DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	)	
	)	
Mira Tomasevic, M.D.,	)	DATE: January 17, 1989
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-46
	)	Decision No. CR17
The Inspector General.	)	
	)	

DECISION

This case is before me on Petitioner's request for a hearing challenging her suspension from participating in the Medicare and Medicaid programs. By notice dated August 12, 1986, the Inspector General (the I.G.) announced that he had suspended Petitioner from participating in these programs for three years, pursuant to section 1128(a) of the Social Security Act, 42 U.S.C.1320a-7. The reason provided for Petitioner's suspension was her conviction in federal court of an offense related to her participation in the Medicaid program. Petitioner requested a hearing on August 23, 1988, protesting the length of the suspension and arguing that it should be reduced to two years. The I.G. moved to dismiss the hearing request, arguing that it was not timely filed. He asserted, alternatively, that the three-year suspension is reasonable. I conducted a hearing in Chicago, Illinois, on October 4, 1988, at which I received evidence as to both the issues of timeliness of the hearing request and the reasonableness of the suspension. I conclude that the hearing request was timely filed, and I deny the motion to dismiss. I conclude further that the three-year suspension imposed on Petitioner is reasonable.

ISSUES

The issues in this case are whether:

1. Petitioner is entitled to a hearing based on her hearing request, filed August 23, 1988.

2. The length of the suspension imposed on Petitioner is reasonable.

APPLICABLE LAWS AND REGULATIONS

1. Section 1128 of the Social Security Act: As of the date of Petitioner's suspension, Section 1128(a) of the Social Security Act, 42 U.S.C. 1320a-7(a), required the Secretary of Health and Human Services (the Secretary) to suspend from participation in the Medicare and Medicaid programs any physician or other individual who had been convicted of a criminal offense related to that person's participation in the delivery of medical care or services under titles XVIII (Medicare), XIX (Medicaid), or XX (block grants to states) of the Act. The law did not prescribe a minimum suspension. The law was revised in August 1987 to require a minimum exclusion from participation in the Medicare and Medicaid programs of five years for any individual or entity "convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program," Pub. L. 100-93 (August 18, 1987), 42 U.S.C. 1320(a)(1) and (c)(3)(B). [1]

Both the law in effect as of the date of Petitioner's suspension and the current law provide that a suspended or excluded individual is entitled to an administrative hearing as to the suspension or exclusion. The law in effect as of Petitioner's suspension provided at 42 U.S.C. 1320a-7(e) that a suspended individual is entitled to a hearing "to the same extent as is provided in section 205(b) of the Social Security Act." Virtually identical language is contained in the 1987 revision at 42 U.S.C. 1320a-7(f)(1). Section 205(b)(1) of the Social Security Act, 42 U.S.C. 405(b)(1), provides that a person entitled to an administrative hearing by virtue of an adverse decision shall be given reasonable notice and opportunity to be heard, and provides further that the hearing decision shall be based "on evidence adduced at the hearing."

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[1] Many of the preexisting statute's provisions were retained without significant change as part of the revised statute. For purposes of simplicity, this decision will, cite to the revised statute, except where specifically noted.

2. Regulations Governing Suspension, Exclusion, or Termination of Practitioners, Providers, Suppliers of Services and Other Individuals. Regulations governing suspension and exclusion of individuals convicted of program-related offenses are contained in 42 C.F.R. Part 1001. Section 1001.123(a) provides that when the I.G. has conclusive information that an individual has been convicted of a program-related crime he will give that individual written notice that he is being suspended from participation beginning 15 days from the date of the notice. Section 1001.125(b) establishes criteria for the I.G. to consider in determining the length of a suspension to impose on an individual convicted of a program-related crime. These instruct the I.G. to consider: "(1) The number and nature of the program violations and other related offenses; (2) The nature and extent of any impact the violations have had on beneficiaries; (3) The amount of the damages incurred by the Medicare, Medicaid, and the social services programs; (4) Whether there are any mitigating circumstances; (5) The length of the sentence imposed by the court; (6) Any other facts bearing on the nature and seriousness of the program violations; and (7) The previous sanction record of the suspended party under the Medicare and Medicaid program."

Section 1001.128(a) provides that an individual suspended for conviction of a program-related crime may request a hearing before an administrative law judge on the issues of whether: (1) he or she was in fact, convicted; (2) the conviction was related to his or her participation in the delivery of medical care or services under the Medicare, Medicaid, or social services program; and (3) the length of the suspension is reasonable.

3. Regulations Governing Appeals Procedures. Regulations governing the hearings and appeals procedures in suspension and exclusion cases are contained in 42 C.F.R. Part 498. Section 498.10 provides that any affected party may appoint another individual to represent him. Section 498.11(b) provides that a notice or request may be sent to either a party, his or her representative, or to both. Section 498.40(a)(2) states that an affected party or that party's representative must file a written hearing request "within 60 days of the receipt of the notice" of an adverse determination in order to be entitled to a hearing. Section 498.22 provides that the date of receipt of a notice will be presumed to be five days after the date on the notice,

unless there is a showing that it was, in fact, received earlier or later.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings and Conclusions as to Petitioner's Right to a Hearing.

1. Beginning in at least 1983, Petitioner owned a condominium at 426 West Barry Street, Chicago, Illinois. Tr. 23. [2]

2. Petitioner resided at that address at various times until July, 1986. Id..

3. In July, 1986, Petitioner left the United States to reside in Yugoslavia. She resided there continuously until December, 1987. Tr. 33, 51; P. Ex. 11, 21.

4. On June 13, 1986, Petitioner's attorney advised the I.G. in writing that he represented Petitioner in connection with the I.G.'s review of her possible suspension from participating in the Medicare and Medicaid programs. P. Ex. 4. On July 7, 1986, Petitioner's attorney again wrote to the I.G. on her behalf. P. Ex. 5.

5. On August 12, 1986, the I.G. sent written notice to Petitioner, pursuant to 42 U.S.C. 1320a-7(c), and 42 C.F.R. 1001.123, advising her that she would be suspended from participating in the Medicare and Medicaid programs. P. Ex. 1. The notice was sent to Petitioner's residence address at 426 West Barry Street. No copy of the notice was sent to Petitioner's attorney. Id..

6. Petitioner did not reside at 426 West Barry Street on the date the notice was sent, and did not receive the notice. Tr. 56.

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[2] Exhibits, the transcript of this case, and the parties' briefs, will be cited as follows:

Petitioner's Exhibit	P. Ex. (exhibit number)/(page)
I.G.'s Exhibit	I.G. Ex. (exhibit number)/(page)
Transcript	Tr. (page)
Petitioner's Brief	P.'s Brief at (page)
I.G.'s Brief	I.G.'s Brief at (page)

7. Petitioner first learned that she had been suspended from participating in the Medicare and Medicaid programs in July or August 1988, in connection with her application for employment as a staff physician at a hospital in Texas. Tr. 56.

8. Petitioner's attorney received a copy of the notice of suspension on August 11 or 12, 1988 and filed a hearing request on Petitioner's behalf on August 23, 1988.

9. The hearing request was filed within 60 days from Petitioner's receipt of the notice of suspension and was timely filed within the requirements of 42 C.F.R. 498.40(b)(2).

10. Petitioner is entitled to a hearing.

B. Findings and Conclusions as to the Whether the Length of the Suspension is Reasonable.

11. Petitioner is a medical doctor who has been employed in a variety of settings as a physician since 1974. Tr. 193; P. Ex. 6/1.

12. Between January and May, 1983, Petitioner was employed as a physician in Chicago, Illinois, at clinics operated by Drug Industry Consultants (D.I.C.). Tr. 22-23; P. Ex. 7/5-7.

13. Petitioner's salary while employed by D.I.C. was $200 per day. Tr. 192.

14. Commencing early in her employment with D.I.C., Petitioner began receiving complaints from her superiors that she was prescribing inadequate amounts of medications to clinic patients. Tr. 181; P. Ex. 5/2; 7/6.

15. Petitioner understood that the additional medications she was pressured to prescribe were not medically necessary, but that their sale contributed to the financial success of D.I.C. Tr. 181-182; P. Ex. 7/6.

16. Petitioner acceded to her superiors' pressure to prescribe additional medications, and prescribed medications which she knew were not medically necessary for the patients she was treating. Tr. 181-182; I.G. Ex. 12/1-2; P. Ex. 7/7.

17. There were some unnecessary medications, such as endocrine drugs, which Petitioner was pressured to prescribe, but which she refused to prescribe. Tr. 182.

18. By intentionally prescribing unnecessary medications to patients of D.I.C.-operated clinics, Petitioner participated in a scheme to defraud the Illinois Department of Public Aid (Medicaid). I.G. Ex. 12/1-2. The conspiracy involved numerous individuals and employees of D.I.C. operating out of several clinics and pharmacies. See I.G. Ex. 3; I.G. Ex. 4/1. The co-conspirators included physicians and pharmacists. I.G. Ex. 4/1. The scheme obtained approximately $20 million from Medicaid. Id..

19. Petitioner disagreed with the activities she observed and was induced to engage in. Tr. 183; I.G. Ex. 4/50. She resigned from D.I.C. after about 70 days' employment. P. Ex. 5/2.

20. Subsequent to terminating her employment with D.I.C., Petitioner received reimbursement checks from the Illinois Department of Public Aid, totalling over $25,000, which Petitioner surrendered to her former employer. Tr. 185-186; P. Ex. 16.

21. Petitioner also learned after terminating her employment with D.I.C., that an individual was signing her name to health insurance claim forms. Tr. 183-184; P. Ex. 17-19. Petitioner reported these acts to the Illinois Department of Public Aid. Tr. 183-184. However, she did not report having prescribed unnecessary medications or the activities she had observed at D.I.C.-run clinics. Tr. 183.

22. Subsequent to her employment by D.I.C., Petitioner was advised by the United States Attorney's office that her activities as a D.I.C. employee were being investigated, and that she might be the subject of an indictment. Tr. 190. Petitioner truthfully admitted her activities to the United States Attorney; however, the United States Attorney did not use evidence provided by Petitioner in connection with its investigation or in prosecutions of other individuals. I.G. Ex. 8.

23. Petitioner was indicted by a federal grand jury in December 1984, and charged with felonies, consisting of unlawful conspiracy and mail fraud. I.G. Ex. 3. The indictment named 36 individuals, including Petitioner, as co-conspirators. Id..

24. Petitioner pleaded guilty on May 3, 1985, to two felony counts of mail fraud. I.G. Ex. 12. The maximum sentence Petitioner could have received for these crimes was ten years' imprisonment, a $2,000 fine, and restitution. Id.. On April 7, 1986, Petitioner received a sentence of three years' probation. I.G. Ex. 5; P. Ex. 11/10. The sentencing judge noted that Petitioner's involvement in the conspiracy lasted only 71 days; that Petitioner initially thought that the terms of her employment by D.I.C. were legitimate; that Petitioner became aware that her activities were not legitimate and complained about them; and that she expressed contrition for her involvement in the scheme. Id..

25. The criminal offenses to which Petitioner pleaded guilty constitute criminal offenses related to her participation in the delivery of medical care or services under the Medicaid program, as provided by 42 U.S.C. 1320a-7(a). Petitioner's guilty pleas constitute convictions as defined by 42 U.S.C. 1320a-7(i).

26. The Secretary is required by law to bar Petitioner from participating in the Medicare program, and to direct state agencies to bar her from participating in the Medicaid program, as a consequence of Petitioner's conviction of crimes related to her participation in the delivery of medical care or services under the Medicaid program, 42 U.S.C. 1320a-7(a)(1).

27. The law in effect as of Petitioner's conviction did not specify a minimum exclusion length; however, the law was amended in August, 1987, to require a minimum five-year exclusion of persons convicted of a criminal offense related to the delivery of an item or service under the Medicare or Medicaid programs. Pub. L. 100-93 (August 18, 1987), 42 U.S.C. 1320a-7(a)(1) and (c)(3)(B).

28. The Secretary has delegated to the I.G. the responsibility for suspending from participation in Medicare and Medicaid persons convicted of program-related offenses. 42 C.F.R. Part 1001.

29. The Secretary has adopted internal guidelines to facilitate processing of suspensions pursuant to the law and regulations. I.G. Ex. 10, 11.

30. The internal guidelines in effect as of the date Petitioner was sentenced for her crimes provided for a minimum suspension of three years for persons suspended for program-related offenses. I.G. Ex. 11/15.

31. A principal purpose of legislation requiring suspension of persons convicted of program-related offenses is to deter other individuals from committing such offenses. See S. Rep. No. 100-109, 1987 U.S. Code Cong. & Ad. News 682, 686.

32. The objective in establishing a minimum suspension period was to create a deterrent against the commission of program-related offenses. I.G. Ex. 11/15.

33. In evaluating Petitioner's case, the I.G. considered the number and nature of the program violations committed by Petitioner, pursuant to 42 C.F.R. 1001.125(b)(1), and concluded that Petitioner had been convicted of two felony charges involving potentially severe penalties. These were determined to be in the mid-range of offenses encountered by the I.G. in suspension cases. Tr. 132.

34. The I.G. concluded, pursuant to 42 C.F.R. 1001.125(b)(2), that he could not determine whether Petitioner's crimes had an adverse impact on program beneficiaries. Tr. 133.

35. The I.G. determined, pursuant to 42 C.F.R. 1001.125(b)(3), that Petitioner's unlawful acts had diverted funds from legitimate program purposes and had defrauded the program. Tr. 134. Although the precise amount of damages could not be calculated, they were concluded to be in the mid-range of damages encountered by the I.G. in suspension cases. Tr. 137.

36. The I.G. concluded, pursuant to 42 C.F.R. 1001.125(b)(4), that there did not exist mitigating factors in Petitioner's case which would justify a reduced suspension. Tr. 140-141. Specifically, the I.G. concluded that Petitioner's truthful statements to the United States Attorney did not constitute a mitigating factor. Tr. 142, 145. The I.G. also concluded that the facts that: Petitioner did not profit from her crimes, apart from her salary, her involvement with D.I.C. lasted only about 70 days, and she expressed contrition over her involvement did not constitute mitigating factors. Tr. 162. The I.G. also concluded that Petitioner's compliance with the terms of her sentence was not a mitigating factor. Tr. 163.

37. The I.G. considered Petitioner's sentence, pursuant to 42 C.F.R. 1001.125(b)(5), and concluded that the three-year probation imposed on Petitioner fell

within the mid-range of sentences encountered in suspension cases. Tr. 139.

38. Based on the facts of the case, the regulations, and guidelines, the I.G. imposed a three-year suspension on Petitioner from participating in the Medicare and Medicaid programs. Tr. 143-144. The suspension was for the minimum length specified by the guidelines. Tr. 174.

39. In determining the length of the suspension, the I.G. considered the regulatory criteria in 42 C.F.R. 1001.125(b).

40. The suspension imposed on Petitioner by the I.G. advances the statutory purpose of deterring individuals from committing crimes related to the delivery of services under the Medicare and Medicaid programs.

41. Based on the law, regulations, and evidence, a three-year suspension of Petitioner from participating in the Medicare and Medicaid programs is reasonable.

ANALYSIS

A. Petitioner's Entitlement to a Hearing.

The threshold issue in this case is whether Petitioner is entitled to a hearing. The I.G. contends that Petitioner's hearing request, filed more than two years after she was sent the notice of suspension, was not timely filed. He argues that, consequently, Petitioner is not entitled to a hearing and that I should dismiss her hearing request. Petitioner asserts that her hearing request was timely filed and that she is therefore entitled to a hearing on the merits. Based on the evidence and on applicable regulations, I conclude that the request was timely filed and that Petitioner is entitled to a hearing.

Certain relevant facts are not in dispute. The parties agree that for several years, Petitioner maintained a residence at 426 West Barry Street, Chicago, Illinois. At the time the I.G. suspended Petitioner, he understood the West Barry Street address to be Petitioner's residence, and so he sent the suspension notice to that address.

The parties disagree as to when Petitioner received the suspension notice. Petitioner testified that several

weeks prior to the date the notice was sent, she moved from West Barry Street to her family's home in Yugoslavia. She averred that she remained in Yugoslavia until December 1987; that mail sent to her Chicago residence was not forwarded to her, and that she did not receive the suspension notice until her attorney obtained a copy from the I.G. in August, 1988. The I.G. argues that these assertions are not credible. He asserts that Petitioner either actually received the notice in August 1986, or at any rate, long before she now says she did.

I am satisfied that Petitioner did not receive the suspension notice until her attorney obtained a copy of it in August 1988. Petitioner's testimony as to her move to Yugoslavia is credible and is corroborated by visa stamps on her passport. Her assertion that she remained in Yugoslavia until December 1987 is also credible and is substantiated by a stream of correspondence between Petitioner in Yugoslavia and her attorney in Chicago. Her testimony that mail sent to her Chicago residence was not forwarded to her is likewise credible. The I.G. has offered little to rebut this evidence, other than producing a certified mail receipt for the suspension notice, signed with Petitioner's name. Petitioner has testified that she did not sign the receipt, and there is no probative evidence to establish that the signature on the receipt is Petitioner's.

The regulations provide, at 42 C.F.R. 498.40(a)(2), that a party must file a hearing request within sixty days from "receipt of the notice" in order to be entitled to a hearing. Petitioner complied with this regulation by filing her hearing request on August 23, 1988, within sixty days from the date her attorney obtained a copy of the suspension notice from the I.G.

The I.G. argues that the regulations should not be construed to require actual receipt of the suspension notice as a trigger date for the limitations period within which a party must file a hearing request. He contends that notwithstanding the plain language of 42 C.F.R. 498.40(a)(2), regulations which permit service of notices by mail would be meaningless if the I.G. had to ascertain in each case whether the affected party actually received the notice. He asserts that if, as in this case, he sends the notice of suspension to an address which he reasonably believes is the affected party's address, then he has discharged his duty to provide notice to that party. Furthermore, according to the I.G., the Petitioner was obliged to notify the I.G.

of any change in her mailing address. Having failed to do so, the Petitioner should not be "allowed to seek refuge" behind non-receipt of the notice. I.G.'s Brief at 9. Petitioner's failure to notify the I.G. of a change in her address was a "gross indifference regarding receipt" of the notice, according to the I.G. Id. Therefore, the I.G. asserts that Petitioner's hearing request should be dismissed as untimely even if she never received the notice which was sent to her Chicago residence.

The I.G. has confused the process requirements of law and regulations for effectuating a suspension with the regulatory notice criteria which trigger the time period within which a party may file a hearing request. Actions which satisfy the former requirement may not be sufficient to satisfy the latter requirement.

The law provides that a suspension shall be effective at such time and upon such reasonable notice to the public and to the suspended party as may be specified in regulations. 42 U.S.C. 1320a-7(c). Regulations provide that a suspension for a person convicted of a program-related crime will become effective beginning fifteen days from the date of written notice of suspension given by the I.G. to the suspended party. 42 C.F.R. 1001.123. The regulations do not specify how the notice must be transmitted, other than that it be in writing. However, it is reasonable to infer that the regulations permit service by mail.

It may be, as the I.G. contends, that actual receipt of the notice by the suspended party is unnecessary to initiate a suspension provided that the I.G. makes a good faith effort to transmit the notice by mail to the party's last known address. But it is clear that actual receipt of the notice is required to trigger the sixty day limitations period within which a hearing request must be filed. 42 C.F.R. 498.40(a)(2).[3] Contrary to the I.G.'s assertion, the limitations regulation does not impose an affirmative duty on a party to advise the I.G.

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[3] The regulations do not require that the I.G. prove in every case that the suspended party actually received the notice. Receipt is presumed to be 5 days after the date on the notice, unless a party proves otherwise. 42 C.F.R. 498.22(b)(3). In this case, Petitioner has rebutted the presumption of receipt.

of a change in address, nor does it permit constructive notice to substitute for actual notice of suspension.

It should be noted that the record does not support the I.G.'s claim that Petitioner was indifferent to receipt of the suspension notice. As of the date of Petitioner's suspension, her attorney was communicating with the I.G. on her behalf, and was forcefully advocating reasons to reduce the suspension. Had the I.G. sent a copy of the suspension notice to Petitioner's attorney, as was his option pursuant to 42 C.F.R. 498.11, the question of receipt would never have arisen.

The I.G.'s arguments are not supported by the case it cites, National Labor Relations Board v. Clark, 468 F.2d 459 (5th Cir. 1972), vacated on other grounds, 411 U.S. 912 (1972). The Clark case stands for the principle that a party need not actually receive notice of an action to be validly served, where the serving party mails the notice in good faith to the receiving party's last known address. Clark does not address the question of whether such service would trigger the limitations period to answer the notice.

B. Reasonableness of the Length of the Suspension.

The I.G. suspended Petitioner from participating in the Medicare and Medicaid programs for three years, pursuant to section 1128(a) of the Social Security Act, 42 U.S.C. 1320a-7. The suspension results from Petitioner's conviction in federal court of offenses related to her participation in the Medicaid program. Regulations provide that in cases such as this, substantive issues which may be considered at a hearing consist of whether: (1) Petitioner was in fact, convicted of an offense; (2) the conviction was related to Petitioner's participation in the Medicare, Medicaid, or social services program; and (3) the length of the suspension is reasonable. 42 C.F.R. 1001.128(a)(1)-(3). Petitioner does not dispute that she was convicted of an offense related to her participation in the delivery of services under the Medicaid program. The issue remaining to be resolved is whether the length of the suspension is reasonable.

Subsumed in this issue is the question of the standard of review I am to employ to decide whether the length of the suspension is reasonable. Petitioner argues that my role is to independently weigh the evidence in light of the

criteria for determining suspensions established by 42 C.F.R. 1001.125(b), and to impose a "reasonable" suspension without regard to the I.G.'s suspension determination. P.'s Brief at 7. This formulation misstates my statutory and regulatory authority. My role is limited to evaluating the reasonableness of the I.G.'s determination. My function is not to substitute my judgment for his, so long as I conclude that his determination is reasonable.

The law and regulations plainly state that it is the Secretary (and his delegate, the I.G.) who bear the responsibility to determine an appropriate suspension. The law in effect as of the date that Petitioner was suspended, and the 1987 revision to that law, clearly repose in the Secretary the obligation to suspend, and to determine the appropriate length of a suspension. See Pub. L. 100-93 (August 18, 1987), 42 U.S.C. 1320a-7a. The regulations establishing criteria for determining length of suspensions provide that they are to be employed by the I.G. in evaluating particular cases and imposing suspensions. The regulations provide that the standard for review of suspensions at administrative hearings includes the issue of whether the length of the suspension imposed by the I.G. is reasonable. 42 C.F.R. 1001.128(a)(3). In adopting this regulatory language, the Secretary made it clear that the administrative law judge's role was to decide whether the I.G.'s suspension determination was reasonable. "(T)he word 'reasonable' conveys the meaning that (the I.G.) is required at the hearing only to show that the length of suspension determined on the basis of these criteria was not extreme or excessive" (emphasis added). 48 Fed. Reg. 3744 (Jan. 27 1983).

In arguing that I should independently determine and assess a "reasonable" suspension, Petitioner has emphasized that the administrative hearing is de novo. 42 U.S.C. 1320a-7(f); 42 U.S.C. 405(b)(1). It is true that my statutory duty is to conduct a de novo hearing--rather than to conduct a paper review of the record generated by the I.G. in making his suspension determination. There is nothing inconsistent between this duty and a standard of review which requires a decision as to the reasonableness of the I.G.'s determination, based on evidence adduced at the hearing.

The evidence establishes that the I.G. scrupulously considered the merits of the case, including facts and arguments raised by Petitioner's attorney, in light of

the criteria established by 42 C.F.R. 1001.125(b). The I.G. concluded, and the record amply substantiates, that Petitioner committed serious criminal offenses. Petitioner was a knowing participant in a massive criminal conspiracy which defrauded the Illinois Department of Public Aid of millions of dollars in Medicaid funds. See 42 C.F.R. 1001.125(b)(1),(3),(6).The offenses to which Petitioner pleaded guilty, two felony counts of mail fraud, are serious crimes which may result in substantial prison terms, fines, and court-ordered restitution. See 42 C.F.R. 1001.125(b)(1). As the I.G.'s agent noted in his testimony, the degree of severity of the offenses committed by Petitioner and their impact on the Medicaid program fall within the mid-range of offenses for which suspensions are imposed.

Petitioner argues that the I.G. either failed to consider or improperly disregarded aspects of her case which should compel a shorter suspension than that imposed by the I.G. These include Petitioner's reluctant participation in the conspiracy, the fact that she played only a small role in the scheme, the fact that her participation totalled only about seventy days, her willingness to cooperate with federal authorities once she knew she was the target of a criminal investigation, and her contrition for her unlawful acts. Petitioner also notes that other authorities, including the district court judge who sentenced her for her crimes, have expressed compassion in view of the equities of her case.

The regulations require the I.G. to consider potentially mitigating evidence and weigh that in determining the length of the suspension. 42 C.F.R. 1001.125(b)(4). The regulations do not define what constitutes mitigating circumstances, nor do they direct that particular weight be attached to specific circumstances. In this case, the I.G. was aware of and evaluated all of the facts alleged to be mitigating by Petitioner. The I.G. concluded that these facts did not constitute extraordinary circumstances which compelled reducing the suspension from the three year period he determined to be minimally necessary.

Prior to enactment of the 1987 revisions to the law governing suspensions, the Secretary implemented a suspension policy which focused on the prophylactic and deterrent effect of suspensions, as opposed to the equities advanced by suspended individuals in their particular cases. The Secretary concluded that a relatively stringent suspension policy was necessary in

order to protect the integrity of the Medicare and Medicaid programs and to strongly warn providers participating in these programs against committing program-related offenses. The Secretary determined that, absent extraordinary circumstances, a policy of deterrence would best be served by requiring a minimum suspension of three years for those individuals convicted of program-related crimes.

This policy comports with Congressional intent. Congress intended legislation mandating suspensions for those convicted of program-related offenses to be remedial in application. When Congress revised the law in 1987 to mandate a minimum five-year suspension for those convicted of program-related offenses, it clarified and strengthened an existing deterrence policy. The efficacy and reasonableness of suspensions was intended to be weighed by their deterrent effect, as opposed to the extent to which they punished offenders in individual cases. S. Rep. No. 100-109, 1987 U.S. Code Cong. & Ad. News 682, 686.

Application of a deterrence policy to specific cases may sometimes produce consequences that seem harsh in light of individual equities. Obviously, a statutory policy which requires a minimum suspension of five years for program-related offenses will produce suspensions in some cases that appear to be more extreme than that at issue in this case. But it is clear that prior to the enactment of the 1987 legislation, a policy which mandated exclusions of at least three years in all but extraordinary cases was supported by sound policy considerations and legislative intent. Application of that policy to the facts of this case does not produce an extreme or excessive suspension. I am satisfied that in this case, the character of Petitioner's crimes, coupled with the need for an effective deterrent against the commission of program- related offenses, outweighs any equitable circumstances that may exist, and militates in favor of a relatively stiff suspension. The conspiracy in which Petitioner participated produced enormous damage to the Medicaid program, and yet was composed of many individuals operating at Petitioner's level, whose individual participation would not, if treated in isolation, appear to be all that serious. If relatively stringent suspensions were reserved only for those offenders who committed crimes involving large sums, or for which lengthy sentences were imposed, then no effective deterrent would exist for those individuals

inclined to engage in the type of misconduct Petitioner engaged in.

CONCLUSION

Based on the law and record of this proceeding I conclude that Petitioner's hearing request was timely filed within the requirements of 42 C.F.R.498.40(a)(2), and Petitioner is entitled to a hearing on the merits. The I.G.'s motion to dismiss this proceeding is denied. I conclude that the suspension imposed on Petitioner by the I.G. is reasonable.

/s/

Steven T. Kessel
Administrative Law Judge