

RE: RUBY L KAY, Petitioner

Docket No.: OSAH-DFCS-NH-1122806-23-Langston

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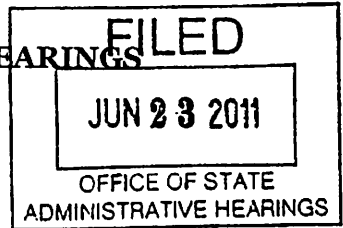
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(DECISION ONLY)

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



RUBY L. KAY, :
Petitioner, :
: Docket No.
v. : OSAH-DFCS-NH-1122806-23- Langston
: :
DHS, FAMILY & CHILDRENS SERVICES, : Agency Reference No. 341242118
Respondent. :

INITIAL DECISION

The above referenced case was called for hearing on April 13, 2011. The parties stipulated the following facts:

Stipulated Facts

1.
Petitioner made a transfer of assets for less than fair market value prior to applying for nursing home Medicaid. The amount of the gift was \$129,888.37. A transfer of resources penalty was applied beginning in November, 2009. The penalty was for 26.42 months.

2.
Subsequent to imposition of the transfer of resources penalty, the recipient of the gift began returning portions of the gift on a monthly basis. The parties stipulated that the amounts shown on Exhibit P-1 were returned, totaling \$58,700.

3.
Petitioner contends that the Department is required to recalculate the penalty due to a partial return of the original gift. Petitioner relies on Section 2342-9 of the ABD Manual, attached as Exhibit R-1. Specifically, Petitioner relies on the following language: "If an asset is partially transferred back to the A/R, recompute the penalty." Petitioner contends that, historically, the Respondent has recalculated a transfer of resources penalty when an asset is partially transferred back. Petitioner contends that if the penalty is recalculated to account for the partial return, then the gift subject to a penalty is \$71,188.37. The resulting penalty would be 14.47 months. Petitioner contends that the recalculated penalty elapsed during January, 2011 and that Petitioner was eligible for nursing home Medicaid as of that time.

4.
Respondent contends that if an asset is partially transferred back, then no recalculation of the penalty is permitted. As support for Respondent's argument, Respondent calls attention to Section 2342-10 of the ABD Manual which states that if multiple gifts are transferred, then a cumulative penalty is calculated based on the multiple transfers. Respondent also calls attention to Exhibit R-2, which is an email from Betsy Wright to "ABD Supv. Region One; Region 3 ABD." That email indicates that effective May 1, 2011, a new bullet point will be added to Section 2342 stating that if "All of the transferred resources/assets have been returned to the individual a transfer of assets penalty does not apply." Accordingly, Respondent contends that the penalty would not be cured unless the remaining \$71,188.37 is returned to Petitioner.

Exhibits P-1 and R-1 were admitted without objection. Petitioner objected to the relevance of R-2 since it describes a prospective change in the ABD Manual. Petitioner's objection was overruled.

Conclusions of Law

1. Petitioner, having recovered \$58,700 of the funds originally gifted, contends that she is entitled to a partial cure of the transfer of resources penalty that was imposed. Respondent contends otherwise, arguing that the rule does not permit partial penalty cures and that a rule change effective on May 1, 2011, will clarify the rule. Further, Respondent contends that it can impose the new rule prior to that time. Thus, since the ABD Manual states that if an asset is partially transferred back, re-compute the penalty, the crux of Respondent's argument is that its policy language was either unclear or that it can apply a rule change retroactively.
2. The Court finds that the policy in place at the time of the gift, and the partial return of gift, permitted a partial cure of the transfer of assets penalty. The Court finds that the new policy, if adopted, would have an effective date of May 1, 2011.
3. The Respondent is not authorized to apply the provisions of its policy manual retroactively. *Georgia Dep't of Cmty. Health v. Fulton DeKalb Hosp. Auth.*, 294 Ga. App. 431, 436-437 (2008). See also O.C.G.A. § 49-4-153(b)(1); Ga. Const. art. I, § I, ¶ X; *Todd v. Morgan*, 215 Ga. 220 (1959) ("A statute does not operate retrospectively because it relates to antecedent facts, but if it is intended to affect transactions which occurred or rights which accrued before it became operative as such, and which ascribe to them essentially different effects, in view of the law at the time of their occurrence, it is retroactive in character."). Therefore, the Petitioner's application will be evaluated under the manual provisions in effective at the time it was submitted. See, e.g.: *Fossett v. Department of Human Resources, OSAH-DFCS-NH-0932233-155-Miller*.

Decision

It is not necessary to determine whether the Department's proposed rule change is permitted. What is clear, however, is that any change in Respondent's policy cannot be imposed retroactively. Accordingly, Respondent erred by failing to recalculate the transfer of resources penalty following the return of \$58,700 in gifted assets consistent with its existing policy. In light of the passage of time, the recalculated penalty should result in Medicaid eligibility effective in January, 2011.

SO ORDERED THIS 23rd day of June, 2011



DAVID C. LANGSTON
Administrative Law Judge