



John Elias Baldacci
Governor

Maine Department of Health and Human Services

Marquardt Building
11 State House Station
Augusta, ME 04333-0011

Commissioner
James D. Bivins
Director

TO: Brenda M. Harvey, Commissioner
Department of Health and Human Services
221 State Street
State House Station 11
Augusta, ME 04333

10/11/06

Date Mailed

ADMINISTRATIVE HEARING RECOMMENDATION

An administrative hearing was held on August 7, 2006 at Augusta, Maine in the case of the Sunset Home of Waterville, before Miranda Benedict, Esq., Hearing Officer. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner, Department of Health and Human Services (DHHS). The parties requested additional time to submit closing arguments. The arguments were received by September 5, 2006 and the record was closed.

ISSUE PURSUANT TO ORDER OF REFERENCE:

Pursuant to an Order of Reference dated May 15, 2006, this matter was referred to the Office of Administrative Hearings for a Hearing Officer to conduct an administrative hearing and to submit to the Commissioner written findings of fact and recommendations on the following issue:

Was the Department correct when it offset the gross investment income against interest expense during the residential care facility audit for Sunset Home of Waterville for fiscal year ending December 31, 2004?

APPEARING ON BEHALF OF SUNSET HOME OF WATERVILLE:

Walter Rotz, P.A
Jonathan Rogers, Esq.

APPEARING ON BEHALF OF AGENCY:

Jane Gregory, Esq.
Herbert Downs

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer exhibits:

- HO-1 Scheduling Notice dated June 7, 2006
- HO-2 Scheduling Notice dated May 16, 2006
- HO-3 Order of Reference dated May 15, 2006
- HO-4 Fair Hearing Report Form dated May 10, 2006
- HO-5 Request for Administrative Hearing dated April 11, 2006

Our vision is Maine people living safe, healthy and productive lives.

- HO-6 Letter from Jane Gregory to Miranda Benedict requesting extension for submission of closing arguments dated August 16, 2006
- HO-7 Letter from Miranda Benedict to parties granting extension dated August 17, 2006
- HO-8 Letter from Jonathan Rogers to Miranda Benedict requesting additional extension for submission of closing arguments dated August 23, 2006
- HO-9 Letter from Miranda Benedict to parties granting extension dated August 28, 2006
- HO-10 Closing argument submitted by Jane Gregory dated August 29, 2006
- HO-11 Closing argument submitted by Jonathan Rogers dated September 5, 2006

Department of Health and Human Services exhibits

- DHHS-1 Chapter 15, Principles of Reimbursement for Residential Care Facilities-Room and Board Costs dated November 1, 2003
- DHHS-2 Emergency Rule: Chapter 15, Principles of Reimbursement for Residential Care Facilities-Room and Board Costs dated July 1, 2004
- DHHS-3 Adopted Rule: Department of Health and Human Services, Chapter 115, Principles of Reimbursement for Residential Care Facilities-Room and Board Costs dated September 15, 2004
- DHHS-4 Cost Report for PNMI Appendix C Case Mix Residential Care Facilities submitted by Sunset Home of Waterville to the Department dated May 24, 2005
- DHHS-5 Final Residential Care Audit Settlement dated December 9, 2005
- DHHS-6 Request for Informal review of audit report submitted by Walter H. Rotz, Esq. on behalf of Sunset Home of Waterville dated January 5, 2006
- DHHS-7 Final Informal Review Decision dated January 27, 2006
- DHHS-8 Revised Audit Report Transmittal dated January 27, 2006
- DHHS-9 Request for informal review of revised Audit Report submitted by Walter H. Rotz, Esq. on behalf of Sunset Home of Waterville dated February 14, 2006
- DHHS-10 Final Informal Review Decision dated March 13, 2006
- DHHS-11 Definition of 'gross investment income' from IRS web site dated August 31, 2006

FINDINGS OF FACT:

1. Sunset Home of Waterville is a residential care facility and a Maine Care provider of Non Medical Institution Appendix C (Case Mix) services.¹
2. 10-144 Chapter 115 Principles of Reimbursement for Residential Care Facilities-Room and Board Costs are the regulations at issue in this case.
3. Sunset Home is required to file a cost report with the Department at the end of its fiscal year.
4. On February 14, 2006 Sunset Home requested an informal review of the January 27, 2006 Audit Report Transmittal.²
5. On March 13, 2006 The Department issued a Final Informal Review Decision, upholding its January 27, 2006 Audit Report Transmittal.

¹ This case applies only to state funds received by Sunset Home of Waterville.

² There was a prior request for an informal review by Sunset Home and a response by the Department. The specific issues in that dispute were resolved by the parties prior to hearing.

6. On April 11, 2006 Sunset Home appealed the March 13 Final Informal Review Decision and requested an administrative hearing.

RECOMMENDED DECISION:

The hearing officer recommends that the Commissioner find that the Department was correct when it offset the gross investment income against interest expense during the residential care facility audit for Sunset Home of Waterville for fiscal year ending December 31, 2004.

REASONS FOR RECOMMENDATION:

The governing principle here is 30.62 of the Principles of Reimbursement for Residential Care Facilities-Room and Board Costs (10-144 Chapter 115). According to this principle,

“All (gross) investment income (not net investment income) from unrestricted funds will be used first to offset any differential between the facility’s room and board rate and its room and board costs, up to the Departmental upper limit on routine services. Any remaining investment income shall then be used to reduce interest expense.”

Specifically the dispute between the Department and Sunset Home is over the calculation of investment income. Sunset Home argues that the investment income amounted to \$85,332.00. The Department argued that the actual income totaled \$95,339.00. There is no dispute that the reason for the difference in calculation is whether Sunset Home was entitled to deduct \$10,007.00 of investment expenses or management fees from the overall investment income before it was used to offset any differential between the facility’s room and board rate and its room and board costs.

Sunset Home argues that the organization is being asked to pay twice for the investment services. According to Sunset Home request for an informal review “The organization is being charged for professional investment services and is then expected to reduce its interest expense by the same cost”. Sunset Home also argues that the rule (30.62) is a disincentive for organizations to seek professional advice to manage its investments, since it places a financial burden on the organization by not allowing the deduction of investment fees. Finally, Sunset Home argues that Department’s rule is arbitrary and ambiguous because it fails to contain a definition of ‘gross’ as applicable to Principle 30.62.

The Department argues that the rule is clear upon its face. It argues that the term ‘gross’ is such a common term that ‘common folk’ know the difference between gross income and net income (HO-10). It argues that the rule’s direction leaves no room for doubt as to its application and that any ‘deduction’ of expenses, as Sunrise Home did, was in contradiction to the rule.

The hearing officer finds that Principle 30.62 is clear upon its face. It is clear, not because the term ‘gross’ is so routinely used that indeed ‘common folk’ know its meaning but rather because the rule provides specific guidance on terminology. According to Principle 14.4 of Chapter 115, Allowability of Costs,

“If these principles do not set forth a determination of whether or not a cost is allowable or sufficiently define a term used, reference will be made first, to the Medicare Provider Reimbursement Manual guidelines following by the Internal Revenue Service Guidelines in effect at the time of such determination if the Medicare Provider Manual is silent on the issues.”

There was no dispute at hearing that the Medicare Manual is silent as to the definition of gross. However, the IRS provides a succinct definition of ‘gross investment income’ applicable to this case. (see DHHS-11). The definition refers to the **total** amount of income from investments, and does not contemplate any deductions.

Sunset Home did not so much argue that the Department was mistaken when they found that Sunset Home had not adhered to Principle 30.62, but rather that the rule itself was misguided. Sunset Home, for example, argued that the rule would encourage investments by organizations such as themselves without paid professional advice since the rule does not allow a deduction for the professional advice.

The role of the hearing officer is not to determine whether Department rules are ‘good’ or ‘bad’. Rather, her role is to ensure that both parties have acted in accordance with the rules. According to the Administrative Hearing Regulations, a primary role of the hearing officer is

*“To render a fair, independent and impartial decision (or recommendation if such is required) resolving all material issues, based upon the evidence presented at the hearing and **in accordance with law**, and where necessary to determine what is needed to bring the parties into compliance with the law.” (emphasis added). Section V(D)(h)*

In this case, the hearing officer recommends that the Commissioner find that the Department was correct when it offset the gross investment income against interest expense, pursuant to Principle 30.62 of, Chapter 15, Principles of Reimbursement for Residential Care Facilities, during the residential care facility audit for Sunset Home of Waterville for fiscal year ending December 31, 2004

DATED 10/6/06

SIGNED: _____
Miranda Benedict, Esq.
Hearing Officer

RIGHT TO FILE RESPONSES OR EXCEPTIONS: CHECK ON THESE APPEAL RIGHTS

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS. ANY WRITTEN RESPONSES AND EXCEPTIONS MUST BE RECEIVED BY THE OFFICE OF ADMINISTRATIVE HEARINGS WITHIN TWENTY (20) CALENDAR DAYS OF THE DATE OF MAILING OF THIS RECOMMENDED DECISION. A REASONABLE EXTENSION OF TIME TO FILE EXCEPTIONS AND RESPONSES MAY BE GRANTED BY THE CHIEF ADMINISTRATIVE HEARING OFFICER FOR GOOD CAUSE SHOWN OR IF ALL PARTIES ARE IN AGREEMENT. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE OFFICE OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. COPIES OF WRITTEN RESPONSES AND EXCEPTIONS MUST BE PROVIDED TO ALL PARTIES. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

cc: Jane Gregory, Esq.
 Jonathan Rogers, Esq.
 Walter Rotz, P.A.
 Herbert Downs