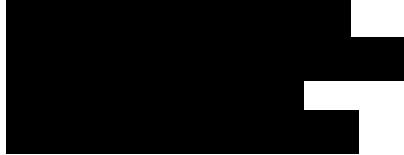




GRETCHEN WHITMER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS  
DIRECTOR



Date Mailed: October 22, 2019  
MOAHR Docket No.: 19-009242  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**ADMINISTRATIVE LAW JUDGE:** Aaron McClintic

### **HEARING DECISION**

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 to 431.250; 42 CFR 438.400 to 438.424; 45 CFR 99.1 to 99.33; and 45 CFR 205.10; and Mich Admin Code, R 792.11002. After due notice, a 3-way telephone hearing was held on September 25, 2019, from Lansing, Michigan. The Petitioner was represented by his Attorney, Scott Brogan. The Department of Health and Human Services (Department) was represented by Assistant Attorney General Dan Beaton. Nick Kasbohm Eligibility Specialist appeared and testified for the Department. Department Exhibit 1, pp. 1-10 was received and admitted. Petitioner's Brief in Support of Appeal was received and reviewed.

### **ISSUE**

Did the Department properly determine the divestment penalty period for Petitioner?

### **FINDINGS OF FACT**

The Administrative Law Judge, based on the competent, material, and substantial evidence on the whole record, finds as material fact:

1. On [REDACTED], 2019, Petitioner applied for Medicaid (MA).
2. On July 26, 2019, Petitioner's application was processed.
3. On July 26, 2019, a Health Care Coverage Determination Notice was sent to Petitioner informing him that he was eligible for MA effective May 1, 2019, with a divestment penalty period from August 1, 2019, through November 30, 2019.
4. On August 14, 2019, Petitioner requested hearing disputing the divestment penalty period.

## **CONCLUSIONS OF LAW**

Department policies are contained in the Department of Health and Human Services Bridges Administrative Manual (BAM), Department of Health and Human Services Bridges Eligibility Manual (BEM), Department of Health and Human Services Reference Tables Manual (RFT), and Department of Health and Human Services Emergency Relief Manual (ERM).

The Medical Assistance (MA) program is established by Title XIX of the Social Security Act, 42 USC 1396-1396w-5; 42 USC 1315; the Affordable Care Act of 2010, the collective term for the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152; and 42 CFR 430.10-.25. The Department (formerly known as the Department of Human Services) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k.

### **Computing Penalty Period**

Compute the penalty period on the total Uncompensated Value of all resources divested.

Determine the Uncompensated Value for each resource transferred and combine into a total Uncompensated Value.

Divide the total Uncompensated Value by the average monthly pri-vate LTC Cost in Michigan for the client's Baseline Date. This gives the number of full months for the penalty period. Multiply the fraction remaining by 30 to determine the number of days for the penalty period in the remaining partial month.

Apply the total penalty months and days. Apply a penalty even if the total amount of the penalty is for only a partial month.

Apply the penalty to the months (or days) an individual is eligible for Medicaid and actually in LTC, Home Health, Home Help, or the MIChoice Waiver. Do not apply the divestment penalty to a period when the individual is not eligible for Medicaid for any reason (that is the case closes for any reason or is eligible for Medicaid but is not in LTC, Home Help, Home Health, or the MIChoice Waiver. Restart the penalty when the individual is again eligible for Medicaid and in LTC, Home Help, Home Health, or MIChoice Waiver. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, that month is not a penalty month. Do not count that month as part of the penalty period. This does not include payments made by commercial insurance or Medicare; see Resources Returned in this item.

Note: An individual is not eligible for MA in a month they have pre-paid for LTC. Because federal law directs a resident in a nursing facility must have access to all monies held by the facility for the resident, count the money held by a nursing facility as cash.

A group 2 deductible eligible individual is not eligible for Medicaid until the deductible is met. Apply the penalty only to the days of the month after the deductible is met.

The 1st day the client is eligible to receive MA coverage for LTC, MIChoice, home help, or a home health service is the 1st day after the penalty period ends.

The penalty period starts on the date which the individual is eligible for Medicaid and would otherwise be receiving institutional level care (LTC, MIChoice waiver, or home help or home health services), and is not already part of a penalty period. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, the individual is not eligible for Medicaid in that month and the month is not a penalty month. That month cannot be counted as part of the penalty period. This does not include payments made by commercial insurance or Medicare.

**Note:** If a past unreported divestment is discovered or an agency error is made which should result in a penalty, a penalty must be determined under the policy in place at the time of discovery. If a penalty is determined for a transfer in the past, apply the penalty from the first day after timely notice is given; see Recipient Exception in this item. (BEM 405, p.15)

#### **Pended Negative Actions (Timely Notice)**

A pended negative action occurs when a negative action requires timely notice based on the eligibility rules in this item. Timely notice means that the action taken by the department is effective at least 12 calendar days following the date of the department's action. BAM 220

In this case, Petitioner's attorney argued in his Brief in Support of Appeal and at hearing that the correct start date of the divestment penalty period was May 1, 2019 because that is the date Petitioner was first eligible for medical assistance under the State Medicaid plan and would otherwise be receiving institutional care services but for the penalty. Petitioner's attorney cited BEM 405, p.6, 42 USC 1396p(c)(1)(A) and 42 USC 1396p(c)(1)(D)(ii) in support of his position.

The Department's position is that agency error was made when the case was initially processed and denied on July 5, 2019. When the case was processed and approved on July 26, 2019, timely notice needed to be given regarding the divestment and the penalty imposed from the first day after timely notice was given. That explains the August 1, 2019, date for the beginning of the divestment penalty period. The Department cites BEM 405, p.15 and BAM 220 in support of their position.

Petitioner disclosed the divestment in his application. Petitioner was otherwise eligible and receiving nursing home level care effective May 1, 2019. Department policy is clear that "the penalty period starts on the date which the individual is eligible for Medicaid and would otherwise be receiving institutional level care... and is not already part of a penalty period." Based on that clear language, the divestment penalty period should begin May 1, 2019. (BEM 405, p.13)

The policy cited by the Department under BEM 405, p.15 does not apply. That section of policy states "If past unreported divestment is discovered or an agency error is made which should result in a penalty" then it gives instructions about how to impose the penalty period. This was not an unreported divestment. Petitioner disclosed the divestment. An agency error was not made that should result in a penalty. It was the divestment itself that required a penalty not any error made by the Department. No agency error was made with regard to the finding of divestment. In addition, the federal regulations, 42 USC 1396p(c)(1)(A) and 42 USC 1396p(c)(1)(D)(ii), do not support the Department's interpretation regarding how the divestment penalty period should be imposed.

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, if any, finds that the Department did not act in accordance with Department policy when it determined Petitioner's divestment penalty period.


### **DECISION AND ORDER**

Accordingly, the Department's decision is **REVERSED**.

THE DEPARTMENT IS ORDERED TO BEGIN DOING THE FOLLOWING, IN ACCORDANCE WITH DEPARTMENT POLICY AND CONSISTENT WITH THIS HEARING DECISION, WITHIN 10 DAYS OF THE DATE OF MAILING OF THIS DECISION AND ORDER:

1. Correct Petitioner's divestment penalty period start date to May 1, 2019.

AM/nr

  
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Aaron McClintic  
Administrative Law Judge  
for Robert Gordon, Director  
Department of Health and Human Services

**NOTICE OF APPEAL:** A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Office of Administrative Hearings and Rules  
Reconsideration/Rehearing Request  
P.O. Box 30639  
Lansing, Michigan 48909-8139

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Dickinson County DHHS- via electronic mail

BSC1- via electronic mail

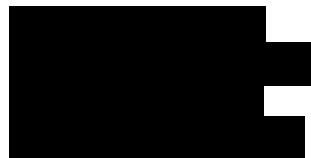
D. Smith- via electronic mail

EQAD- via electronic mail

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**Petitioner**



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