

Paul R. LePage, Governor

Ricker Hamilton, Commissioner

Department of Health and Human Services
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221 State Street
11 State House Station
Augusta, Maine 04333-0011
Tel.: (207) 287-3707; Fax: (207) 287-3005
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IN THE MATTER OF:

Alana Wilkins, RN



)
) **FINAL DECISION**
)

This is the Department of Health and Human Services' Final Decision.

The Recommended Decision of Hearing Officer Strickland, mailed February 5, 2018 has been reviewed.

I hereby adopt the findings of fact and I accept the Recommendation of the Hearing Officer that the Department was not correct when denied Alana Wilkins' request for MaineCare reinstatement.

DATED: March 26, 2018 SIGNED: *Ricker Hamilton*
RICKER HAMILTON, COMMISSIONER
DEPARTMENT OF HEALTH & HUMAN SERVICES

YOU HAVE THE RIGHT TO JUDICIAL REVIEW UNDER THE MAINE RULES OF CIVIL PROCEDURE, RULE 80C. TO TAKE ADVANTAGE OF THIS RIGHT, A PETITION FOR REVIEW MUST BE FILED WITH THE APPROPRIATE SUPERIOR COURT WITHIN 30 DAYS OF THE RECEIPT OF THIS DECISION.

WITH SOME EXCEPTIONS, THE PARTY FILING AN APPEAL (80B OR 80C) OF A DECISION SHALL BE REQUIRED TO PAY THE COSTS TO THE DIVISION OF ADMINISTRATIVE HEARINGS FOR PROVIDING THE COURT WITH A CERTIFIED HEARING RECORD. THIS INCLUDES COSTS RELATED TO THE PROVISION OF A TRANSCRIPT OF THE HEARING RECORDING.

cc: Janet Michael, JD, PO Box 10631, Portland, ME 04104
Thomas Bradley, AAG, Office of the Attorney General
Herbert Downs, DHHS/Division of Audit



Department of Health
and Human Services

Maine People Living
Safe, Healthy and Productive Lives

Paul R. LePage, Governor

Ricker Hamilton, Commissioner

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FEB - 5 2018

DATE OF MAILING: _____

Ricker Hamilton, Commissioner
Department of Health and Human Services
11 SHS, 221 State Street
Augusta, ME 04333

RE: Alana Wilkins, RN – denial of request for MaineCare reinstatement.

ADMINISTRATIVE HEARING RECOMMENDATION

An administrative hearing in the above-referenced matter was held on November 1, 2017, before Hearing Officer Jeffrey P. Strickland at Biddeford, Maine. The Hearing Officer's jurisdiction was conferred by appointment from the Commissioner, Department of Health and Human Services. The hearing record was left open through December 19, 2017, for written closing arguments.

APPEARING ON BEHALF OF RESPONDENT:

Thomas Bradley, AAG
Kelli Johnson, RN

APPEARING ON BEHALF OF CLAIMANT:

Janet Michael, Esq.
Alana Wilkins, RN

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer exhibits:

- H-1: The following items, collectively:
- Reschedule letter dated September 19, 2017.
 - Reschedule letter dated August 17, 2017.
 - E-mail chain dated August 14, 2017, through August 15, 2017.
 - Scheduling letter dated May 17, 2017.
 - Order of Reference dated May 16, 2017.
 - Fair Hearing Report Form dated May 10, 2017.
 - Appeal letter dated April 29, 2017.
 - Final Informal Review Decision dated March 6, 2017.
 - Informal review request dated January 9, 2017.
 - Denial of request for MaineCare reinstatement dated September 20, 2016.

- Request for MaineCare reinstatement dated September 15, 2016.
- Denial of request for MaineCare reinstatement dated May 25, 2016.
- Request for MaineCare reinstatement dated March 18, 2016.
- Entry of appearance date October 31, 2017.
- E-mail chain dated December 4, 2017.

Respondent exhibits:

- D-1: Order of Reference dated May 16, 2017.
- D-2: Fair Hearing Report Form dated May 10, 2017.
- D-3: Consent Agreement for Warning dated January 22, 2003.
- D-4: Letter from Marci A. Alexander, AAG, to Richard T. DeRoberto, OIG, dated March 7, 2003, with attachments.
- D-5: MaineCare Exclusion Letter dated March 18, 2003, with Certified Mail Receipt.
- D-6: MaineCare letter of violation by Employment dated March 18, 2009; Certified Mail Receipts.
- D-7: Request for reinstatement dated March 18, 2016.
- D-8: Decision to deny reinstatement dated May 25, 2016.
- D-9: Request for reinstatement dated September 15, 2016.
- D-10: Decision to deny reinstatement dated September 20, 2016.
- D-11: Request for informal review dated January 9, 2017.
- D-12: Letter from Katherine Wadley dated February 7, 2017.
- D-13: Final Informal Review Decision dated March 6, 2017.
- D-14: Request for administrative hearing dated April 29, 2017.
- D-15: 10-144 C.M.R. Ch. 101 (MaineCare Benefits Manual), Chapter I.

Claimant exhibits:

- C-1: State of Maine Nursing License.
- C-2: Letter from Maine State Board of Nursing to Alana Wilkins, RN, dated July 19, 2017.
- C-3: Letter of Recommendation from Normand M. Methot dated October 23, 2017.
- C-4: Letter of Recommendation from Tim Smith dated October 13, 2017.
- C-5: Letter of Recommendation from Merrill R. Farrand, Jr., D.O., dated October 16, 2017.
- C-6: Letter of Recommendation from Jonathan P. Shill, M.D., PhD., dated October 16, 2017.
- C-7: E-mail from Tami Perry to Claimant dated March 30, 2015.
- C-8: Certificate of Naturalization dated October 14, 2005.
- C-9: Notary Public certificated dated July 25, 2017.
- C-10: Treatment record (Claimant) dated March 20, 2003.
- C-11: Photographs (six total) dated March 18, 2003, and March 20, 2003.
- C-12: Treatment record, dated March 20, 2009, and March 25, 2009; Proof of Death Certificate dated April 26, 2010.
- C-13: Behavior Detail Report (eight total) dated November 17, 2008. through May 20, 2009.

WRITTEN ARGUMENT:

- 1. Respondent's closing argument dated December 19, 2017.
- 2. Claimant's closing argument dated December 19, 2017.

FINDINGS OF FACT:

- 1. Claimant is a Registered Professional Nurse in the State of Maine. Ex. C-1.
- 2. On April 22, 2002, Claimant while employed in the capacity of acting director of nursing at Kennebunk Nursing and Rehabilitation Center diverted a total of 13 tablets of Zyprexa (Olanzapine)

that had been discontinued by a resident's physician and were to be discarded according to protocol. Ex. D-3; Ex. D-4; Test. Alana Wilkins.

3. Claimant diverted the drugs in question for the purpose of administering them to her husband, who had been prescribed Zyprexa but had run out and was unemployed at the time due to an injury. Ex. D-3; Ex. D-11, Informal Review Ex. "A"; Test. Alana Wilkins.

4. Claimant's husband had a past history of physically abusing Claimant and one of her children when unmedicated or intoxicated. Ex. D-11, Informal Review Ex. "C"; Test. Alana Wilkins.

5. Following the above, one or more anonymous complainants reported Claimant's actions to Administrator Irving Fraunce, her supervisor at that time, and to the Department of Human Services, Bureau of Medical Services, Division of Licensing and Certification. Test. Alana Wilkins.

6. On April 25, 2002, Mr. Fraunce confronted Claimant regarding her reported actions whereupon "[Claimant] admitted to the theft and expressed remorse." Ex. D-11, Informal Review Ex. "A"; Test. Alana Wilkins.

7. Claimant at that time informed Mr. Fraunce that she had taken the Zyprexa for her husband because he had run out and "they could not afford to refill it." Ex. D-11, Informal Review Ex. "A".

8. Claimant at that time offered to return the diverted drugs and subsequently returned 12 of the 13 tablets she had diverted. Ex. D-11, Informal Review Ex. "A"; Test. Alana Wilkins.

9. Claimant as a result of her actions was suspended from work for two days without pay and, although no actual financial loss was incurred as a result of the diversion, required to pay the resident \$139.68 for the unreturned tablet. Ex. D-11, Informal Review Ex. "A"; Test. Alana Wilkins.

10. Following the above, Claimant upon being offered her choice of the Director of Nursing and Assistant Director of Nursing positions accepted the Assistant Director of Nursing position at Kennebunk Nursing and Rehabilitation Center. Test. Alana Wilkins.

11. On June 11, 2002, the State of Maine Board of Nursing issued a Notice of Complaint to Claimant on the basis of an anonymous letter dated June 1, 2002. Ex. D-3.

12. Following the above, an anonymous letter was sent to an otherwise unrelated resident's family who were known for being "very outspoken". Test. Alana Wilkins.

13. Claimant was terminated from Kennebunk Nursing and Rehabilitation Center on or about September 30, 2002, and began working for Merrill Farrand, D.O. the next week. Test. Alana Wilkins.

14. On November 13, 2002, Claimant attended an informal conference with the State of Maine Board of Nursing regarding information in an anonymous letter dated June 1, 2002, a letter from Kennebec Nursing and Rehabilitation Center dated June 17, 2002, and Complaint Narrative #02-PNF-581 from the Department of Human Services, Division of Licensing & Certification. Ex. D-3.
15. On November 21, 2002, the State of Maine filed a criminal complaint against Claimant in Biddeford District Court on one count of Stealing Drugs, Class D (17-A M.R.S. § 1109). Ex. D-4.
16. On January 10, 2003, Claimant signed a Consent Agreement for Warning in which she admitted to having misappropriated 13 tabs of the drug Zyprexa for the purpose of medicating her husband, whose prescription had run out, and agreed that her conduct constituted grounds for discipline under 02-380 C.M.R. Ch. 4, §§ 1(A)(6) (Unprofessional conduct) and (3)(F) (Diverting drugs, supplies or property of patients or health care provider). Ex. D-3.
17. The State of Maine Board of Nursing Consent Agreement for Warning became effective on January 22, 2003, upon being executed by the Office of the Attorney General. Ex. D-3.
18. The State of Maine Board of Nursing Consent Agreement for Warning was reported to the NPDB and NURSYS as a disciplinary action for diverting a controlled substance. Ex. D-11.
19. On January 21, 2003, Claimant on the basis of her guilty plea was convicted of Stealing Drugs, (Class D (17-A M.R.S. § 1109) and was sentenced to confinement for three months (all suspended), ordered to pay fines, surcharges and assessments in the total amount of \$352.00, and placed on probation for one year with terms that included "DISCLOSURE OF ANY EMPLOYER DURING TERM OF PROBATION ON THIS CONVICTION". Ex. D-4.
20. On March 18, 2003, Respondent issued a decision which stated that, based on her conviction, Claimant had "been excluded from receiving reimbursement from any and all medical assistance programs administered by DHS . . . for an indefinite period of time from the date you receive this letter or for such period as may later be determined by the Secretary of the United States Department of Health and Human Services under Section 1128 of the Social Security Act, whichever is longer . . . because of your failure to comply with state law as is required under MaineCare Benefits Manual (MCBM), [Chapter I] Section 1.17 J & M." Ex. D-5.
21. Claimant has not been excluded by the OIG. Stipulated.
22. Claimant was assaulted by her husband on March 18, 2003. Ex. C-11; Test. Alana Wilkins.
23. Claimant's husband was taken into custody on March 19, 2003. Test. Alana Wilkins.
24. Claimant received Respondent's March 18, 2003, decision on March 24, 2003. Ex. D-4.

25. Respondent's March 18, 2003, decision included instructions for requesting an informal review within 30 days of receiving that decision and for requesting a hearing within 30 days of receiving a decision on an informal review. Ex. D-5.
26. Claimant did not request an informal review of Respondent's March 18, 2003, decision within 30 days of receiving that decision on March 24, 2003. Ex. H-1.
27. Respondent's March 18, 2003, decision to exclude Claimant did not include instructions for requesting reinstatement or indicate that causing claims to be submitted during a period of exclusion could result in the denial of a request for reinstatement. Ex. D-5.
28. Claimant received a second copy of Respondent's March 18, 2003, decision on March 28, 2009, along with a letter dated March 18, 2009, which stated that Claimant was "currently employed by a MaineCare provider, Henrietta Goodall Hospital, that Respondent did not have "documentation showing that you have requested reinstatement to the MaineCare Program after your March 24, 2003, exclusion from the program", and that "[r]einstatement is required to enroll as a MaineCare provider and/or be employed by a healthcare entity that receives MaineCare funding." Ex. D-5.
29. Respondent's March 18, 2009, letter included instructions for requesting reinstatement. Ex. D-5.
30. Respondent's March 18, 2003, decision and March 18, 2009, letter did not state that causing claims to be submitted during periods of exclusion could jeopardize reinstatement. Ex. D-5.
31. Henrietta Goodall Hospital received a copy of Respondent's March 18, 2003, decision and March 18, 2009, letter on March 23, 2009. Ex. D-2.
32. On February 2, 2016, Respondent advised Southern Maine Medical Center, which by then had merged with Henrietta Goodall Hospital, to terminate Claimant's employment. Ex. D-2.

CONCLUSIONS OF LAW:

1. The denial of reinstatement on the basis of 42 C.F.R. Part 1000 requirements pertaining to exclusion is not supported.
2. It is reasonably certain that the types of actions that formed the basis for the original exclusion in this case have not recurred and will not recur.

RECOMMENDED DECISION:

The Hearing Officer recommends that the Commissioner REVERSE Respondent's decision to deny Claimant's request for reinstatement.

RATIONALE:

The disputed action in this case is the denial of an excluded provider's request for reinstatement based on failure to abide by the provisions of 42 C.F.R. § 1000 *et seq.* pertaining to the exclusion of individuals and entities, with the original exclusion being based on a misdemeanor conviction for Stealing Drugs (17-A M.R.S. § 1109).

The evidence shows that Respondent on March 18, 2003, issued a decision which stated that Claimant, a Registered Nurse, had been "excluded from receiving reimbursement from any and all medical assistance programs administered by DHS . . . effective for an indefinite period of time from the date you receive this letter or for such period as may later be determined by the Secretary of the United States Department of Health and Human Services under Section 1128 of the Social Security Act, whichever is longer." The evidence further shows that the March 18, 2003, decision was sent to Claimant via certified mail on March 24, 2003, and again on March 28, 2009.

Claimant was terminated from her position at Southern Maine Medical Center on February 2, 2016, and requested reinstatement on March 18, 2016, and again on September 15, 2016. Respondent's September 20, 2016¹, decision to deny Claimant's request for reinstatement reads as follows:

By letter dated March 18, 2003 (copy enclosed), the Maine Department of Health and Human Services informed you that you were excluded from participating in MaineCare and that neither you nor any MaineCare provider for whom you are an employee, partner, or owner may receive reimbursement from MaineCare for services rendered by you. You received and signed for this notification in March of 2003. Your State exclusion became effective on March 24, 2003.

Per Southern Maine Health Care's admission, you have been employed through the Southern Maine Health Care system since August 16, 2004. On February 2, 2016, Southern Maine Health Care became aware that you were on the Maine Excluded Provider List. Southern Maine Health Care has forwarded a copy of your discharge notice, dated February 2, 2016.

Based on the above information, the Department has determined that you have provided services to and received MaineCare reimbursement from a provider who is a MaineCare participant. Your employment occurred while you were State excluded. Therefore, your reinstatement request is denied.

The Department's action is pursuant to the provisions of the MaineCare Benefits Manual Chapter I, Section 1.19-1 Grounds for Sanctioning and/or Recouping Payment from Providers, Individuals, or Entities:

Y. Failure to abide by the provisions of 42 CFR 1000 *et seq.*, pertaining to the exclusion of individuals and entities.

Claimant on January 9, 2017, requested an informal review, and Respondent on March 6, 2017, issued a Final Informal Review Decision upholding its decision to deny reinstatement. The March 6, 2017, Final Informal Review Decision additionally asserts as follows:

¹ Respondent's original notice, dated May 25, 2017, having been sent to Claimant's previous address in error. Ex. D-7; Ex. D-8.

In March of 2009, PI learned that Alana Wilkins was an employee of Henrietta Goodall Hospital. A letter was sent from Marc Fecteau, Director, PI, to Alana Wilkins and Paula Crosby, Compliance Officer, Henrietta Goodall Hospital. The letter stated that PI had not received a request from Alana Wilkins for reinstatement, and explained that reinstatement was required in order to enroll as a MaineCare provider and/or be employed by a healthcare entity that receives MaineCare funding. The letter explained that Alana Wilkins must request reinstatement. PI received a certified mail receipt signed by Alana Wilkins on March 28, 2009, acknowledging receipt of the letter. PI also received the certified mail receipt signed by Donna A. Moody of Henrietta Goodall Hospital on March 23, 2009. No request for reinstatement was received.

Issues raised on appeal relate primarily to the conduct forming the bases for both the original exclusion and the denial of reinstatement. Claimant's evidence and argument concern the severity and extent of her conduct with respect to the former and mitigating circumstances with respect to both, in addition to her professional competence, commitment, and trustworthiness as a provider.

Basis for original exclusion:

Respondent's March 18, 2003, notice states that the decision to exclude Claimant was based on a January 21, 2003, conviction "in Maine District Court of stealing drugs" while she was working for Kennebunk Nursing and Rehabilitation, a MaineCare provider, and describes the legal basis as follows: "The Department takes this action because of your failure to comply with state law as is required under MaineCare Benefits Manual (MCBM), Section 1.17-1 J & M. This sanction is imposed in accordance with MCBM, Chapter I, concerning the types and extent of sanctions."

Respondent at hearing additionally submits a January 22, 2003, State of Maine Board of Nursing Consent Agreement for Warning wherein "[Claimant] admits that she misappropriated 13 tabs of the drug 'Zyprexa.' She took the drugs for the purpose of medicating her husband whose prescription of Zyprexa had run out. When confronted by her supervisor regarding the incident [Claimant] admitted that she took the drugs. [Claimant] returned 12 tabs of Zyprexa to the facility and reimbursed the facility \$139.00 for the medication." Finally, Respondent's May 10, 2017, Fair Hearing Report Form, under the section entitled "Regulation(s) Under Which The Action Was Taken By The Department", reads as follows: "MaineCare Benefits Manual (MBM) Chapter I Sections 1.03-6, 1.19-1, 1.19-2, 1.19-3 and provisions of 42 CFR 1000 *et seq.*, pertaining to the exclusion of individuals and entities."

Claimant on appeal argues to the effect that the conduct that was the subject of both the criminal conviction and the Board of Nursing Consent Agreement amounted to an isolated and otherwise inconsequential act motivated by a need to protect herself and her children from domestic violence, and that her work history and performance as a nurse have otherwise been above reproach. In sum, Claimant's evidence supports that her then-husband, who was prone to violence when unmedicated, was out of work and had run out of his prescribed Zyprexa, and that Claimant's actions in diverting drugs on the occasion in question were influenced by fear for her and her children's personal safety and economic duress. Claimant's evidence supports that she acted impulsively on the latter occasion, that she regrets her actions, that there have been no other issues with her conduct before or since, and that no financial loss or other harm was incurred as a result of the conduct in question.

With respect to Respondent's evidence, Claimant argues that Respondent could not have been aware of the State of Maine Board of Nursing Consent Agreement at the time of its decision to impose exclusion in that the Board only reports to Respondent licensees "who have voluntarily surrendered their licenses, whose licenses have been suspended, and whose licenses have been revoked . . . [and not] when the discipline imposed is a Warning, Censure, Reprimand and/or Probation." Claimant further argues that the Consent Agreement was most likely reported by the Board of Nursing to NURSIS and/or the National Practitioner Data Bank, and that, being the lowest level of discipline that can be imposed (i.e., as opposed to a censure or reprimand), the Consent Agreement for Warning would not have supported the decision to exclude had it been considered. Claimant additionally points out that OIG was notified of the January 21, 2003, conviction for Stealing Drugs but did not exclude Claimant.

Basis for denial of reinstatement:

Summary of arguments:

Claimant argues that she was unaware of having been excluded as the result of extenuating circumstances on both occasions that Respondent's notice was delivered to her via certified mail. Claimant's evidence shows that she was the victim of a violent physical assault by her then-husband on March 18, 2003, six days prior to receiving Respondent's decision on March 24, 2003, and that she was dealing with significant family issues including her father's recent terminal diagnosis and her middle child's behavioral issues at school when she received Respondent's decision a second time on March 28, 2009. With respect to her employment during the period of exclusion, Claimant argues, "even if she had read it, she most likely would not have understood what it meant because she still did not understand it and the implications of the letter when she saw it in 2016."

Relative to her understanding of the implications of her guilty plea to the charge of Stealing Drugs, Claimant further argues that, being unrepresented at the time, she was unaware of any consequences to her ability to work as a nurse other than that she was prohibited from working in a hospital during the one-year period of probation associated with the conviction. Claimant further notes that no actions were taken by Respondent or by her employer Henrietta Goodall Hospital, which received Respondent's decision via certified mail on March 23, 2009, following same.

Relative to Respondent's evidence, Claimant argues that Respondent's witness Kelli Johnson (Registered Nurse Member of Respondent's Exclusion Committee) "was not able to clearly articulate the criteria that would form a basis for" denying reinstatement. Relative to the rationale for denial, Claimant argues that Respondent's decision is not supported from the standpoint of specific factors that may be considered (seriousness of the offense, extent of violation, history of prior violation, etc.) in determining the sanction(s) to be imposed per § 1.19-3.

Claimant further argues that, in contrast to OIG-initiated exclusions, no "clear pathway" exists for reinstatement from MaineCare exclusions and that "[c]ontinuing [Claimant's] exclusion indefinitely amounts to 'cruel and unusual' punishment." Claimant further points out that, due to rule changes

that became effective July 2017, Respondent's denial of reinstatement if upheld would result in Claimant's being ineligible for reinstatement until 2029, by which time she "would be approaching retirement age and . . . have completely lost her nursing skills and knowledge." Claimant asks that the following be considered in making findings of fact and a recommended decision:

(1) Alana admitted to taking the Zyprexa instead of wasting it in the wastebasket at Kennebunk after Patient Zyprexa order was discontinued. Alana returned 12 of the 13 tablets of Zyprexa to Kennebunk. Alana paid restitution which put \$139.68 into Patient account for medication which would have been destroyed and for which Patient would not have (under ordinary circumstances) been reimbursed.

(2) Alana was living with a very abusive husband (now her ex-husband) at the time that she took the Zyprexa to give to her husband in the hope that he would take it (as he had run out of his Zyprexa prescription and could not afford to fill his prescription) and be less abusive to her and their middle child.

(3) The MSBON investigated the complaint regarding Alana's theft of Zyprexa and met with Alana at an Informal Conference to get all of the facts regarding her misappropriation of Zyprexa. As a result, the MSBON imposed a Warning (the lowest level of discipline) on Alana's nursing license.

(4) When approached by the Maine Attorney General's office, Alana felt that she had no choice but to enter into the offered agreement to avoid 'jail time' for having taken the Zyprexa. She ended-up with a misdemeanor conviction.

(5) Alana had no history of any wrongdoing in her professional or personal life before she took the Zyprexa and she has no history since of any wrongdoings.

(6) Alana has shown herself to be a very good nurse through the letters of reference and evaluations that she provided. She is also a very caring, concerned and committed mother who has always put her children first.

(7) Since her misdemeanor conviction, Alana had to prove her good moral character to become a citizen of the United States and she has also had to show her good moral character to become a Notary Public.

(8) Alana did not know (despite having signed for the March 18, 2003 and the March 18, 2009 certified letters from Program Integrity) that she was on the exclusions list. She would not have continued to work if she knew and understood that she was not supposed to be working. This is not a case of someone trying to get away with doing something wrong; this is merely a case in which Alana's life circumstances, being brutally attacked by her now ex-husband on March 18, 2003 and being overwhelmed by Child #2's behavioral problems and her father's terminal cancer diagnosis in mid-March through April of 2009 and beyond, kept her from ever reading the letters that were sent to notify her that she was excluded.

(9) Alana is a person of good moral character as shown by the letters from her current employers. [Please see hearing exhibits AW #3 and AW #4.] She has a good work ethic and she tries hard to do her best at whatever she does.

(10) Alana is a very good nurse who deserves the opportunity to return to the practice of nursing and thus benefit anyone who is fortunate enough to become her patient.

(11) Alana desires to be a diabetic educator and to help the many diabetic patients that she might come in contact with if she could practice as a nurse again. However, Alana will now, due to not working as a nurse for almost two years, need to start over gathering the needed training hours to allow her to become certified as a diabetic educator.

(12) Alana has Constitutional protections in terms of due process rights and a property interest in her right to practice her nursing profession as were referenced on page 15 of our January 9, 2017 request for MaineCare Reinstatement. [Please see hearing exhibit DHHS #11.]

Claimant goes on to argue, "there are not any clear-cut guidelines that are used by MaineCare / Program Integrity to determine what justifies a decision to exclude a healthcare provider from MaineCare participation. While we realize that the basis of the initial exclusion in this case was not the focus of the hearing, it sheds a light on some of the problems inherent in the entire process that came into play in this matter. There should be some clear guidelines that, for example, describe situations that trigger what in essence would be a mandatory exclusion. Also, there should be an expectation that anything that is not serious enough to trigger a mandatory exclusion should be fully investigated and analyzed prior to any decision being made to impose an exclusion. And (again), [i]f the Exclusion Committee had checked to see if a complaint had been made against [Claimant] with the MSBON, they would have discovered that the MSBON had investigated the matter and had decided from a licensing standpoint that [Claimant's] actions rose to the level of discipline but only to the lowest level of discipline, a Warning. Certainly, a Warning by the MSBON is not reported to Program Integrity and is unlikely to trigger an exclusion."

Claimant in closing argues, "the only wrongful intentional act that [Claimant] participated in was the decision to take the 13 Zyprexa instead of properly disposing of same in the wastebasket . . . [that she] did not knowingly and willfully make a decision to work even though she was excluded . . . [that she] actually believed that while she was on criminal probation that she could not work for certain healthcare entities such as hospitals and she thought that she was doing everything right and following all of the rules [and that she] showed by her actions while she was on probation that she was willing to follow all the rules and do what was expected of her." Lastly, Claimant argues that her failure to read either of the two notices signed for by her on March 24, 2003, and March 28, 2009, were understandable in light of the violent physical assault by Claimant's husband and its aftermath and significant family issues including her middle child's PTSD-related behavior problems at school and her father's recent terminal diagnosis around the dates in question.

Respondent in closing concedes that "[t]he theft in quantity or its nature was not as great an offense as might occur" and that "the notice might have [been] drafted more clearly toward [Claimant's] situation", but emphasizes both the criminal nature of the conduct and its inconsistency with Claimant's professional responsibilities. With respect to the Consent Agreement, Respondent notes, [t]o what extent the Board of Nursing action against [Claimant] played a role in the Department's decision was not established by the evidence." Relative to the legal basis of the disputed action, Respondent points out that Claimant received its decision on two separate occasions and that she failed to respond both times, suggesting an unwillingness to comply with MaineCare rules.

Sufficiency of notice:

Again, the legal basis cited for Respondent's decision to deny Claimant's request for reinstatement is 10-144 C.M.R. Ch. 101, Chapter I, § 1.19-1 (Y) (Failure to abide by the provisions of 42 CFR 1000 *et seq.*, pertaining to the exclusion of individuals and entities). Respondent's evidence supports that its decision was received by Claimant on two occasions, March 24, 2003, and March 28, 2009, and that Claimant nonetheless continued to be employed by MaineCare provider(s) following those dates and

up until February 2, 2016, when Respondent advised Southern Maine Medical Center to terminate Claimant's employment due to her status as an excluded individual. Ostensibly, the fact of her employment by MaineCare providers in the meantime would tend to support that Claimant furnished services to MaineCare beneficiaries during the period of her exclusion, and thereby caused MaineCare "claims to be submitted or payments to be made"² for those services.

Relative to notice, "[w]hen the State agency initiates an exclusion under § 1002.210, it must provide to the individual or entity subject to the exclusion notification consistent with that required in subpart E of part 1001 of this chapter." 42 C.F.R. § 1002.212. The notice requirements of § 1002.212 (i.e., § 1001) are applicable to all State-initiated exclusions. 57 FR 3298-01. Notice requirements per § 1001 include "[t]he effect of the exclusion." § 1001.2002. As concerns the immediate case, the effect of exclusion includes the fact that causing claims to be submitted or payments to be made during the period of exclusion "may serve as the basis for denying reinstatement to the programs." § 1001.1901.

As discussed, Respondent's decision was received by Claimant on March 24, 2003, and again on March 28, 2009. Respondent's decision did not state the requirements and procedures for reinstatement as per § 1001.2002; Respondent's March 18, 2009, letter that accompanied the copy of Respondent's decision received by Claimant on March 28, 2009, presumably was intended to remediate the latter deficiency by directing Claimant to request reinstatement at that time.

In any event, the critical point with respect to the issue of notice in this case is that Respondent's decision does not state that the effect of exclusion includes the risk of incurring additional periods of exclusion or being denied reinstatement if the excluded individual or entity causes claims to be submitted or payments to be made during the period of the exclusion. The applicable rule clearly expresses that State agency exclusion notifications must be consistent with the requirements of Subpart E of Part 1001. Again, the latter notice requirements include stating the effect of exclusion, which in pertinent part includes the possibility of reinstatement being denied if the excluded individual causes claims to be submitted or payments to be made during the period of exclusion.

Basis for reinstatement:

Per the applicable rule, "[t]he State agency may grant reinstatement only if it is reasonably certain that the types of actions that formed the basis for the original exclusion have not recurred and will not recur." § 1002.215. Factors to be considered in making this determination include the individual's conduct prior to the date of the exclusion, if not known to the agency at the time of the exclusion, conduct after the date of the exclusion, and whether all fines, and all debts due and owing to any Federal, State or local government that relate to Medicare or any of the State health care programs, have been paid, or satisfactory arrangements have been made, that fulfill these obligations. *Id.*

² See 42 C.F.R. § 1001.3002 (Basis for reinstatement in OIG-initiated exclusions).

Again, the only reason provided for Respondent's decision to deny reinstatement in this case is Claimant's employment with a MaineCare provider while she was excluded. Given the above-noted deficiencies in Respondent's decision relative to this specific issue, Claimant's having caused claims to be submitted or paid for services provided to MaineCare beneficiaries during the period of her exclusion is not a supportable reason for denying her reinstatement. And, as noted previously, Claimant's employer (Henrietta Goodall Hospital, which merged into Southern Maine Medical Center) was notified of Claimant's status as an excluded provider on March 23, 2009.

With respect to the recurrence of the types of actions that formed the basis for the original exclusion, there is no evidence that Claimant has engaged in diverting drugs prior to or since April 22, 2003. Again, Claimant's conduct in this case related to diversion of the drug Zyprexa, an antipsychotic, and not a narcotic or controlled substance³. There is no evidence that Claimant has a substance abuse disorder or that her actions in 2003 were characteristic or amounted to more than an isolated event.

Claimant's evidence supports that she was a highly valued employee of Southern Maine Medical Center, having received satisfactory and superior ratings in all areas from August 2008 through October 2015. The evidence further supports that Claimant has completed significant coursework in the field of diabetes education and that she would continue to pursue additional education and professional qualifications, such as dialysis nursing, if she were able to return to nursing. Claimant's work history includes experience as a(n) MDS coordinator, charge nurse, and acting director of nursing.

Conclusion:

Claimant in this case is a Registered Professional Nurse who was excluded in 2003 based on a misdemeanor conviction for "stealing drugs." The latter consisted of taking home 13 tablets of Zyprexa, an antipsychotic, that had been discontinued by a resident's physician and were intended for disposal in accordance with facility protocol. Claimant at the time was married to an abusive alcoholic individual who had run out of his prescribed Zyprexa and was without an income due to unemployment, and the medications were taken with the intent of providing them to her husband to forestall likely physical abuse to herself and children. Claimant as a result of the theft was terminated from her job, disciplined by the Board of Nursing, and convicted on the basis of her unrepresented guilty plea. Claimant was also excluded by Respondent at that time and received Respondent's exclusion letter approximately four days after a particularly brutal assault by her husband which resulted in his incarceration and subsequent divorce by Claimant.

The notice sent by Respondent to Claimant was legally deficient under Federal program rules with respect to the potential effect of Claimant's continued employment following exclusion. Claimant with her three children to support continued to work as a nurse at Henrietta Goodall Hospital and

³ Of note, the basis of Claimant's January 22, 2003, Consent Agreement with MSBON is currently being incorrectly reported by the National Practitioner Data Bank and NURSYS as "DIVERSION OF A CONTROLLED SUBSTANCE (H16)." Ex. D-11.


Southern Maine Medical Center while excluded, on the basis of which Respondent denied Claimant's request for reinstatement after she was terminated from Southern Maine Medical Center due to her excluded status. In light of the specific notice deficiency noted previously, Claimant's having "caused claims to be submitted or payments to be made" during the period of her exclusion⁴ is not a valid basis for denying her request for reinstatement. Of note, the basis for the original exclusion did not exist under MaineCare rules until 2017⁵, meaning that it would likely have been reversed had Claimant appealed it at the time. These facts argue strongly in favor of reinstatement.

Accordingly, the Hearing Officer recommends that the Commissioner resolve this matter in favor of CLAIMANT.

RIGHT TO FILE EXCEPTIONS AND RESPONSES:

THE PARTIES MAY FILE WRITTEN EXCEPTIONS AND RESPONSES TO THE ABOVE RECOMMENDATIONS. ANY WRITTEN EXCEPTIONS AND RESPONSES MUST BE RECEIVED BY THE DIVISION OF ADMINISTRATIVE HEARINGS WITHIN FIFTEEN (15) CALENDAR DAYS OF THE DATE OF MAILING OF THIS RECOMMENDATION. A REASONABLE EXTENSION OF THE TIME LIMIT FOR FILING EXCEPTIONS AND RESPONSES MAY BE GRANTED BY THE CHIEF ADMINISTRATIVE HEARING OFFICER FOR GOOD CAUSE SHOWN OR IF ALL PARTIES ARE IN AGREEMENT. EXCEPTIONS AND RESPONSES SHOULD BE FILED WITH THE DIVISION OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME (04333-0011). THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER. COPIES OF WRITTEN EXCEPTIONS AND RESPONSES MUST BE PROVIDED TO ALL PARTIES.

DATED: 2-2-18

SIGNED: 
Jeffrey P. Strickland, Esq.
Hearing Officer

cc: Alana Wilkins, RN,
Janet Michael, RN, Esq.
Thomas Bradley, AAG
Herb Downs

⁵ See 10-144 C.M.R. Ch. 101, Chapter I, § 1.20-1(AA) (2017).