Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
John W. Crews,	)	Date: December 5, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-271
	)	Decision No. CR509
The Inspector General.	)	
	)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, John W. Crews, from participating in Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs until Petitioner obtains a Nursing Home Administrator license in the State of Virginia.[1] I base my decision on evidence which proves that Petitioner surrendered his license during the pendency in that State of a formal disciplinary proceeding involving his Nursing Home Administrator license that concerned his professional competence, professional performance, or financial integrity.

BACKGROUND

In a letter (Notice) dated February 21, 1997, the I.G. notified Petitioner that he was being excluded from participating in Medicare and Medicaid because his license to practice medicine or provide health care in the State of Virginia was revoked, suspended, or otherwise lost or was surrendered while a formal disciplinary proceeding was pending before the licensing authority for reasons bearing on Petitioner's professional competence, professional performance, or financial integrity. The I.G. asserted that Petitioner's exclusion was authorized by section 1128(b)(4) of the Social Security Act (Act). Additionally, the I.G.

---

[1] I use the term "Medicaid" hereafter to refer to all State health care programs from which Petitioner was excluded.

advised Petitioner that his exclusion would remain in effect until he obtained a valid license in the State of Virginia.

Petitioner requested a hearing and the case was assigned to me for decision. The parties have each submitted written arguments and proposed exhibits. Petitioner made a request for the opportunity for oral argument, which I denied. Order Denying Petitioner's Request for the Opportunity for Oral Argument, dated October 28, 1997.

The I.G. submitted one proposed exhibit (I.G. Ex. 1) and three attachments. I have remarked the attachments as exhibits. I.G. Attachment 1 is now I.G. Ex. 2; I.G. Attachment 2 is now I.G. Ex. 3; and I.G. Attachment 3 is now I.G. Ex. 4. Petitioner did not object to my receiving the documents submitted by the I.G. into evidence. I thus admit I.G. Exs. 1-4 into evidence. Petitioner submitted eight exhibits (P. Exs. 1-8) and Attachments A-F. I have remarked the attachments as exhibits. Attachment A is now P. Ex. 9; Attachment B is now P. Ex. 10; Attachment C is now P. Ex. 11; Attachment D is now P. Ex. 12; Attachment E is now P. Ex. 13; Attachment F is now P. Ex. 14. The I.G. did not object to my receiving the documents submitted by Petitioner into evidence. I thus admit P. Exs. 1-14 into evidence. In deciding this case, I have considered the exhibits, the applicable law, and the arguments of the parties.

APPLICABLE LAW

Pursuant to section 1128(b)(4) of the Act, the I.G. may exclude "[a]ny 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."

Section 1128(c)(3) of the Act was amended by section 212 of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104-191). A new subparagraph, section 1128(c)(3)(E), was added, which states that the length of an exclusion under section 1128(b)(4) "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, or the individual or the entity is excluded or suspended from a Federal or State health care program." Prior to 1996, the Act provided no criteria for establishing the length of

exclusions for individuals or entities excluded pursuant to section 1128(b)(4). The 1996 amendments require, at section 1128(c)(3)(E), that an individual or entity who is excluded under section 1128(b)(4) be excluded for not less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered. Under the 1996 amendments, no issue of reasonableness exists where the exclusion imposed by the I.G. is concurrent with the loss, suspension, or revocation of a State license. A concurrent exclusion, as in Petitioner's case, is the mandated minimum required by law.[2]

PETITIONER'S ARGUMENTS

Petitioner's primary argument is that he is not a provider of health care as required by section 1128(b)(4) of the Act. He maintains that, while his license as a nursing home administrator involves the management and administration of a facility which provides health care services through the efforts of its physician and nurse staff, his duties did not involve the provision of care directly to patients.

Petitioner also maintains that he did not surrender his license as specified in section 1128(b)(4)(B) of the Act. Rather, he argues that his license expired on March 31, 1996, prior to the institution of disciplinary proceedings and before the July 17, 1996 Consent Order in his case.

Finally, Petitioner contends that the I.G. is not required to exclude him even if the statutory criteria are met for exclusion under section 1128(b)(4) of the Act. Petitioner contends that because section 1128(b)(4) was only meant "to reach more serious offenders," the I.G. should have used discretion and not excluded him.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to this case, Petitioner was a Nursing Home Administrator who was licensed by the Virginia Board of Nursing Home Administrators (Board).

2. At all times relevant to this case, Petitioner held the Nursing Home Administrator's license for Grace Lodge Nursing Home (Grace Lodge), located in Lynchburg, Virginia.

---

[2] An issue of reasonableness will arise only if the I.G. imposes an exclusion for a longer term than the sanction which has been imposed by a State licensing authority. In that event, the administrative law judge will hear and decide the issue of whether the period of exclusion which extends beyond the concurrent exclusion term is reasonable.

3. As Administrator, Petitioner was directly responsible for the management and operation of Grace Lodge, for ensuring that Grace Lodge was in compliance with federal and state regulations and standards, and for ensuring that proper care was provided to its residents.

4. On August 13-16, 1991, the Health Care Financing Administration (HCFA) conducted an inspection of Grace Lodge and found that it was not in compliance with federal long term care facility requirements and Virginia nursing home regulations. I.G. Ex. 1; P. Ex. 6.

5. On May 26-28, 1992, May 11-13, 1993, and April 20-22, 1994, the Virginia Department of Health conducted Medicaid certification and nursing home licensure inspections of Grace Lodge and found that it was not in compliance with federal long term care facility requirements and Virginia nursing home regulations. I.G. Ex. 1; P. Ex. 6.

6. On April 26, 1995 and on February 28, 1996, the Informal Conference Committee of the Board (Committee) met to review allegations that Petitioner, as a result of the deficiencies set forth in the August 16, 1991, May 28, 1992, May 13, 1993, and April 22, 1994, HCFA Statements of Deficiencies, may have violated § 54.1-3103 of the Code of Virginia and § 7.1(1),(2), and (3) of the regulations of the Virginia Board of Nursing Home Administrators. I.G. Ex. 1.

7. On April 26, 1995 and February 28, 1996, the Committee also reviewed allegations that Petitioner may have violated §§ 7.1(6), 8.1, 8.3(A), 8.4, 8.5, and 8.8(C) of the regulations of the Board, in that Petitioner failed to provide proof of completion of the twenty continuing education classroom hours required for the 1994 licensure year. I.G. Ex. 1.

8. In its notice to Petitioner of the convening of the February 28, 1996 conference, the Board advised Petitioner that if the Committee found a violation and was of the opinion that dismissal of the charges was not appropriate, the Committee would either present its findings to the full Board with the recommendation for disciplinary sanction in the form of a Consent Order or refer the case for formal hearing. I.G. Ex. 1.

9. On April 5, 1996, Petitioner, in writing, notified the Director, Long Term Care Services, Office of Health Facilities Regulation, Virginia Department of Health, that he was no longer the licensed administrator of Grace Lodge as his service as administrator terminated effective March 31, 1996. P. Ex. 2.

10. On July 10, 1996, Petitioner entered into a Consent Order with the Board which found that, as a result of the 1991, 1992, 1993, and 1994 HCFA Statements of Deficiencies, Grace Lodge was not in compliance with the applicable federal long term care requirements and Virginia nursing home regulations and that Petitioner had failed to provide proof of completion of the 20 hours of continuing education required for the 1994 licensure year. I.G. Ex. 1.

11. In the July 10, 1996 Consent Order, the Board accepted "the SURRENDER of the license of (Petitioner) to practice nursing home administration in the Commonwealth of Virginia upon express condition that this Consent Order is in lieu of further proceedings affecting the license of (Petitioner)." I.G. Ex. 1.

12. On February 21, 1997, the I.G. notified Petitioner of his indefinite exclusion from participation in Medicare and Medicaid pursuant to section 1128(b)(4) of the Act.

13. Section 1128(b)(4)(B) of the Act authorizes the I.G. to exclude an individual who voluntarily surrenders his license to provide health care during the pendency of formal disciplinary proceedings by the State's licensing authority which concern the individual's professional competence, professional performance, or financial integrity.

14. Petitioner, as a nursing home administrator, possessed a license to provide health care within the scope of section 1128(b)(4) of the Act.

15. Petitioner surrendered his Nursing Home Administrator's license during the pendency of a formal disciplinary proceeding within the scope of section 1128(b)(4)(B) of the Act.

16. Petitioner's surrender of his Nursing Home Administrator's license was for reasons bearing on his professional competence, professional performance, or financial integrity within the scope of section 1128(b)(4) of the Act.

17. The I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act.

18. Where an exclusion is imposed pursuant to section 1128(b)(4) of the Act, the period of the exclusion shall not be less than the period during which the individual's license to provide health care is revoked, suspended, or surrendered. Section 1128(c)(3)(E) of the Act.

19. When an exclusion is imposed pursuant to section 1128(b)(4) of the Act and the period of exclusion is concurrent with the loss, suspension, revocation, or surrender of a State license, then no issue of reasonableness concerning the length of exclusion exists.

20. The exclusion imposed by the I.G. against Petitioner, which will remain in effect until Petitioner regains a license to provide health care in the State of Virginia, was authorized under sections 1128(b)(4) and 1128(c)(3)(E) of the Act.

DISCUSSION

In my review, I find that the record establishes that Petitioner surrendered his Nursing Home Administrator's license while a formal disciplinary proceeding was pending before the Virginia licensing authority concerning his professional performance, professional competence, or financial integrity. In arriving at this determination, I specifically reject Petitioner's contention that a Nursing Home Administrator's license is not a license to provide health care within the scope of section 1128(b)(4) of the Act. It is clear from the wording of the statute that section 1128(b)(4) encompasses entities which have licenses to provide health care, such as nursing homes, even though these entities provide such services only through the employment of medical personnel such as doctors and nurses. In view of this, it is disingenuous for Petitioner to argue that his license does not relate to health care.

At all times relevant to this litigation, Petitioner was the administrator of a Medicare/Medicaid long-term care facility and, as such, was directly responsible for ensuring that proper care was provided to its residents. In fact, one of the overriding reasons that Virginia requires its nursing home administrators to be licensed is to ensure that the nursing home and its residents are properly maintained in a healthy and safe manner. See 18 Va. Admin. Code § 95-20-470 (I.G. Ex. 2). The Board, may, among other things, suspend, or revoke, or place on probation, a nursing home administrator's license, if it finds that a nursing home administrator was "conducting the practice of nursing home administration in such a manner as to constitute a danger to the health, safety, and well-being of the residents, staff, or public . . .". Id. It therefore strains credulity for Petitioner to contend that he is not licensed as a provider of health care services where he bears the ultimate responsibility for ensuring that health care services of the nursing home are provided properly to residents in accordance with relevant regulatory requirements.

Such conclusion is consistent with my decision in Maurice Labbe, DAB CR488 (1997), in which I held that a nursing home administrator who, in response to allegations by the Maine Nursing Home Administrators Board, permanently surrendered his license by entering into a consent agreement, was properly subject to an exclusion under sections 1128(b)(4)(A) and 1128(b)(4)(B) of the Act until he regained his license in Maine. Under the terms of the consent agreement, Labbe agreed to surrender his Nursing Home Administrator's license and not apply for any presently offered or future offered category of license in the State of Maine.

In Muhammad A. Malick, DAB CR463 (1997), the petitioner operated a business which administered sonogram and blood tests. He was found subject to exclusion under section 1128(a)(1). I rejected the petitioner's argument that he was not subject to exclusion because he was not a health care practitioner providing direct services to patients. Similarly, in Ifeoma Afeonyi, DAB CR262 (1993) I held that the I.G.'s exclusion authority under section 1128(a)(1) (which involves those who "deliver" health care items or services under Medicare or Medicaid) applied to Petitioner even though she was an owner of a medical clinic and not a health-care practitioner. Just as the individuals in Malick and Afeonyi who owned or operated facilities were still subject to mandatory exclusion under section 1128(a)(1) of the Act, Petitioner need not be licensed to directly provide health care to nursing home residents to be subject to exclusion under section 1128(b)(4).

I note further that, under the federal regulations for Medicare/Medicaid certification of long term care facilities, a nursing home is required to have an administrator who is "[l]icensed by the State where licensing is required." 42 C.F.R. § 483.75(d)(2)(i).[3] Moreover, under Virginia law, in order to provide health care services to residents, all nursing homes must have a duly licensed administrator. Thus, an administrator's license is essential to provide health care services in such facilities. Without a licensed administrator, Grace Lodge would not be able to function in providing health care services to its residents.

Petitioner argues that he let his license expire on March 31, 1996, and then subsequently agreed to a "surrender" of that license. The record does not support Petitioner's contention that his license expired. The record reflects that the Committee met on April 26, 1995, to consider whether

---

[3] Virginia requires that its nursing home administrators be licensed. See 18 Va. Admin. Code § 95-20-470 (I.G. Ex. 2).

Petitioner violated Virginia regulations in his management of Grace Lodge. On January 30, 1996, such Committee sent Petitioner notice that such proceeding would reconvene on February 28, 1996. I.G. Ex. 1. In correspondence dated April 5, 1996, to the Director, Long Term Care Services, Office of Health Facilities Regulation of the Virginia Department of Health, Petitioner notified the director that, as of March 31, 1996, his service as administrator of Grace Lodge terminated. Such chronology does not, without more, indicate that Petitioner's license expired and/or that it might not be the subject of administrative sanction. Furthermore, the Consent Order dated July 10, 1996, entered into by the Board and Petitioner and signed by Petitioner states that the Board "hereby accepts the SURRENDER of the license of John W. Crews, N.H.A., to practice nursing home administration in the Commonwealth of Virginia upon express condition that this Consent Order is in lieu of further proceedings affecting the license of Mr. Crews." I.G. Ex. 1. Such language indicates that if Petitioner had not surrendered his license, further proceedings would be necessary, an unlikely occurrence if the license had expired or if Petitioner did not have the right to readily retain his licensure. More importantly, such language clearly reflects that the circumstances surrounding Petitioner's license was viewed as a surrender by both parties to the Consent Order.

I find that Petitioner's license was surrendered while a formal disciplinary proceeding was pending before the Board. During its April 26, 1995 meeting, the Committee considered allegations that Petitioner may have violated Virginia regulations governing his license as a Nursing Home Administrator. I.G. Ex. 1. The January 30, 1996 letter sent to Petitioner by the Committee indicated that the Committee would reconvene on February 28, 1996, and that the purpose of the Conference was to review allegations against Petitioner. It further stated that if the Committee found a violation, the Committee would either present its findings to the full Board with the recommendation for disciplinary sanction in the form of a Consent Order or refer the case for formal hearing in accordance with §§ 54.1-110 and 9-6.14:12 of the Code of Virginia. On July 10, 1996, Petitioner signed such Consent Order which was accepted by the Board on that date. I.G. Ex. 1.

Petitioner as administrator of Grace Lodge was responsible for management of the facility, for ensuring that it was in compliance with federal and state regulations and standards, and for ensuring that it was properly providing services to its residents. 42 C.F.R. § 483.75; see 22 Va. Admin. Code § 40-71-60 (P. Ex. 11); see also Ernest Valle, DAB CR309 (1994); Jerry L. Edmonson, DAB CR59 (1989). During the years 1991 through 1994, HCFA and the Virginia Department of Health

conducted surveys of Grace Lodge and found its operation deficient in a number of areas including patient care. The surveys revealed that the residents of Grace Lodge were not given adequate medical care and that issues were raised concerning the safety of the facility. P. Exs. 6 and 7. The facility received from HCFA a Statement of Deficiencies after each survey which set forth the deficiencies. I.G. Ex.1; P. Ex. 6. The allegations that Grace Lodge was not in compliance with federal long-term care requirements during the period of time when Petitioner, as the licensed Nursing Home Administrator, was responsible for ensuring the facility's compliance, bore directly on his professional performance or professional competence.

The entire reason and purpose for the disciplinary proceeding initiated by the Board was to examine Petitioner's professional competence and professional performance in light of the specific allegations raised in the HCFA Statements of Deficiencies. These allegations related to Petitioner's professional performance and competence as they pertained to his ability to properly manage Grace Lodge. Thus, the requirements of section 1128(b)(4)(B) of the Act have been met.

Previous decisions of the Departmental Appeals Board (DAB) administrative law judges (ALJs) establish that a chronology such as occurred in Petitioner's case constitutes a license surrender within the scope of section 1128(b)(4)(B) of the Act. An ALJ found the I.G.'s indefinite exclusion of a provider who violated section 1128(b)(4) to be reasonable in Dillard P. Enright, DAB CR138 (1991). In that case, the petitioner alleged that his nursing license was not surrendered while a formal disciplinary proceeding was pending. Enright involved a petitioner who surrendered his nursing license to a Nursing Board before formal findings were made as to the allegations in a complaint filed against him. In this decision, the ALJ found that the petitioner's license surrender at an "informal meeting" before the Nursing Board constituted a surrender while a formal disciplinary proceeding was pending, within the meaning of section 1128(b)(4)(B) of the Act. The ALJ found that "[i]f Petitioner had not surrendered his license, the Nursing Board would have had a responsibility to resolve the issues raised by the claims. . . . The Nursing Board, in the absence of Petitioner's surrender of his license, was fully prepared to go forward." Enright, at 9. Likewise, in this case, if Petitioner had not entered into a Consent Order, the Committee would have referred the case "for formal hearing in accordance with § 54.1-110 and § 9-6.14:12 of the Code of Virginia." I.G. Ex. 1.

Petitioner has contended that the proceeding conducted by the Board on February 28, 1996 was not a formal disciplinary proceeding within the meaning of section 1128(b)(4)(B) of the Act. Petitioner states that under Virginia state law, there are both informal and formal administrative processes. Petitioner argues that "the informal fact finding procedures do not rise to the level of a formal disciplinary level proceeding . . ." and that the distinction in Virginia law between informal and formal proceedings would be "rendered meaningless" if the informal proceedings under Virginia law are determined to constitute formal disciplinary proceedings under section 1128(b)(4)(B) of the Act. Petitioner's Memorandum in Opposition, at 9-10.

The fact that, under Virginia law, the proceedings before the Board were not considered "formal" is not definitive or meaningful in interpreting section 1128(b)(4)(B). This case is governed by federal law, and the interpretation of a federal statute or regulation is a question of federal, not state, law. Chester A. Bennett, M.D., DAB CR64 (1990).

In John W. Foderick, M.D., DAB CR43 (1989), the ALJ stated that "[a]lthough section 1128(b)(4)(B) does not define the term 'formal disciplinary proceeding,' it is reasonable to conclude from the face of the statute, and from legislative history, that the law refers to a license proceeding which places a party's license in jeopardy and which provides that party with an opportunity to defend against charges which might result in a license suspension or revocation. This interpretation is consistent with the purpose of the law. . . . The law presumes that an individual or entity who surrenders a health care license in the face of charges, and in the circumstance where he has the opportunity to defend himself, is as likely to be untrustworthy as the individual or entity who loses a license after litigating the issue of his or her professional competence, performance, or financial integrity." Foderick, at 6-7.

In the present case, Petitioner surrendered his license in the face of the Committee's investigation of allegations involving Grace Lodge and also, his failure to provide proof of completion of the required classroom hours for the 1994 licensure year. I.G. Ex. 1. A letter from the Board dated January 30, 1996, notified Petitioner of the allegations and provided him with the opportunity to respond. I.G. Ex. 1. Petitioner was subject to the jurisdiction of the Board, and if Petitioner had not surrendered his license, the Board would have continued its investigation of the allegations which could have led to sanctions including license suspension or revocation. Prior to the completion of formal proceedings, Petitioner entered into a Consent Order with the Board. I.G. Ex. 1. According to the Consent Order,

Petitioner "consents to the following Order affecting his license to practice nursing home administration in the Commonwealth of Virginia." Id. (emphasis added). Under the terms of the Consent Order, Petitioner agreed to surrender his license to the Board in lieu of the Board pursuing further proceedings against his license.

Even were I to accept Petitioner's assertion that his license expired, after which he did not seek relicensure, an appellate panel of the DAB has held that the language of section 1128(b)(4)(B) does not require actual physical surrender of the license document. William I. Cooper, M.D., DAB No. 1534 (1995), at 4.[4] The appellate panel in Cooper upheld the ALJ's conclusion, stating that the term "license" can mean a permission to act, as well as the document evidencing that that permission has been conferred. Id. In this case, I find that Petitioner, by entering into the Consent Order, relinquished the permission conferred on him by the Board to be a nursing home administrator under circumstances described by section 1128(b)(4)(B).

In addition to citing section 1128(b)(4)(B) of the Act as the basis for the exclusion against Petitioner, the I.G. has also cited section 1128(b)(4)(A) of the Act as an alternative basis.[5] Because I have determined that the circumstances of

---

[4] The citation for the Civil Remedies Division decision in Cooper is Dr. William I. Cooper, DAB CR381 (1995).

[5] In her reply brief, the I.G. cited section 1128(b)(4)(A) of the Act as a basis for Petitioner's exclusion. After receiving the I.G.'s brief, Petitioner filed a Motion for Sanctions against the I.G. Petitioner made this motion on grounds that the I.G. filed a reply brief without authority to do so and failed to comply with the procedures of the Departmental Appeals Board, Civil Remedies Division. Petitioner moved that I strike the I.G.'s reply brief in its entirety and that I refuse to consider such brief. In the alternative, Petitioner requested the opportunity to reply to the I.G.'s reply brief, with the costs of such response assessed against the I.G. Further, Petitioner moved that I prohibit the I.G. from introducing a new legal basis for Petitioner's exclusion and a recent Civil Remedies decision in support of its position. The I.G. did not file a response to Petitioner's motion.

I issued a Ruling dated September 26, 1997, in which I denied Petitioner's motion to impose sanctions against the I.G. I permitted the I.G.'s reply brief, in its entirety, to become

(continued...)

Petitioner's case leave no doubt that a license "surrender" did occur within the meaning of section 1128(b)(4)(B) of the Act, I do not find it necessary to reach the issue of whether Petitioner's exclusion can be sustained under section 1128(b)(4)(A) of the Act. However, were I to consider this issue, it is likely that I would apply the appellate panel's reasoning in Cooper and find that Petitioner's "surrender" of his license falls also within the meaning of section 1128(b)(4)(A) of the Act.[6]

---

[5](...continued)
part of the record, and I granted Petitioner the opportunity to file a rebuttal brief to the I.G.'s reply brief. I stated that costs of filing Petitioner's rebuttal brief would be solely borne by Petitioner. Furthermore, I did not prohibit the I.G. from introducing the decision of Maurice Labbe, supra, in support of its position. Finally, I deferred ruling on Petitioner's request that I prohibit the I.G. from introducing a new legal basis for Petitioner's exclusion.

Petitioner filed a rebuttal brief. In its rebuttal brief, Petitioner contended, among other things, that the I.G. cited section 1128(b)(4)(A) of the Act as a basis for Petitioner's exclusion for the first time in her reply brief. Petitioner argued that, until the I.G.'s reply brief, the sole alleged basis for Petitioner's exclusion was section 1128(b)(4)(B). Petitioner contended that the circumstances of his case did not meet the criteria of section 1128(b)(4)(A). Petitioner argued also that the Labbe decision was distinguishable from his case. Additionally, Petitioner made a request for the opportunity for oral argument, which I denied. Order Denying Petitioner's Request for the Opportunity for Oral Argument, dated October 28, 1997.

[6] Contrary to Petitioner's contention that the "otherwise lost" language contained in section 1128(b)(4)(A) of the Act cannot be interpreted to refer to the surrender of a license because a license surrender is specifically addressed in section 1128(b)(4)(B), the appellate panel in Cooper concluded that the broad "otherwise lost" language used by Congress indicates that Congress intended section 1128(b)(4)(A) to encompass any loss that occurs by a means other than revocation or suspension by a licensing authority. Cooper, at 6. The appellate panel in Cooper moreover stated that such an interpretation of section 1128(b)(4)(A) would not render section 1128(b)(4)(B) superfluous. Id. In the Cooper case, the appellate panel concluded that Dr. Cooper, who had "surrendered" his license to practice medicine within the meaning of section 1128(b)(4)(B) of the Act, could also have been excluded under section 1128(b)(4)(A).

Finally, Petitioner contends that for the I.G. to take action against him is unwarranted because section 1128(b)(4) of the Act is meant to apply to "more serious offenders." This argument is without merit. The I.G.'s use of discretion in deciding to impose a permissive exclusion is not reviewable. 42 C.F.R. § 1005.4(c)(5); Nanette Neu, R.N., DAB CR429 (1996).

CONCLUSION

I conclude that the I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act. I conclude also that the term of exclusion imposed by the I.G. is mandated by section 1128(c)(3)(E) of the Act.

/s/

Joseph K. Riotto
Administrative Law Judge