



GRETCHEN WHITMER  
GOVERNOR

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

ORLENE HAWKS  
DIRECTOR

[REDACTED]  
[REDACTED]  
[REDACTED], MI [REDACTED]

Date Mailed: August 29, 2023  
MOAHR Docket No.: 23-004196  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**ADMINISTRATIVE LAW JUDGE: Ellen McLemore**

### **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 telephone hearing was held on August 23, 2023, via conference line. Petitioner was represented by her attorney, John Adair. The Department of Health and Human Services (Department)/Respondent was represented by Assistant Attorney General, Joseph Ortiz. Respondent solicited testimony from Brandy Marr, Eligibility Specialist and Lisa Williams, Assistance Payments Lead Worker.

### **ISSUE**

Did the Department properly impose a Medical Assistance (MA) divestment penalty from June 1, 2023, through August 29, 2023?

### **FINDINGS OF FACT**

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

1. Petitioner was an ongoing MA Long-Term Care (LTC) recipient.
2. On February 6, 2023, the Department's LTC unit learned of verifications that were submitted on February 2, 2023, of the sale of a property that was co-owned by Petitioner (Exhibit A, pp. 11-21). The Department also received verification of how the proceeds of the sale were gifted to Petitioner's former spouse.
3. On February 6, 2023, the Department sent Petitioner a Verification Checklist (VCL) requesting verification of an annuity contract (Exhibit A, pp. 23-24).
4. On February 15, 2023, the Department received the annuity contract, and the information was forwarded to the Department's legal unit (Exhibit A, pp. 29-33).

5. On March 7, 2023, the legal unit's evaluation was completed. The Department ended the annuity and certified Petitioner's MA benefit case.
6. On March 7, 2023, the Department sent Petitioner a Health Care Coverage Determination Notice (HCCDN) informing him that he was approved for MA benefits with a Patient Pay Amount (PPA) of \$10,801, effective April 1, 2023, ongoing (Exhibit A, pp. 45-48).
7. On April 26, 2023, Petitioner's eligibility was updated and HCCDN was sent informing him that his PPA was \$1,501 per month effective May 1, 2023, ongoing, and that he was subject to a divestment penalty period of June 1, 2023, through August 29, 2023 (Exhibit A, pp. 59-62).
8. On July 24, 2023, Petitioner's attorney requested a hearing disputing the Department's actions.

### **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.

Divestment is a type of transfer of a resource and not an amount of resources transferred. Resource means all the client's assets and income. Transferring a resource means giving up all or partial ownership in the resource. Divestment results in a penalty period, not MA program ineligibility. BEM 405 (January 2019), pp. 1-2; BEM 400 (February 2019), pp.1-3. During the penalty period, MA will not pay the client's cost for LTC services; home and community-based services; home help; or home health. MA will pay for other MA-covered services. BEM 405, p. 1. A divestment is a transfer of a resource by a client that is (i) within a specified time (the look-back period), (ii) for less than fair market value (FMV), and (iii) not an excluded transfer. BEM 405, p. 1.

In this case, Petitioner does not dispute that a divestment occurred or that the divestment penalty period was properly calculated. At issue is the start date of the divestment penalty period. Petitioner asserts that the correct penalty start date should be March 1, 2023, as Petitioner notified the Department of the divestment on February 2, 2023, and he met the eligibility requirements of MA, while the Department maintains that the penalty

start date should be June 1, 2023, as the Department is not authorized to retroactively apply a penalty period due to notice requirements.

After processing an application and upon certification of eligibility results, Bridges automatically notifies the client in writing of positive and negative actions by generating the appropriate notice of case action. BAM 220 (January 2019), p. 2. An adequate notice is a written notice sent to the client at the same time an action takes effect (not pending). For MA cases, adequate notice is given at case opening with a deductible or patient pay amount, or at case opening with a divestment penalty. BAM 220, pp. 3-4. A timely notice is given for negative case actions and is mailed 11 days before the intended negative action takes effect. The action is pending to provide the client a chance to react to the proposed action. BAM 220, pp. 4-5. Examples of negative actions are outlined in BAM 220, which includes changing the Program Enrollment (PET) code to a divestment penalty code. BAM 220, p. 11.

LTC facilities will not be paid unless the appropriate PET code is in the Community Health Automated Medicaid Processing System (CHAMPS). BEM 547 (April 2018), p. 1. For Department staff, adding, removing or changing PET codes are not negative actions. BEM 547, p. 1. However, changing a PET code to EXM-DIVM for a long-term care or hospital (L/H) or waiver MA patient is a negative action. BEM 547, p. 1. PET code EXM-DIVM indicates a divestment penalty. BEM 405 (January 2022), p. 18.

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. BEM 405, p. 14. If a penalty is determined for a transfer in the past, the Department must apply the penalty from the first day after timely notice is given. BEM 405, p. 14. Timely notice must be given to LTC recipients before actually applying the penalty. BEM 405, p. 15. Adequate notice must be given to new applicants. BEM 405, p. 15.

At the hearing, the Department conceded that an agency error occurred, specifically, a failure to timely implement the divestment penalty period. Petitioner was an ongoing MA LTC recipient. Because the MA case was ongoing, the Department asserted that the penalty period could not be retroactively applied because 42 CFR 431.211, BAM 220 and BEM 405 require timely notice prior to taking negative action. 42 CFR 431.211 expressly requires that the Department "send a notice at least 10 days before the date of action" except in those circumstances identified in §§ 431.213 and 431.214, none of which apply in this case. Here, notice of the divestment penalty period was not issued until April 26, 2023. The Department maintained that the penalty cannot be imposed before the effective date of the intended negative action, due to the timely notice requirements. Therefore, the Department argued that it properly followed policy when it started the penalty period on June 1, 2023.

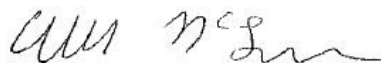
Petitioner argued that BAM 220 requires the Department to act on a change reported for MA cases within 15 working days of becoming aware of the change. BAM 220, p. 7. However, the Department did act on the reported change when it sent the VCL on February 6, 2023. Policy states that timely notice is required for negative actions, and changing the PET code to implement a divestment penalty period is a negative action.

Negative case actions cannot take effect until timely notice is provided to the client. Both parties conceded that the divestment penalty period was not applied until June 1, 2023. Thus, the PET code for the divestment penalty was not changed prior to June 1, 2023. Notice of the divestment penalty period was not issued until April 26, 2023. Therefore, the Department could not implement the divestment penalty period until June 1, 2023.

Although Petitioner had constructive notice of the divestment penalty, as Petitioner's attorney notified the Department that they anticipated the penalty when submitting verification of the divestment on February 2, 2023, ALJs have no authority to make decisions on constitutional grounds, overrule statutes, overrule promulgated regulation, or overrule or make exceptions to Department policy. Department Delegation of Hearing Authority executed by Robert Gordon, Department Director, June 6, 2019. MOAHR has no jurisdiction to grant equitable relief. Here, the Department's actions in applying the divestment penalty effective June 1, 2023, was consistent with Department policy and federal law.

### **DECISION AND ORDER**

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 act in accordance with Department policy when it imposed a divestment penalty period to Petitioner's MA case from June 1, 2023, through August 29, 2023. Accordingly, the Department's decision is **AFFIRMED**.



---

**Ellen McLemore**  
Administrative Law Judge

EM/tm

**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.

