Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Nanette Neu, R.N.,	)	DATE: August 16, 1996
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-163
	)	Decision No. CR429
The Inspector General.	)	
	)	

DECISION

In this case, I uphold the decision of the Inspector General (I.G.) to exclude Petitioner from participating in the Medicare and Medicaid[1] programs for a period of three years under section 1128(b)(1) of the Social Security Act (Act).

Section 1128(b)(1) of the Act provides that the Secretary of Health and Human Services (Secretary) may exclude any individual who has been convicted under State or federal law of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, in connection with the delivery of health care items or services. On behalf of the Secretary, the I.G. has the discretion to decide whether to impose and direct an exclusion under section 1128(b)(1) of the Act. 42 C.F.R. § 1001.201(a); see also 42 C.F.R. § 1005.4(c)(5).[2] The Secretary has made the

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[1] In this decision, I use "Medicaid" as an abbreviation for all the health care programs listed in section 1128(h) of the Act.

[2] Section 1128(b)(1) and its implementing regulations stand in contrast to the mandatory provisions of the Act which would require an exclusion of at least five years if the individual's conviction meets the specified criteria, such as being a conviction for a criminal offense related to the delivery of an item or service under title XVIII (Medicare) or under any State health care program. Sections 1128(a)(1) and (c)(3)(B) of the Act.

I.G.'s exercise of said discretion unreviewable. 42 C.F.R. § 1005.4(c)(5). Therefore, the only two issues in this case are whether there exists a basis for the I.G.'s imposition of the permissive exclusion against Petitioner and whether the length of the exclusion is reasonable. See 42 C.F.R. § 1001.2007(a)(1).

The Secretary's regulation implementing section 1128(b)(1) of the Act specifies also a benchmark exclusion period of three years, subject to her increasing or decreasing the three year exclusion period based on the existence of various enumerated factors. 42 C.F.R. § 1001.201. All regulations contained in 42 C.F.R. Part 1001 are binding upon the I.G. and the administrative law judge. 42 C.F.R. § 1001.1(b). Based on the evidence and arguments of record, the administrative law judge has the authority to affirm, reverse, or modify the exclusions imposed by the I.G. 42 C.F.R. § 1005.20.

During the prehearing conference held on April 10, 1996, the parties waived an in-person hearing and agreed to submit the case to me for decision based upon a written record. Accordingly, I set out a briefing schedule in my prehearing order dated April 18, 1996. The parties have submitted their motions, briefs and exhibits.[3]

For the reasons that follow, I find in favor of the I.G. on the issues of whether a basis for the exclusion exists under section 1128(b)(1) of the Act, and whether a three-year exclusion is reasonable in length.

FINDINGS

1. At all times relevant to this action, Petitioner has been a Registered Nurse. I.G. Exs. 1, 2, 8.

2. During the period relevant to this action, Petitioner was employed as the Director of Nursing for Laabs Home Health Care, Inc., a home health agency. I.G. Ex. 7.

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[3] In addition to filing a Motion for Disposition Based on the Written Record, the I.G. has submitted a brief in chief (I.G. Br.) and a reply brief (I.G. Reply), along with 11 exhibits (I.G. Exs. 1 through 11). Petitioner has submitted a Motion for Appropriate Relief and In Opposition to the Inspector General's Motion, a brief in chief (P. Br.), and three exhibits (P. Exs. 1 through 3). I have admitted all of the exhibits into evidence.

3. On November 1, 1991, Petitioner signed a form for the patient N.R. to receive home health services from Laabs Home Health Care. I.G. Ex. 8 at 1.

4. N.R. is confined to a wheel chair, has left-sided paralysis, and suffers from brain damage, seizures, and memory limitations. I.G. Ex. 2 at 2; I.G. Ex. 8 at 2; P. Ex. 1 at 30.

5. On or before November 8, 1991, N.R. was admitted by Laabs Home Health Care for the receipt of home health services. I.G. Ex. 8.

6. In November of 1991, N.R. acted on Petitioner's suggestion to open a checking account with his money, placed both Petitioner's name and his name on the account, and gave Petitioner authorization to use the funds from the account to buy his groceries and pay his bills. I.G. Ex. 2; P. Ex. 1 at 8.

7. Petitioner pled guilty to the offense of "Theft by Bailee in excess of $500," a misdemeanor offense, in Wisconsin State Court for having stolen N.R.'s money from the bank account between November 8, 1991 and July 8, 1992. The guilty plea was accepted by the court. I.G. Exs. 1, 2; P. Ex. 1 at 3, 34.

8. Petitioner was convicted within the meaning of sections 1128(b)(1) and (i)(3) of the Act. Finding 7.

9. Petitioner's conviction was for an offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct within the purview of section 1128(b)(1) of the Act. Finding 7.

10. During the period from November 8, 1991 to July 8, 1992, the period specified in the Criminal Complaint, N.R. received home health care services from Laabs Home Health Care. I.G. Ex. 8.

11. During the period from November 8, 1991 to July 8, 1992, Petitioner, in her capacity as an employee of Laabs Home Health Care, delivered as well as supervised the delivery of home health services to N.R. I.G. Ex. 8.

12. At various times during the period from November 8, 1991 to July 8, 1992, Petitioner delivered to N.R. also certain basic, non-skilled, custodial or life-sustaining types of health care services, such as buying him food to eat and clothing to wear, doing his laundry, paying his rent, and paying his telephone bills. P. Ex. 1 at 7, 14-19, 26.

13. In setting up the checking account from which Petitioner stole money as a bailee, N.R. had intended Petitioner to use the money from the account to take care of his basic health maintenance needs, such as buying his groceries and paying his bills. I.G. Ex. 2 at 2, 3.

14. Petitioner agreed to provide such basic, health maintenance types of care to N.R. by using his money from the checking account for that purpose. See Finding 12; P. Ex. 1 at 8, 17.

15. In explaining the use of N.R.'s money in the checking account, Petitioner noted that she had provided health care services to N.R. and then billed Laabs Home Health Care for her services. P. Ex. 1 at 19.

16. It is logical to conclude that, to avoid disrupting N.R.'s receipt of home health services, N.R.'s rental bills would need to be paid so that he could have a home in which to live and receive home health care services. See Finding 10.

17. Due to his medical condition, Petitioner needed to have his telephone bills paid so that he would have telephone services available in case of medical emergencies. See I.G. Ex. 8 at 5; Finding 4.

18. Petitioner placed N.R. at risk for being evicted from his apartment due to the nonpayment of his rent. P. Ex. 1 at 31.

19. Petitioner did not always pay N.R.'s telephone bills. P. Ex. 1 at 31.

20. Sometimes N.R. ran out of goods at his home, and Petitioner would tell him that there was no money left and to wait until the beginning of the month when his benefit checks would usually arrive. P. Ex. 1 at 31.

21. Drawing from the account N.R. had established, Petitioner wrote checks to pay for her child care needs and to buy things for herself such as cosmetics and weight reduction services. P. Ex. 1 at 9.

22. Instead of depositing the full amount of the checks sent to N.R. each month by government agencies and his pension program, Petitioner sometimes withdrew cash and spent the cash without obtaining receipts. I.G. Ex. 2 at 3; P. Ex. 1 at 26-27, 29-30.

23. Petitioner's commission of her crimes had placed N.R.'s physical health at risk. See Findings 13 to 21.

24. Petitioner's commission of her crimes had a negative impact on the state of N.R.'s mental health. P. Ex. 1 at 36-37.

25. Petitioner's conviction was in connection with the delivery of health care items or services within the meaning of section 1128(b)(1) of the Act. Findings 1 to 7, 10 to 24.

26. The I.G. had a basis for imposing and directing an exclusion against Petitioner. Findings 8, 9, 25; section 1128(b)(1) of the Act.

27. When the I.G. decides in her discretion to impose an exclusion under section 1128(b)(1) of the Act, the regulations require her to impose an exclusion of three years, unless certain enumerated aggravating or mitigating factors exist to warrant increasing or decreasing the three-year benchmark period of exclusion. 42 C.F.R. §§ 1001.201, 1005.4(c)(5).

28. The I.G. imposed and directed the benchmark exclusion period of three years against Petitioner. I.G. Br. at 9.

29. Petitioner has the burden of coming forward with evidence to prove her affirmative defense that the mitigating factor codified at 42 C.F.R. § 1001.201(b)(3)(i) is present and should have reduced the length of the three-year benchmark exclusion period. Order and Schedule for Filing Briefs and Documentary Evidence at 2.

30. Petitioner has proven that she satisfies the first element of the mitigating factor codified at 42 C.F.R. § 1001.201(b)(3)(i), in that she was convicted of only one misdemeanor. Finding 7.

31. The remaining element Petitioner has the burden of proving is that, due to the acts that resulted in conviction or similar acts, the total financial losses to one or more individuals or entities equal less than $1500. 42 C.F.R. § 1001.201(b)(3)(i).

32. Under the elements of the misdemeanor offense to which she pled guilty, Petitioner is deemed to have stolen more than $500 but not more than $1000. P. Ex. 2; I.G. Ex. 1.

33. Petitioner has not proven her allegation that she stole only $300 from N.R. Finding 31.

34. Petitioner has failed to account for her prior unlawful acts of writing bad or worthless checks. See P. Ex. 1 at 32, 38.

35. Petitioner's writing bad or worthless checks, together with her crimes against N.R., were considered by the judge in sentencing her as evidence of a gradual victimization of others over a significant period of time. P. Ex. 1 at 37-39.

36. Petitioner agreed to pay restitution in the amount of $3000 to N.R., while pleading guilty to having stolen more than $500 but not more than $1000 from N.R. P. Ex. 1 at 30; Finding 31.

37. It is not possible to ascertain precisely how much Petitioner stole from N.R. given his mental impairments, her withdrawals of cash from the checking account, and her expenditures without obtaining receipts. Findings 4, 22; P. Ex. 1 at 38.

38. Petitioner has not adequately refuted the inference that the $3000 in restitution she agreed to pay consisted of the money she pled guilty to having stolen (between $500 and $1000), as well as an additional amount she was not charged with stealing but which she actually stole from N.R. See P. Ex. 1 at 11.

39. Petitioner has failed to prove the element of the mitigating factor that less than $1500 in total financial losses had been suffered by N.R. or others due to the acts which resulted in her conviction as well as similar acts. Findings 33-38.

40. Petitioner has failed to prove that, as applied to the facts of this case, the mitigating factor she relies upon, even if present, warrants reducing the benchmark exclusion period. See Findings 1-29.

41. The three-year exclusion imposed and directed by the I.G. is reasonable as a matter of law. Findings 27-29, 39, 40.

DISCUSSION

A. I conclude that there exists a proper basis for the exclusion under section 1128(b)(1) of the Act.

The I.G. contends that all elements of the statute have been met. That is, the I.G. contends that the evidence shows: (a) Petitioner was convicted under State law; (b) Petitioner's conviction was in connection with the delivery of a health care item or service; and (c)

Petitioner's conviction was for an offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. I.G. Br. at 6-7. The I.G.'s contention is based primarily on the fact that Petitioner was providing health care to the victim of her crimes, N.R., during the time she committed the offenses which resulted in her conviction. I.G. Reply at 1-2.

The evidence of record establishes that Petitioner, a Registered Nurse, was convicted in the State Court of Wisconsin after having pled guilty to one misdemeanor count of theft by bailee in excess of $500.00 from November 8, 1991 through July 8, 1992.[4] I.G. Exs. 1, 9. During the period she committed her criminal offenses, Petitioner was employed by Laabs Home Health Care, Inc., as its Director of Nursing. I.G. Ex. 7. Her income was approximately $52,000 a year. P. Ex. 1 at 3. The victim of Petitioner's crimes, N.R., was a patient of Laabs Home Health Care during the time Petitioner committed her crimes.[5] I.G. Ex. 6 at 1-2; I.G. Ex. 8. N.R. was receiving health care from said home health agency as a Medicare beneficiary. I.G. Ex. 8 at 4.[6]

Seven days before Petitioner began committing the crimes for which she was convicted, she signed a form for Laabs Home Health Care to admit N.R.[7] I.G. Ex. 8 at 1. On November 8, 1991, a physician authorized N.R.'s admission to said home health care agency, and Petitioner's criminal activities against N.R. began. I.G. Ex. 1; I.G. Ex. 8 at 1. Also according to the evidence submitted by

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[4] The court's acceptance of a plea of guilty constitutes a conviction within the meaning of the Act. Section 1128(i)(3) of the Act. Petitioner does not dispute that she was convicted. I.G. Exs. 4, 6.

[5] I use the term "crimes" instead of "crime" because, as noted by the court during sentencing, "[I]t's more accurate I think to talk about crimes. This was a repeated pattern of behavior over a significant period of time." P. Ex. 1 at 34.

[6] However, at Petitioner's sentencing hearing, her attorney represented that the crimes were investigated by the Medicaid fraud unit. P. Ex. 1 at 22.

[7] Employees of a home health agency provide care or services at the patients' homes or other designated locations. Therefore, I use the word "admit" or "admission" to mean that the patient is placed under the care of the home health agency for the receipt of care or services at the patient's home or other locations.

the I.G., during the period from November 8, 1991 to July 8, 1992, Petitioner, in her capacity as an employee of Laabs Home Health Care, delivered as well as supervised the delivery of home health services to N.R. I.G. Ex. 8.

Petitioner has stipulated to the contents of the Criminal Complaint as the basis for her guilty plea. P. Ex. 1 at 3. According to the Criminal Complaint, Petitioner's victim, N.R., was paralyzed on his left side and was confined to a wheelchair. I.G. Ex. 2 at 2.[8] N.R. said he knew Petitioner to be a Registered Nurse employed by Laabs Home Health Care. Id. On November 8, 1991, N.R. acted on Petitioner's suggestion and made an initial deposit of $150.00 to open a checking account in both their names in order for Petitioner to pay his bills and buy his groceries. Id. at 2, 3. N.R. gave Petitioner his power of attorney. P. Ex. 1 at 8.

Each month, N.R. received checks by mail in the amount of $198.00 from his pension fund, $255.23 from the Social Security program, and $122.00 from the Supplemental Security Income program. I.G. Ex. 2 at 2, 4-5. Petitioner was the only person with a key to N.R.'s mailbox. Id. at 3. The bank records showed that Petitioner had endorsed N.R.'s benefit checks and that sometimes she deposited portions of his checks into the account started by N.R. and took the remaining amounts in cash. Id. at 5. By the time of the criminal investigation, 130 checks had been drawn from this account, and all of them showed Petitioner's signature. Id. at 3, 4. N.R. identified only 14 checks, which totalled $720.42, as having been written by Petitioner for his use. Id. at 4. The remaining checks written by Petitioner included those made payable to Jenny Craig (a weight loss program), to Visa credit card, and for Mary Kay cosmetic products. Id. at 3-4. N.R. said he had no Visa card, was not a member of the Jenny Craig program, and did not receive any Mary Kay cosmetic products. Id. According to Petitioner's attorney in the criminal proceedings, the checks Petitioner wrote fell into two categories: those for the care of her children, and those for things to make her feel better about herself, such as for Weight Watchers, Jenny Craig, and cosmetics. P. Ex. 1 at 9.

At the time of the criminal investigation, the account had been charged more than $450.00 for overdrawn checks and had a balance of only $3.90. I.G. Ex. 2 at 6. The

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[8] Laabs Home Health Care's records show that since March of 1974, N.R. has suffered from traumatic brain injury, left hemiplegia, and seizures. I.G. Ex. 8 at 3.

amount of money Petitioner was charged with stealing ($2695.29) was calculated on the basis of the amount of the monthly benefit checks which were payable to N.R. and deposited into the joint bank account, less the amount of the checks N.R. acknowledged as having been written by Petitioner for his use. Id. at 6.

In her brief, Petitioner does not dispute that she was convicted or that her conviction was for an offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct within the purview of section 1128(b)(1) of the Act. Instead, Petitioner takes issue with the I.G.'s conclusion that her conviction was in connection with the delivery of a health care item or service.

Petitioner argues that she was excluded without a proper basis under section 1128(b)(1) of the Act. Petitioner contends she had befriended N.R., who "also happened to be a patient of the home health agency where Petitioner was director of nursing." P. Br. at 3. In her hearing request and prior correspondence with the I.G.'s office, Petitioner alleged also that no nurse-patient relationship existed when she became a friend of N.R. and helped him move into lodgings for the handicapped (I.G. Ex. 6 at 1), that she began her fiduciary relationship with N.R. prior to his becoming her patient (I.G. Ex. 4 at 1), and that she continued to act as N.R.'s friend and handle his financial affairs (but she did not render care to him or supervise his care) after he became a patient of the home health agency employing her (I.G. Ex. 6).

The evidence submitted by Petitioner shows, inter alia, that Petitioner, by her attorney, had alleged at her sentencing hearing that she had bought things for N.R., such as the Girl Scout cookies Petitioner purchased from her daughter. P. Ex. 1 at 19-20. Petitioner asserted also at the sentencing hearing that, for Christmas, Petitioner had given N.R.'s money to employees of the home health agency where she was Nursing Director, allegedly because these employees were caring for N.R. Id. at 20.

Petitioner contends that the I.G. has not alleged or proven that Petitioner's "mismanagement" of N.R.'s funds affected the delivery of health care. P. Br. at 3. In Petitioner's opinion, there was no marked effect on the provision of care or any impact on the funding or payment of health care services. Id. I assume that in pointing out that the Criminal Complaint alleged only that the checking account was opened by N.R. for payment of his bills and to buy his groceries (P. Br. at 3), Petitioner is intimating that none of the money Petitioner stole

from the account was ever intended by N.R. for the payment of his health care services.

Petitioner asserts also that the I.G.'s imposition of an exclusion on her reflects an impermissibly broad interpretation of section 1128(b)(1). Id. Apparently still believing herself innocent of the charges which resulted in her conviction, she asks, "[I]s Medicare going to exclude every nursing assistant accused of stealing from patients in nursing homes [?]" Id.

The best conclusion I can draw from Petitioner's arguments is that they are meritless.

First of all, I cannot countenance Petitioner's assertion that she had merely "mismanaged" N.R.'s funds, or her suggestion that her conviction resulted from her actions as N.R.'s friend. She was convicted of stealing from N.R. in her capacity as the bailee of his money. Petitioner should be aware by now that theft and breach of a fiduciary responsibility are not acts of friendship, especially when such criminal acts are perpetrated against an individual such as N.R., who suffered from paralysis and brain injury, and was confined to a wheelchair. P. Ex. 1 at 30; I.G. Ex. 2 at 2. After the parties presented arguments at the sentencing hearing, the court even noted the existence of a business contractual agreement which she breached in taking N.R.'s money. P. Ex. 1 at 36. The crimes she committed against N.R. would not be changed into acts of friendship even if I accepted as true that she had his best interests at heart at times such as when she used his money to buy Girl Scout cookies from her daughter and she made gifts of his money to employees she supervised and worked with.

In asking with misplaced indignation whether there will be an exclusion of every nursing assistant accused of stealing from nursing home patients, Petitioner has again purposely ignored the fact that she was not only accused, but convicted, of stealing from N.R. Neither Petitioner nor any other Registered Nurse or health care provider has been issued a license to steal from patients. Therefore, I do not share Petitioner's concern that the I.G. might endeavor to exclude all nursing assistants or other health care providers (including directors of nursing) who have been convicted of stealing from patients under their personal care or the care of their employer. Indeed, the I.G. is authorized by statute and regulation to exclude such providers.

Nor does the evidence support Petitioner's assertions that N.R. "happened" (P. Br. at 3) to have become a patient of the home health agency at which Petitioner was employed as Nursing Director after she had already formed

a fiduciary relationship with N.R. Petitioner was responsible for Petitioner's admission as a patient. Laabs Home Health Care's patient admission form shows very clearly that Petitioner signed it on November 1, 1991 in order to have N.R. receive care as a patient. I.G. Ex. 8 at 1. The evidence shows clearly also that N.R.'s admission to said home health agency was authorized by a physician on November 8, 1991 (id.) and that the crimes for which Petitioner was convicted began on November 8, 1991. I.G. Ex. 1.

Moreover, whether a fiduciary relationship had formed prior to N.R.'s admission to Laabs Home Health Care is immaterial. Petitioner was not convicted for stealing from N.R. during any period prior to his having been admitted to Laabs Home Health Care. No matter when Petitioner and N.R. had first formed their fiduciary relationship, Petitioner cannot seriously believe that she was at liberty to steal from N.R. after he was admitted to Laabs Home Health Care. I do not think it defies common sense to conclude, as Petitioner should have concluded, that being a nurse and having been employed by Laabs Home Health Care as its Nursing Director, Petitioner should have refrained from stealing money from a patient admitted by the facility, whether the thefts were to occur on or off company premises, and whether the thefts were to occur during or after her work hours for the home health agency.

I agree with the I.G. that there is no merit to Petitioner's suggestion that the financial misconduct must occur within an institutional setting. See P. Br. at 3; I.G. Reply at 2. It makes no difference under section 1128(b)(1) of the Act whether the criminal acts took place within the confines of an institution or in a private home. I agree also with the I.G. that "the Petitioner's privilege to practice nursing carries with it an ongoing basic responsibility of ethics, morality, and integrity, regardless of whether she is performing her duties in an institution or home health care setting." I.G. Reply at 2.

I do not find material or factually supportable Petitioner's argument that N.R. was a patient of Laabs Home Health Care but not her patient. Whatever standards Laabs Home Health Care or Petitioner might have used to associate particular patients with particular health care providers, the statutory criteria is "in connection with the delivery of health care items or services." The evidence leaves no doubt that not only was Laabs Home Health Care providing health care services to N.R. during Petitioner's commission of her crimes, Petitioner was also providing health care services to N.R. during the same period. Between November 8, 1991 and July 8, 1992,

Petitioner committed her crimes and repeatedly signed the treatment plans for N.R. and certified N.R. for the receipt of home health care. I.G. Ex. 1; I.G. Ex. 8 at 1-4. On at least one occasion during the period of her criminal activity against N.R., Petitioner prepared the clinical progress notes pursuant to visiting N.R., which indicates that Petitioner was involved directly in N.R.'s care. I.G. Ex. 8 at 5. In addition, Petitioner also billed Laabs Home Health Care for her medical services to N.R. P. Ex. 1 at 19.

"In connection with the delivery of any health care item or service" includes the performance of management or administrative services relating to the delivery of such items or services. 42 C.F.R. § 1001.201(a)(1). There is no doubt that the I.G. has proved that Petitioner managed or oversaw her employer's delivery of health care to N.R. on a regular basis from November 8, 1991 until July 8, 1992, while she was stealing from him. See I.G. Reply at 1-2. Therefore, it was not necessary for the I.G. to submit more evidence to show also that Petitioner was N.R.'s primary or frequent direct care provider from Laabs Home Health Care during the period of November 8, 1991 to July 8, 1992.

In addition to the foregoing connections between Petitioner's crimes and her delivery and supervision of care to N.R. as an employee of Laabs Home Health Care, information in Petitioner's exhibits also indicates that, during the period she committed the crimes, she was providing health care to Petitioner in other ways. According to the evidence of record, the bank account from which she stole was supposed to have been used in her delivery of such other health care to N.R.

The transcript of the sentencing hearing submitted by Petitioner shows that her attorney represented that she went to the store to buy food for N.R. (P. Ex. 1 at 7, 14, 19); that the joint account was set up because N.R. said he could not go to the grocery store himself because he was wheelchair bound, and Petitioner had said she would go on his behalf (id. at 8); that Petitioner used N.R.'s money also to buy him clothing items such as pants, shirts, underwear, and socks (id. at 16); that Petitioner did N.R.'s laundry (id. at 19); that Petitioner allegedly paid for N.R.'s rent (id. at 18); that it was up to Petitioner's "discretion ... just to take care of" N.R. (id. at 17); and that "[a]s long as Mr. R. was having his needs taken care of, I don't think that she thought that he would care ..." (id.). These representations are consistent with N.R.'s statement in the Criminal Complaint that he set up the joint checking account in order for Petitioner to pay his bills and buy his groceries. I.G. Ex. 2 at 2, 3.

Given that N.R. was a long-time invalid confined to a wheelchair suffering from left-sided paralysis, seizures, limited memory, and brain injury, the foregoing evidence shows that what he expected of Petitioner -- and what she claims to have done on occasions with his funds from the checking account -- was to use his money to provide him with very basic, non-skilled, custodial or health maintenance types of services. These basic health care services consisted of providing N.R. with food to eat and clothes to wear, and making sure that he would continue to have a place to live and receive home health care services by paying his rent and other bills. As specifically represented to the judge during the sentencing hearing, Petitioner would have attempted to prove, if her case had gone to trial, that N.R. had no alternative source of food other than from Petitioner. P. Ex. 1 at 26.

In addition, the sentencing hearing transcript contains also the following statement from Petitioner's counsel showing that Petitioner delivered health care services to N.R. in her individual capacity and then billed Laabs Home Health Care for her services:

> Then there's verified medical bills to Laab's. Bills incurred by Nanette Neu in the amount of $35.58.

P. Ex. 1 at 19. Petitioner's counsel provided this information in explaining how N.R.'s money from the checking account was used or should have been used.

Even though there is no evidence that the performance of the health care services noted above would require Petitioner's expertise as a Registered Nurse, she claimed to have actually performed them for N.R. because he was an ailing invalid incapable of doing the things she did for him. Petitioner knew, and N.R. intended, that his money in the checking account should be used in caring for his basic health care needs. Therefore, her stealing his money from the checking account for her own uses can only be viewed as "in connection with the delivery of health care items or services."

I reject also Petitioner's arguments that the "in connection with" element is absent in this case because her crimes did not affect the delivery of health care to N.R. and did not impact on the funding or payment of health care services for N.R. P. Br. at 3. The arguments are wrong as a matter of law and as a matter of fact.

In no case decided under section 1128(b)(1) of the Act have we ever required a showing of actual harm to the patient's health or an actual curtailment of funding for the patient's care. As noted in the decision cited by both parties, section 1128(b)(1) of the Act does not require that a petitioner's crime involve the direct or immediate manipulation of health care items or services, and even false entries in a hospital's accounting records, for example, have been deemed to be "in connection with the delivery of health care items or services" within the meaning of the law. Joel Fass, DAB CR349, at 6 (1994) (citations omitted).

In this case, Petitioner's own evidence shows that her criminal acts would have harmed N.R.'s health and disrupted his receipt of home health services if the criminal investigations and prosecution had not intervened. During Petitioner's sentencing hearing, the prosecuting attorney noted that, according to the sentencing memorandum, Petitioner had failed to pay N.R.'s phone bills and rent, and N.R. was in serious jeopardy of being ousted from his apartment because his apartment manager had requested that eviction proceedings be commenced against N.R. P. Ex. 1 at 31. Petitioner has not disputed the truth of these statements. The rent Petitioner failed to pay for N.R. amounted to approximately $89 per month, and the phone bill she failed to pay for him was for approximately $20 per month. P. Ex. 1 at 20-21.

Nor has she disputed the prosecuting attorney's statement during her sentencing hearing that, according to the victim impact statement, N.R. often needed to call his sister because he was out of things at his apartment. When N.R. called Petitioner at her office to request certain items, she would tell him to wait until the third of the month when his benefit checks were due to arrive because there was no money left. Id. at 31. However, Petitioner admits to having written checks with N.R.'s money in order to meet her own child care needs and to purchase cosmetics and weight reduction services in order to make herself feel good. P. Ex. 1 at 9.

Petitioner's failure to use N.R.'s money to pay his rent and phone bills placed N.R.'s health at risk and threatened to disrupt the delivery of home health care services to him. Since N.R. was receiving home health services, eviction from his home due to nonpayment of rent would have necessarily impacted adversely on his continued receipt of home health care services. Even though it is theoretically possible for a home health agency to deliver its services outdoors at curbside, such circumstances are not likely to be salubrious for an evicted wheelchair-bound, partially paralyzed patient

suffering also from brain damage. With respect to N.R.'s need for telephone services, Petitioner recorded in the Clinical Progress Note her personal observation that, during her visit to N.R.'s apartment, Petitioner had a telephone next to him and had emergency call strings in his bedroom and bathroom. I.G. Ex. 8 at 5. It is not difficult to ascertain from even such a brief observation by Petitioner that N.R. had his telephone next to him because he needed it as well as the call strings elsewhere in his apartment for medical emergencies. Therefore, it is reasonable to conclude that N.R. would need to have his telephone bills paid in order to receive telephone service.

Even the fact that his bills went unpaid had negative effects on the state of N.R.'s mental health. As observed by the court during the sentencing proceedings, the harm to the victim was the anguish caused him by Petitioner's actions. No matter how much money was actually lost by N.R., "the real harm to the victim . . . [is] the fright and the concern that he experienced when bills weren't being paid." P. Ex. 1 at 36. The court observed also,

> And that if there really wasn't enough money to pay these bills, then someone needed to address it, not this simple statement that an account that should have had a lot of money in it didn't have a lot of money in it. I'm sure there was a lot of confusion on his part and a lot of fright, and that's -- that's the real harm to him.

Id. at 37. The court stated further than N.R. "had to experience that fright to a serious degree here, apparently almost to the point of eviction." Id. at 36.

As noted earlier, Petitioner's checking account had been charged more than $450.00 for the overdrawn checks written by Petitioner, and the balance was only $3.90 by July 8, 1992. I.G. Ex. 2 at 6. N.R.'s sister reported Petitioner to the Police Department, which, in turn, caused the Medicaid Fraud Control Unit to investigate her actions and the State Attorney General's Office to prosecute her. P. Ex. 1 at 21, 22; I.G. Ex. 2 at 1-2, 6. It was these other people's intervention which prevented Petitioner's criminal actions from causing actual and substantial harm to N.R.'s health. But for N.R.'s being a beneficiary of the Medicare program (I.G. Ex. 8 at 7), Petitioner's theft of his money would have impacted negatively on his ability to pay for his home health care services out of his own funds.

For the foregoing reasons, I conclude that all elements of section 1128(b)(1) have been proven by a preponderance of the evidence and that a basis for the exclusion exists.

B. I conclude that Petitioner has failed to prove the existence of the mitigating factor she cites, and, therefore, the three-year exclusion imposed and directed by the I.G. is of a reasonable length as a matter of law.

The period of exclusion imposed and directed against Petitioner is three years, which became effective on February 12, 1996. As noted above, the I.G. is authorized to impose and direct an exclusion period of three years under section 1128(b)(1) of the Act when none of the aggravating factors listed by regulation exists to cause a lengthening of the benchmark period and none of the enumerated mitigating factors exists to cause a decrease of the benchmark period. 42 C.F.R. § 1001.201. Petitioner alleges that the I.G. improperly imposed and directed the three-year benchmark exclusion period by having failed to apply the mitigating factor codified at 42 C.F.R. § 1001.201(b)(3)(i):

> The individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss to . . . other individuals or entities due to the acts that resulted in the conviction and similar acts is less than $1,500.

42 C.F.R. § 1001.201(b)(3)(i); P. Br. at 4.

In my prehearing order, I placed the burden on Petitioner to come forward with evidence in support of her affirmative arguments.

The evidence cited by Petitioner establishes that the offense for which she was convicted, "Theft by Bailee in excess of $500," was a Class A Misdemeanor under Wisconsin law. I.G. Ex. 1. There is no evidence that she has been convicted of other offenses. Therefore, her conviction for one misdemeanor offense satisfies the first criterion of the above quoted mitigating factor.

Petitioner argues also that the remaining criteria of the mitigating factor have been met as well because a Class A misdemeanor is applicable under Wisconsin law only if "the value of the property does not exceed $1,000." P. Br. at 4 (citations omitted). Even though she also agreed to pay $3000 in restitution as part of her plea agreement, she notes that she pled guilty only to having stolen less than $1000 under the Class A misdemeanor. P. Br. at 4-5. Petitioner argues that under the State

statutory criteria for calculating restitution, the $3000 amount she paid in restitution "does not necessarily represent the amount of the loss" sustained by her victim. P. Br. at 5.

Petitioner points out also that, during the sentencing hearing, her attorney said she had agreed to pay $3000 in restitution as "punishment." P. Br. at 6. Her attorney at the sentencing hearing referred to two accountants' calculations which showed that only $300 was missing from N.R.'s account. Id. at 5. She contends that the prosecuting attorney did not disagree with the calculations, and that the judge who accepted her agreement to make restitution in the amount of $3000 believed that the loss to N.R. was actually $300 as well. Id.

I find that Petitioner has not sustained her burden of proving that "the entire amount of financial loss to other individuals or entities due to the acts that resulted in the conviction and similar acts is less than $1,500," as specified in 42 C.F.R. § 1001.201(b)(3)(i). What she succeeded in proving is that, given the elements of the offense to which she pled guilty, she was not convicted of having stolen more than $1000 from N.R. Contrary to what is suggested by Petitioner's argument, this proof is not enough for meeting the requirements of the mitigating factor she relies upon.

First, there is no legal basis for adopting her argument that she stole only $300 from N.R. when the conviction is for theft by bailee in excess of $500 and a Class A misdemeanor is defined as theft of property not in excess of $1000. Under her conviction, she is deemed to have stolen within the range of more than $500 and not more than $1000 from N.R.

In addition, Petitioner has not argued persuasively or proven by a preponderance of the evidence that she was convicted for stealing $300 as opposed to, for example, stealing $999 from N.R. As noted by the court and attorneys during the sentencing hearing, Petitioner received cash from the bank while depositing portions of N.R.'s monthly checks into the account, and she kept no receipts of everything she allegedly bought for N.R. with the cash she took. P. Ex. 1 at 25, 26-27, 29-30. N.R., a patient with brain injury and limited memory, had entrusted his money to her for his use. Id. at 30. Given N.R.'s mental impairments and the fact that Petitioner made various cash transactions that she could not account for with receipts, she gave estimates of what she had spent to accountants who then calculated that N.R. sustained a loss of only $300. Id. at 25, 35-36. N.R.'s food bill, for example, was calculated based on

the average weekly food cost for an individual with "liberal spending."[9] Id. at 19.

Under these circumstances, I am not persuaded that the accountants' estimate of N.R.'s loss was reliable or amounted to more than a recitation of Petitioner's self-serving statements in the aggregate. Even the court stated during the sentencing hearing that, if the case had gone to trial, it is unlikely that the actual amount of Petitioner's embezzlement could be determined with certainty. Id. at 38. Therefore, Petitioner has not met her burden of proving in this proceeding that N.R.'s loss from her crimes was limited to $300 or that the conviction was based solely on the amount of $300.

Petitioner has failed also in her proof because she has not accounted for certain prior unlawful acts of financial misconduct which are referenced in the exhibit she submitted. The regulation on mitigation relied upon by Petitioner is not limited to the amount of loss which directly resulted in convictions. 42 C.F.R. § 1001.201(b)(3)(i). The amount of loss to other people and in other incidents is calculated also if the loss was "due to ... similar acts" by Petitioner. Id.; cf. 42 C.F.R. § 1005.17(g).

At the very least, Petitioner should have accounted for the prosecuting attorney's information during sentencing that she had "picked up a couple of ordinance violations for worthless checks." P. Ex. 1 at 32. This information came from the exhibit Petitioner submitted as evidence, as did the court's explanation of its initial inclination to impose jail time in sentencing her. The court stated, "these prior bad checks . . . suggest in some ways that maybe you don't deserve to be treated as a first offender[,]" that Petitioner's offense against N.R. "wasn't just a decision to take advantage of a moment and steal some money[,]" and that "[t]his was a gradual victimization over a significant period of time." Id. at

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[9] I assume the characterization of "liberal spending" refers to Petitioner because she was charged with buying N.R.'s food for him, she had no receipts for food purchases, and N.R. had no particular eating habit of record other than his eating lasagna from a place called "Moyers" a couple of times a week. P. Ex. 1 at 14, 15, 26. I do not think his eating lasagna from Moyers a couple of times a week should be construed as "liberal spending," especially since there is evidence also that he would run out of things at his apartment at times and Petitioner would tell him to wait until his next check came. Id. at 31.

37-38.[10] The court obviously considered the past writing of "bad checks" to be related to her theft of N.R.'s money. Yet, Petitioner chose not to provide any information concerning how much, if any, financial loss resulted from these unlawful acts which, on their face, appear to be in the nature of financial fraud similar to those offenses which resulted in Petitioner's conviction.

In addition, the fact that Petitioner agreed to make restitution of $3000 raises certain inferences which she has not successfully refuted. As I noted earlier, no one knows exactly how much money she actually stole from N.R. because she sometimes took cash and did not keep receipts. She was originally charged with a Class C felony involving theft over $2500. I.G. Ex. 2. However, because N.R. has limited memory due to his brain injury, the State amended the charge to a Class A Misdemeanor pursuant to Petitioner's plea agreement. I.G. Ex. 1; P. Ex. 1 at 30.

Under these circumstances, Petitioner's willingness to voluntarily pay restitution to N.R. in the amount of $3000 as part of her plea agreement is not persuasive proof that she never stole that amount from N.R. The amount of the restitution raises the question of whether, in addition to the statutory amount to which she had pled guilty to having stolen (more than $500 but not more than $1000), Petitioner has caused N.R. considerably more in financial losses through the commission of similar acts for which she had not been convicted. Her arguments and proof do not adequately resolve this question, which is relevant to the mitigating factor she asserts.

It is true that Petitioner alleged during her sentencing that she considered the $3000 in restitution as punishment. However, there is nothing inherently believable about her proposition that, even though she never stole more than $300 from N.R., she wanted to punish herself by agreeing to pay him $3000 as "restitution." Moreover, there is insufficient evidence that the Prosecuting Attorney agreed with Petitioner's contention that $3000 in restitution exceeded the total monetary losses N.R. had actually sustained from all of Petitioner's actions. She noted only that the

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[10] The court made these statements in explaining why it had initially considered imposing jail time against Petitioner. The court decided not to impose any jail time only because the exact amount of her theft could not be ascertained even if the case had gone to trial. P. Ex. 1 at 38. However, the court stated later that it was imposing a fine for the same reasons that it had initially considered jail time. P. Ex. 1 at 39.

restitution amount was resolved by agreement and that, therefore, she would not argue at the sentencing proceeding about how much money Petitioner had actually stolen from N.R. P. Ex. 1 at 30. An agreement is a meeting of the minds by at least two parties. Here, there is no evidence that the Prosecuting Attorney thought of the $3000 as punishment instead of as reimbursement for N.R.'s losses, as the word "restitution" ordinarily means.

Petitioner is correct in pointing out that Wisconsin law gives the court latitude in considering various factors when setting the amount of restitution. P. Br. at 5. However, this fact is of questionable relevancy since the court in this case did not calculate the amount of the restitution but, instead, approved it as part of the plea agreement after Petitioner had already paid the $3000 as restitution. I.G. Ex. 1; P. Ex. 1 at 34. The court accepted the agreement with the following comment:

> It may well be that the restitution that has been paid here goes well beyond the actual figure, the actual dollars that he was actually deprived of, but I think it's a fair restitution.

P. Ex. 1 at 39.

This statement by the court provides some support for the conclusion that Petitioner never stole a total of $3000 from N.R. Viewed in the context of Petitioner's having spent much cash without obtaining receipts for a brain-injured patient with limited memory, the court's statement reflects the reality that the prosecution was unlikely to prove that Petitioner stole $3000 from N.R. if the case had gone to trial. However, the mitigating factor Petitioner must prove as her affirmative defense does not use $3000 as the measure. Neither this statement by the court nor anything else offered by Petitioner proves that the financial loss suffered by N.R. and others totalled less than $1500 from the acts that resulted in Petitioner's conviction as well as similar acts.

Even if Petitioner had proved the existence of the mitigating factor she cited, she does not become automatically entitled to a reduction of the benchmark period. I note that the word "may" is used in the regulation which permits a reduction of the exclusion period. 42 C.F.R. § 1001.201(b)(3). The fact that she was convicted of one misdemeanor offense for stealing between $500 to $1000 does not lessen the heinous nature of her crimes, as shown by the manner in which she committed her offenses, her victim's dependency on her,

the trust she breached, her victim's need for the money she stole, and the uses to which she had put the stolen money. Thus, Petitioner has not shown that, as applied to the facts of this case, the mitigating factor she cited, if present, warrants a reduction of the exclusion period.

Therefore, Petitioner has failed to prove that a benchmark exclusion period of three years is unreasonable. The facts introduced by both parties indicate that Petitioner lacks trustworthiness. A three-year exclusion under the regulations is reasonable to safeguard the health and financial interests of Medicare and Medicaid patients.

CONCLUSION

I uphold the three-year exclusion the I.G. imposed and directed under section 1128(b)(1) of the Act.

/s/

Mimi Hwang Leahy

Administrative Law Judge