issue.

1. Petitioner surrendered his license to practice medicine in Pennsylvania during the pendency of a formal disciplinary proceeding which concerned his professional competence or performance. Pages 3-4, 6-8.

2. The I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act. Pages 8-9.

3. The exclusion which the I.G. imposed against Petitioner is reasonable. Page 9.

## II. Analysis

### A. Undisputed material facts

The undisputed material facts of this case are as follows. On December 23, 1991, the Commonwealth of Pennsylvania, State Board of Medicine (Pennsylvania Board of Medicine) issued an order to show cause to Petitioner. I.G. Ex. 1. The order to show cause contained numerous allegations that Petitioner had failed to comply with the ethical or quality standards of the medical profession. Id. at 2-140. It stated that, should the Pennsylvania Board of Medicine find the allegations to be true, the Board could impose penalties against Petitioner, including revocation or suspension of Petitioner's license to practice medicine in Pennsylvania. Id. at 140.

Petitioner was advised of his right to request a hearing. I.G. Ex. 1 at 141. On March 18, 1992, Petitioner answered the order to show cause. P. Ex. 1.

In March 1994, Petitioner and the Pennsylvania Board of Medicine entered into a consent agreement. I.G. Ex. 2. In order to resolve the allegations against him, Petitioner agreed to the following:

a. That on or before June 30, 1994, [Petitioner] will voluntarily and permanently cease and desist from practicing medicine and surgery within the Commonwealth of Pennsylvania;

b. That on December 31, 1994, the end of the current biennial renewal period, [Petitioner] shall allow his unrestricted medical license, . . . to go on permanent inactive status;

c. That [Petitioner] will not at any time thereafter apply for reinstatement, reissuance, reactivation or renewal of his unrestricted license

to practice medicine and surgery in the Commonwealth of Pennsylvania.

Id. at 2-3.

Petitioner asserts that there exist facts in addition to the foregoing undisputed material facts which are material to this case and which he would prove at an in-person evidentiary hearing. Petitioner avers that, if provided an in-person hearing, he would prove that the reasons he entered into the consent agreement had nothing to do with his professional competence or performance. He asserts that he would prove that his reasons for giving up his right to renew his license relate to the time and financial commitment that would have been involved in contesting the allegations made against him in Pennsylvania, coupled with his intent to relocate his practice to another State. Petitioner's Brief at 4.

For purposes of resolving the I.G.'s motion, I accept as true Petitioner's contention that he entered into the consent agreement because he did not want to incur the expense and time outlay that would be involved in defending against the allegations made in the Pennsylvania Board of Medicine's order to show cause. Also, I accept as true Petitioner's contention that he entered into the consent agreement because he was planning to relocate his practice to another State. However, for the reasons I discuss at Part II.C. of this decision, these contentions are not of facts that are material to the outcome of this case.

In his request for hearing in response to the I.G.'s October 19, 1994 notice of exclusion, Petitioner alleged that he was licensed to practice in States other than Pennsylvania, and that these States were fully aware of the actions which occurred in Pennsylvania concerning Petitioner's Pennsylvania license. Petitioner contended further that none of these other States had taken any adverse action concerning the licenses to practice medicine which Petitioner held in those States.<sup>4</sup> If true, these allegations might provide a basis for Petitioner to argue that the exclusion which the I.G. imposed is not reasonable. See Part II.B. of this decision.

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<sup>4</sup> In Petitioner's Request for Hearing and at the initial prehearing conference that I held, Petitioner's counsel asserted that the States of Oklahoma and New Jersey were fully aware of the events which had occurred in Pennsylvania, but had not taken any adverse action against the licenses to practice medicine which Petitioner held in those States. Petitioner's Request for Hearing, November 3, 1994; Order and Notice of Hearing, December 14, 1994.

However, Petitioner has not offered to prove any facts which might support these allegations. He has not contended, in response to the I.G.'s motion for summary disposition, that he would be able to prove at an in-person hearing that Oklahoma or New Jersey had decided not to take action against Petitioner's licenses in those States, being fully apprised of the events that occurred in Pennsylvania. He has not submitted exhibits or proposed testimony to support the assertions he made in his request for a hearing. I conclude that Petitioner has not shown that there may exist evidence which supports his allegations concerning his licenses to practice medicine in States other than Pennsylvania.

#### B. Applicable 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

(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 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 by 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 . . .

C. Analysis of the material facts and law

The I.G. argues that, based on the undisputed material facts and the law, she was authorized to exclude Petitioner, either under section 1128(b)(4)(A) or section 1128(b)(4)(B) of the Act. According to the I.G., within the meaning of section 1128(b)(4)(A) of the Act, Petitioner "otherwise lost" his license to practice medicine in Pennsylvania for reasons bearing on his professional competence or performance when he entered into the consent agreement with the Pennsylvania Board of Medicine. The I.G. argues also that, within the meaning of section 1128(b)(4)(B) of the Act, Petitioner "surrendered" his license to practice medicine in Pennsylvania during the pendency of a formal disciplinary proceeding in that State which concerned his professional competence or performance.

Petitioner argues that the I.G. has not established a basis to exclude him either under section 1128(b)(4)(A) or section 1128(b)(4)(B) of the Act. Petitioner asserts that his license to practice medicine in Pennsylvania was not revoked, suspended, or otherwise lost within the meaning of section 1128(b)(4)(A). He argues that, where an individual relinquishes voluntarily the privilege of providing health care for reasons of expedience, the loss of that privilege is not a "loss" under section 1128(b)(4)(A), even if the events that predicated the loss of license involve charges relating to that individual's professional competence or performance.<sup>5</sup> Petitioner asserts additionally that he should be permitted to prove that the reasons he gave up his Pennsylvania license to practice medicine had to do with expediency, and not with the merits of the charges filed against him in Pennsylvania.

Petitioner argues also that the I.G. has not established a basis to exclude him under section 1128(b)(4)(B) of the Act. He argues that he did not surrender his license to practice medicine within the meaning of this section.<sup>6</sup> Petitioner

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<sup>5</sup> Petitioner characterizes the terms of the consent agreement as the relinquishing of his right to renew his Pennsylvania license. Petitioner's Brief at 3.

<sup>6</sup> Petitioner does not deny that a formal disciplinary proceeding was pending against him in Pennsylvania when he entered into the consent agreement. He concedes that this proceeding concerned his professional competence or

apparently asserts that, in order to surrender a license within the meaning of section 1128(b)(4)(B), an individual must physically surrender his or her license document to the appropriate State authorities. Although Petitioner acknowledges that he agreed to cease practicing medicine in Pennsylvania and to not seek renewal of his license to practice in that State, he asserts that this agreement did not contain a provision to physically surrender his license to practice medicine.

Petitioner's license to practice medicine was not revoked, suspended, or otherwise lost, within the meaning of section 1128(b)(4)(A) of the Act. It is apparent from the plain language of this section that it applies only to those circumstances where an individual or entity loses a license to provide health care as the consequence of an adverse action taken by a State licensing authority.<sup>7</sup> Petitioner's license to practice medicine in Pennsylvania was not taken from him by the Pennsylvania Board of Medicine. Rather, Petitioner voluntarily relinquished the privilege of practicing in Pennsylvania in order to end a disciplinary proceeding that had been initiated against him in that State.

It is unnecessary for me to address Petitioner's assertion that the reason he ceased practicing in Pennsylvania did not relate to his professional competence or performance. I do not reach that issue because section 1128(b)(4)(A) does not apply to the circumstance where an individual or entity voluntarily relinquishes the privilege of providing health care. Thus, the reason that the individual or entity relinquishes the privilege is irrelevant to application of this section. However, I would have concluded that Petitioner's argument as to the reasons for his ceasing his Pennsylvania practice is not germane, had I concluded that his license was "otherwise lost" within the meaning of section 1128(b)(4)(A). The reasons described by that section relating to a loss of a license to provide health care plainly relate to the reasons on which a State licensing authority bases an adverse action, and not to an individual's or entity's reasons for giving up a license to a State licensing authority.

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performance. Petitioner's Brief at 5.

<sup>7</sup> If I were to interpret this section as broadly as is urged by the I.G., then section 1128(b)(4)(B) would be superfluous. That is so because, under the I.G.'s advocated interpretation of "otherwise lost" in section 1128(b)(4)(A), the term would encompass any situation that might comprise a surrender of a license within the meaning of section 1128(b)(4)(B).

Petitioner "surrendered" his license to practice medicine in Pennsylvania within the meaning of section 1128(b)(4)(B) of the Act. I construe this section to apply to the case where an individual or entity voluntarily relinquishes the privilege to provide health care conferred by a license during the pendency of formal disciplinary proceedings that concern the individual's professional competence, professional performance, or financial integrity. The undisputed material facts of this case prove that Petitioner relinquished his privilege to practice medicine in Pennsylvania under circumstances described by section 1128(b)(4)(B).

I do not agree with Petitioner's argument that this section applies only to the circumstance where an individual or entity physically surrenders to a State licensing authority the document which authorizes that individual or entity to provide health care. In neither section 1128(b)(4)(A) nor section 1128(b)(4)(B) did Congress intend the word "license" to mean only a document which memorializes a privilege to provide health care. The word "license" is not defined either in section 1128(b)(4)(A) or section 1128(b)(4)(B). Absent an explicit congressional definition of "license," it is reasonable to give it its common and ordinary meaning. Webster's New Collegiate Dictionary, 1977 Ed., defines a "license" to be:

1 a: permission to act b: freedom of action 2 a: a permission granted by a competent authority to engage in a business or occupation or in an activity otherwise unlawful b: a document, plate, or tag evidencing a license granted . . . .

From this, it is evident that the common and ordinary meaning of "license" encompasses permission by an authority to perform an act. While it is true that a "license" may constitute a document which evidences the grant of authority, the common and ordinary meaning of the word plainly is far broader than that. There is nothing contained in section 1128(b)(4)(A) or section 1128(b)(4)(B) to suggest that Congress intended it to be applied consistent with only the narrowest possible definition of "license."

The undisputed material facts of this case establish that Petitioner surrendered the authority granted by the Pennsylvania Board of Medicine to practice medicine in Pennsylvania during the pendency of a formal disciplinary proceeding concerning his professional competence or performance. The consent agreement which Petitioner entered into with the Pennsylvania Board of Medicine had three relevant elements. Petitioner agreed to: (1) permanently cease practicing medicine in Pennsylvania; (2) allow his



license to practice medicine in Pennsylvania to go on permanent inactive status; and (3) not seek reinstatement of his Pennsylvania license. I.G. Ex. 2. These elements comprise a surrender by Petitioner of his Pennsylvania license within the meaning of section 1128(b)(4)(B) of the Act.

The exclusion of Petitioner is reasonable. The coterminous exclusion imposed by the I.G. is authorized by 42 C.F.R. § 1001.501(b)(1). Petitioner has neither offered nor proven any facts to show that the requirement of this regulation, that, ordinarily, an exclusion imposed pursuant to section 1128(b)(4) must be coterminous with the loss of a license to provide health care, should not apply here.

### 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)(B) of the Act, and that the exclusion imposed by the I.G. is reasonable. Therefore, I enter summary disposition sustaining the I.G.'s exclusion determination.

/s/

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Steven T. Kessel  
Administrative Law Judge