

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Sushil Gupta, M.D.,	)	Date: January 31, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-06-636
	)	Decision No. CR1561
The Inspector General.	)	
_____	)	

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Sushil Gupta, M.D., from participating in Medicare and other federally funded health care programs for a period of five years.

**I. Background**

Petitioner is a physician. On July 31, 2006, the I.G. notified Petitioner that he was being excluded from participating in Medicare and other federally funded health care programs for a period of five years. The I.G. told Petitioner that his exclusion was imposed pursuant to section 1128(a)(2) of the Social Security Act (Act) which mandates the exclusion, for at least five years, of any individual who:

has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a pre-hearing conference at which I established a schedule for the parties to submit briefs and written exhibits. I advised the parties that either party could request an in-person hearing and that I would schedule one if I determined it to be warranted by that party's proposed evidence.

Neither party requested an in-person hearing. The I.G. submitted a brief, a reply brief, and five proposed exhibits designated as I.G. Ex. 1 - I.G. Ex. 5.<sup>1</sup> Petitioner submitted a brief and an attachment consisting of a brief that he had filed with the Appellate Court of the State of Connecticut. Petitioner did not designate his attachment as an exhibit. For purposes of the record, I am designating the brief as P. Ex. 1. I receive into the record I.G. Ex. 1 - 5 and P. Ex. 1.

## **II. Issue, findings of fact and conclusions of law**

### **A. Issue**

The sole issue in this case is whether Petitioner was convicted of a criminal offense that mandates his exclusion pursuant to section 1128(a)(2) of the Act. The duration of his exclusion is not at issue – assuming that there is a statutory basis for the exclusion – because the I.G. excluded Petitioner for the statutory minimum period of five years. *See* Act, section 1128(c)(3)(B).

### **B. Findings of fact and conclusions of law**

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading. I discuss each Finding in detail.

#### ***1. The I.G. is authorized to exclude Petitioner because he was convicted of a criminal offense described by section 1128(a)(2) of the Act.***

These are the facts. On July 29, 2005, Petitioner was convicted after a trial in the Superior Court of the State of Connecticut of the crime of fourth degree sexual assault. I.G. Ex. 5, at 1 - 2. Petitioner's conviction was for two counts of having sexual contact with patients by means of false representations that the sexual contact was for a bona fide medical purpose. I.G. Ex. 3, at 2. Essentially, Petitioner was convicted of fondling, and

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<sup>1</sup> The I.G. inaccurately styled his brief as a “motion for summary affirmance.” Summary affirmance or judgment is not what is at issue here. I offered the parties the option of having the case heard on written evidence in lieu of having an in-person hearing. That is not the same thing as summary judgment where the moving party must show that there are no disputed issues of material fact. In a hearing based on written evidence there is always a possibility that there will be disputed issues of material fact. All that distinguishes such a hearing from an in-person hearing is the absence of testimony presented in person.

having other sexual contact with, two of his female patients by pretending that such contact was a necessary element of physical examinations that he performed. *Id.* at 2 - 9.

The conduct of which Petitioner was convicted clearly constitutes “abuse” within the meaning of section 1128(a)(2) of the Act. By any definition, inappropriate and unwanted sexual contact is abusive. Furthermore, such abuse was of patients in the context of providing medical care to them, in that the individuals that Petitioner was convicted of abusing were his patients and the abuse took place while he performed physical examinations of these patients.

The I.G.’s authority to exclude an individual pursuant to section 1128(a)(2) derives from that individual’s *conviction* of an offense described by that section. The individual’s claims of innocence of the crime or crimes of which he was convicted are not relevant to the issue of authority to exclude so long as there is a conviction. In this case Petitioner’s conviction of an offense described by section 1128(a)(2) is sufficient to establish the I.G.’s authority to exclude him.

***2. The I.G.’s authority to exclude Petitioner is not vitiated by Petitioner’s appeal of his conviction.***

Petitioner’s sole argument in opposition to the I.G.’s exclusion determination is that he has appealed his conviction and that it would be a denial of due process to exclude him while his appeal is pending. I am without authority to consider his argument. There is nothing in either the Act or regulations that would permit me to enjoin the I.G. from imposing an exclusion against Petitioner while he appeals his conviction. In hearing and deciding a case such as this, my authority is limited to applying the Act and regulations as they are written. I do not have the authority to overrule the I.G.’s determination based on constitutional or general equity principals where there is nothing in the Act or regulations that permits me to do so.<sup>2</sup>

/s/

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**Steven T. Kessel**  
Administrative Law Judge

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<sup>2</sup> The I.G. must reinstate an individual who is excluded based on a conviction if the conviction is reversed or vacated on appeal. 42 C.F.R. § 1001.3005(a)(1). If Petitioner prevails in his appeal, the I.G. will reinstate him assuming no other grounds exist to exclude him. This regulation, however, does not permit or require reinstatement while an appeal is pending.