The Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the case of:	)	
	)	
Sandra Hernandez a/k/a Sandra Meza,	)	Date: August 20, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-320
	)	Decision No. CR1994
The Inspector General.	)	
	)	

DECISION

Petitioner, Sandra Hernandez, asks review of the Inspector General's (I.G.'s) determination to exclude her for five years from participation in Medicare, Medicaid, and all federal health care programs under section 1128(a)(1) of the Social Security Act (Act). For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner, and that the statute mandates a minimum five-year exclusion.

I. Background

Petitioner was a registered nurse employed as a surveyor for the Texas Department of Aging and Disability Services, the state agency responsible for nursing home inspections. I.G. Ex. 2. She accepted $2000 from Bill Lofton, the administrator of a nursing home whose facility she was charged with inspecting. I.G. Ex. 2. On August 14, 2006, she pled no contest in a Texas State Court to one misdemeanor count of "Gift to Public Servant by Person in his Jurisdiction," a class A misdemeanor. The court entered an order of deferred adjudication. She was sentenced to one year of probation, allowed to complete 32 hours of community service work in lieu of serving four days in jail, and required to pay $2000 in restitution, a $1000 fine, and various court costs and supervision fees. I.G. Ex. 3.

In a letter dated December 31, 2008, the I.G. advised Petitioner that, because she had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or state health care program, the I.G. was excluding her from participation

in Medicare, Medicaid, and all federal health care programs for a period of five years. I.G. Ex. 1. Section 1128(a)(1) of the Act authorizes such exclusion. Petitioner requested review, and the matter has been assigned to me for resolution.

The parties agree that an in-person hearing is not required and that the matter may be resolved based on written submissions. I.G. Br. at 5;[1] P. Br. at 5. The parties have submitted their briefs. With its brief, the I.G. submitted ten exhibits (I.G. Exs. 1-10). Petitioner submited no additional exhibits. The I.G. filed a reply brief.

Petitioner has objected to the admission of I.G. Exs. 8 and 9. I.G. Ex. 8 is a state administrative law judge's proposed decision, which recommends revoking Petitioner's nursing license. I.G. Ex. 9 is the opinion and order of the Texas Board of Nursing, which modifies the proposed decision and revokes Petitioner's nursing license.[2] Petitioner argues that these documents are irrelevant and inadmissible because they involve different issues and different parties; because the proposed decision was modified; and because the nursing board's decision is under appeal.

Review of the two documents shows that, in fact, they primarily address whether, based on her August 2006 criminal conviction, Petitioner's nursing license should be revoked. The state administrative body considered facts underlying her conviction, which relate directly to the matter before me. *See Dewayne Franzen*, DAB No. 1165, at 6 (1990); *Emma Voloshin, M.D.*, DAB CR1179, at 3 (2004) (to determine whether a crime is program-related, adjudicator may go beyond the four corners of the statute under which the individual was convicted). In any event, I am specifically authorized to accept evidence of "crimes, wrongs, or acts other than those at issue in the instant case" in order to show "motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme." 42 C.F.R. § 1005.17(g).

Petitioner can hardly complain that the state matters involved different parties since she herself was represented there; only the I.G. was not. That the proposed decision was modified does not make it inadmissible, particularly where the modifications are set forth in the Board's decision. I.G. Ex. 9. Nor has Petitioner provided any support for

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[1] Contrary to Civil Remedies Division procedures, the I.G. submitted a brief without numbering its pages. In the interest of time, we have numbered them rather than returning the document to the I.G. for correction.

[2] Revocation of her nursing license is an independent basis for excluding Petitioner from program participation. Act § 1128(b)(4). It is also considered an aggravating factor which could justify increasing the period of suspension beyond the mandatory five years. 42 C.F.R. §1001.102(b)(9).

excluding these documents simply because she has appealed them. I therefore admit into evidence I.G. Exs. 1-10.

Although I admit I.G. Exs. 8 and 9, as the discussion below shows, I need not rely on either document to reach a decision since the criminal information and the criminal court's judgment, by themselves, establish a basis for the I.G.'s exclusion.

II. Issues

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from program participation. Because an exclusion under section 1128(a)(1) must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

III. Discussion

Petitioner must be excluded for five years because she was convicted of a criminal offense related to the delivery of an item or service under the Medicare or a state health program, within the meaning of section 1128(a)(1) of the Act.[3]

Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.[4] 42 C.F.R. § 1001.101.

While acknowledging that a no contest plea falls within the statutory definition of "conviction," Petitioner nevertheless argues that she was not "convicted" of a criminal offense because the court "deferred further proceedings without entering an adjudication of guilt." P. Br. at 2. The Departmental Appeals Board (Board) has consistently rejected this and similar arguments, and characterizes as "well established" the principle that the term "conviction" includes "diverted, deferred and expunged convictions regardless of whether state law treats such actions as a conviction." *Henry L. Gupton*, DAB No. 2058, at 8 (2007).

In *Gupton*, the Board explained why, in these I.G. proceedings, the federal definition of "conviction" must apply. That definition differs from many state criminal law

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[3] I make this one finding of fact/conclusion of law.

[4] The term "state health care program" includes a state's Medicaid program. Act § 1128(h)(1); 42 C.F.R. § 1320a-7(h)(1).

definitions. For exclusion purposes, Congress deliberately defined "conviction" broadly to ensure that exclusions would not hinge on the state criminal justice policies. Quoting the legislative history, the Board explained:

> The rationale for the different meanings of "conviction" for state criminal law versus federal exclusion law purposes follows from the distinct goals involved. The goals of criminal law generally involve punishment and rehabilitation of the offender, possibly deterrence of future misconduct by the same or other persons, and various public policy goals. [footnote omitted] Exclusions imposed by the I.G., by contrast, are civil sanctions, designed to protect the beneficiaries of health care programs and the federal fisc, and are thus remedial in nature rather than primarily punitive or deterrent. . . . In the effort to protect both beneficiaries and funds, Congress could logically conclude that it was better to exclude providers whose involvement in the criminal system raised serious concerns about their integrity and trustworthiness, even if they were not subjected to criminal sanctions for reasons of state policy.

Gupton, at 7-8. I agree with the Board's analysis and conclude that Petitioner was convicted within the meaning of the Act.

Next Petitioner argues that nothing in the state criminal statute, under which she was convicted, refers specifically to Medicare or a state health program, so the I.G. has not established that her crime was "related to" the delivery of a healthcare item or service under Medicare or any state health care program.

An offense is related to the delivery of an item or service under the Medicare or state health care program if there is "a nexus or common-sense connection" between the conduct giving rise to the offense and the delivery of the item or service. *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Berton Siegel, D.O.*, DAB No. 1467 (1994). Here, Petitioner is correct that the state criminal statute does not refer specifically to Medicare or any state health care program. Rather it applies generally to a wide array of public servants who are not allowed to accept gifts from those they regulate. But the statute should not be read in a vacuum. The charge on which Petitioner was convicted is set forth in the criminal information, which specifies that she was an RN surveyor with the state agency "conducting inspections of nursing facilities" and that she accepted money from Bill Lofton, knowing that "said Bill Lofton was subject to regulation and inspection" by her and the state agency that employed her. I.G. Ex. 2. The state court found that "the evidence substantiates the said defendant's guilt of the offense of GIFT TO PUB[LIC]

SERVANT BY PERSON IN HIS JURISDICTION, MISDEMEANOR A, occurring on 10th January, 2006, as charged in the information. . . ." I.G. Ex. 3, at 1 (emphasis in original).

Thus, the criminal information and court adjudication order establish that Petitioner was a state surveyor who knowingly took money from someone whose facility she was responsible for inspecting. The state survey process is critical to the delivery of care and services under the Medicare and state health care programs because it is the principle means for assuring that the items and services provided in nursing homes meet minimum standards of quality. Nursing homes may participate in those programs only if they are in substantial compliance with program requirements. This means that any deficiencies may pose no greater risk to resident health and safety than the "potential for causing minimal harm." 42 C.F.R. § 488.301. The federal agency charged with administering the Medicare and Medicaid programs contracts with the state survey agencies (such as Petitioner's) to determine whether facilities are in substantial compliance with program requirements. *See* Act § 1864(a); 42 C.F.R. § 488.20.

The state law recognizes the inherent danger in allowing state regulators to accept money or gifts from those they regulate – even without any suggestion of special favors in return. A state surveyor accepting money from the facility she is charged with surveying undermines the integrity of the survey and certification process as well as the state licensing process. I consider this sufficient to establish the necessary connection between Petitioner's conduct and the delivery of items and services under Medicare and state health care programs.

IV. Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid and all federal health care programs, and I sustain the five-year exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge