Office of Medicaid
BOARD OF HEARINGS

Appeal Decision:	Approved	**Appeal Numbers:**	1823946
Decision Date:	6/18/19	**Hearing Date:**	01/16/2019
Hearing Officer:	Christopher Jones	**Record Open to:**	03/29/2019

Appearance for Appellant:

Appearance for MassHealth:
Patricia Lemke - Springfield MEC by phone
Michael Somers, Esq.

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171

APPEAL DECISION

Appeal Decision:	Approved	**Issue:**	LTC – Trust
Decision Date:	6/18/19	**Hearing Date:**	01/16/2019
MassHealth's Rep.:	Patricia Lemke; Michael Somers, Esq.	**Appellant's Rep.:**	
Hearing Location:	Tewksbury MassHealth Enrollment Center	**Aid Pending:**	No

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a notice dated November 1, 2018, MassHealth denied the appellant's application for MassHealth long-term-care benefits because MassHealth counted assets held in a trust she created. Exhibit 2; 130 CMR 520.023(C). The appellant filed this appeal in a timely manner on November 20, 2018. Exhibit 2; 130 CMR 610.015(B). Denial of assistance is valid grounds for appeal. 130 CMR 610.032.

Action Taken by MassHealth

MassHealth denied the appellant's application for long-term-care benefits because it deemed assets held in a trust to be countable.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.000, in determining that that the assets held in an irrevocable trust are countable in determining eligibility for Medicaid benefits.

Summary of Evidence

The applicant was over the age of 65 when she entered a nursing facility and filed an application for long-term-care benefits on March 29, 2018. The appellant is seeking benefits begin as of February 11, 2018. MassHealth originally denied the appellant's application on April 2, 2018 for excess assets, but this notice was accepted as deficient in the wake of the Superior Court decision in Maas/Hirvi.[1] MassHealth therefore reissued a corrected notice on November 1, 2018, which is the subject of this appeal.[2] Ultimately, all of these notices denied coverage based upon $250,607 in assets held in a trust established by the appellant. Under the November 1, 2018 notice, MassHealth specifically identifies Article 4(F) as allowing "direct payment of Trust principal on any conditions to certain family members and to any charitable organizations including nursing facilities."

The appellant offered a memorandum at the hearing explaining her position regarding why the trust is not countable. Generally, the appellant highlights all of the various trust provisions that explicitly prohibit trust principal from being used and specifically argued that any appointment to a charitable organization would need to be treated as a charitable donation.

At the hearing, MassHealth characterized the identified power of appointment as an escape valve that allows the appellant a way to access trust principal in an emergency.

MassHealth cited Braiterman[3] as persuasive support for why this power of appointment makes a trust countable under the "any circumstances" test. MassHealth argued that Braiterman held that the power to appoint upon conditions or trusts creates a possibility that a donor can appoint principal upon the condition that the resources be returned to the donor. MassHealth clarified that the prohibition in this trust clause against discharging legal obligations poses no bar to simply appointing principal upon the condition that the assets be returned to the donor.

MassHealth also argues that Daley allowed for MassHealth to count trusts if there is a power of appointment that may be exercised to a charitable organization. MassHealth's attorney testified that charitable nursing facilities exist in Massachusetts and can be openly found on the Attorney General's website. Further, he argued that it does not matter that the appellant is not in a charitable nursing facility now, because the possibility exists for her to have entered a charitable nursing facility, which is all that is needed under the "any circumstances" test. He also argued that nothing in the trust provision requires that the appointment to a charitable organization be exercised as a donation. Rather the appointment may be upon any condition, such that it could be characterized as a quid pro quo payment for the donor's care.

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[1] See Maas v. Sudders, Sup. Ct. CA Nos. 18-129-D, 18-845-D (Wilkins, J. June 22, 2018).

[2] Another notice was issued on September 13, 2018, but it was also deficient. As a result, a duplicative appeal, No. 1822079, was created. Because all substantive issues are preserved through this appeal, Appeal No. 1822079 was withdrawn. See Exhibit 5.

[3] Petition of Estate of Braiterman, 145 A. 3d 682 (NH 2016).

The appellant's attorney disagreed with MassHealth's reading of Daley, and pointed out that the Nadeau trust was approved on remand. Generally, he argued that the clear intent of the trust is that the appellant cannot access the principal. Specifically, Article 4(F) of the trust prohibits the appointment being "used to discharge a legal obligation of the Grantor." Therefore, the terms of the trust generally and specifically prohibit this power of appointment from being used to pay for care at a nursing facility. The appellant's attorney argued that Heyn[4] makes clear that the law allows for people to set up trusts and have them be non-countable in accordance with the rules of state trust law. He accepted that this might result in different outcomes in different states, but argued that under Massachusetts trust law this trust is not countable.

MassHealth's attorney argued that any common law of trusts would necessarily be supplanted by federal Medicaid law, as it is part of one of the most heavily regulated statutory schemes in existence. He argued that as a federal program, it would need to be equally applied across the states, and cannot therefore be subject to the vagaries of state trust law. He also argued that a "grantor" trust characterization implicitly makes a trust countable, because the underlying principle of a grantor trust is that the grantor is telling the IRS that the assets in that trust are still the grantor's for tax purposes. He acknowledged that there is no specific legal basis, however, for MassHealth to find a trust countable simply because it is a grantor trust for tax purposes. MassHealth's attorney distinguished between Heyn and Braiterman because there was no ability to create a legal obligation in Heyn, where there was in Braiterman and there is here. He also argued that the language prohibiting the donor from discharging a legal obligation is ignorable because similar limitations are ignored in cases like Doherty and Cohen.[5] He noted that one of the trusts reviewed in Cohen was reviewed in Probate Court, and found that it could not pay principal to the donor under trust law, but under Medicaid analysis the state trust law was ignored where it conflicted with Medicaid law. He accepted that the prohibition on using the power of appointment to pay a nursing home is weaker because of the prohibition on the use of the appointment to discharge a legal obligation, but he argued it had no impact on his argument under Braiterman that the appointment to a child could be premised upon the assets being returned to the donor.

The appellant's attorney argued that MassHealth's position follows a line of reasoning to the point of absurdity. The appellant also argued that MassHealth's practice at the hearing was still in violation of the notice requirements outlined in Maas. To correct any potential due process problems with MassHealth's presentation, the appellant was offered the opportunity to request a written version of MassHealth's arguments and be allowed the opportunity to respond to them in writing.[6] The appellant was specifically requested to preserve any due process arguments in their memo.

[4] Heyn v. Dir. of Medicaid, 89 Mass. App. Ct. 312 (2016).

[5] Doherty v. Dir. of the Off. of Medicaid, 74 Mass. App. Ct. 439 (2009); Cohen v. Comm'r of the Div. of Med. Asst., 423 Mass. 399, 402-403 (1996)

[6] MassHealth's attorney explained that the current practice is an attempt to conserve resources. He explained the agency's experience has been that memoranda drafted prior to the hearing often missed critical facts not disclosed by the applicant to MassHealth prior to the hearing. Therefore, the agency's "enhanced" notice seeks to identify the trust provisions that it finds problematic and the regulations upon which the agency relies. More detailed arguments are then provided at hearing with memoranda only submitted after the hearing once the agency knows the current state of facts involved with the trust.

Both parties were also specifically asked to brief the distinction between Heyn and Braiterman as they pertain to the power of appointment clause in this trust.

The record was left open, and both parties submitted memoranda. In addition to the substantive memorandum, the appellant filed a separate motion requesting an order to compel an exchange of memoranda three days prior to the hearing Maas.[7]

Findings of Fact

Based on a preponderance of the evidence, I find the following:

1. The applicant was over the age of 65 when she entered a nursing facility. An application for long-term-care benefits was submitted on her behalf on April 2, 2018, and benefits were sought as of February 11, 2018. Exhibit 3; testimony by MEC representative.

2. On May 18, 2018, MassHealth denied the application due to excess assets. This notice was deficient, and MassHealth reissued another deficient notice on September 13, 2018 before it issued an "enhanced" denial notice, on November 1, 2018, that identified Article 4.F as the basis for why the trust was countable. Exhibit 3; testimony by MEC representative.

3. The excess assets identified were $250,607 in a trust established by the applicant. The appellant otherwise had $756.25 in a bank account. Exhibits 3; testimony by MEC representative.

4. The appellant timely appealed these denials. Exhibits 2, 5.

5. The applicant established the trust April 9, 2010 with real property, and this is the only asset in the trust. Exhibits 4E.

6. The appellant is the grantor of the trust, and the trust specifically identifies her three living children by name. Exhibit 4E, Art. 2.

7. The trust is irrevocable, and the grantor "may not revoke, amend or alter this agreement in any way. The Trustee ... may, however, amend any administrative provisions of this Trust by an instrument in writing signed and acknowledged by the Trustee. ... 'Administrative provisions' refers to any provision of the Trust dealing with the management and administration of the Trust and in no event shall any amendment affect, enlarge, or shift any beneficial interest created hereunder." Exhibit 4E, Art. 3.

8. Article 4 governs "Payment of Income and Principal During Life of Grantor":

    A. Income: The Trustee shall hold, manage, invest and reinvest the Trust Estate, shall collect the income therefrom, and shall pay the entire net

[7] It is unclear what relief the appellant expects from this motion as it was submitted at the same time as their reply memorandum, more than two months after the hearing before which they requested memoranda be exchanged.

income to or for the benefit of the Grantor, in convenient annual installments, for the lifetime of the Grantor.

B. Invasion of Principal: The Trustee has no power to invade the principal of the Trust Estate for the benefit of the Grantor, her creditors, her estate or creditors of their Estate and shall not do so under any circumstances. In no event may the principal of this Trust Estate by paid to or applied for the benefit of a governmental agency or department.

C. Residential Real Property: The Trustee is authorized and directed to retain in the Trust Estate any premises which the Grantor shall occupy as her residence. The Grantor shall have the right to occupy such premises for residential purposes. Any purchaser of real property owned by this Trust shall be entitled to rely upon the authority of the Trustee to sell such real property. The net proceeds of such sale shall be added to the Trust Estate and shall be considered principal in its entirety, to be invested and reinvested at the discretion of the Trustee as part of the Trust Estate.

D. The Grantor shall not be required to pay rent for any such premises, but shall be responsible for and required to pay all of the expenses and the maintenance of the property including taxes, insurance, utilities, mortgage payments and normal costs of maintenance and upkeep.

E. The Trustee shall pay such amounts of principal as the Trustee, in her sole and absolute unfettered discretion, shall determine to or ... for the benefit of the ... the issue of the Grantor living from time to time. However, in no way, shape or form, shall the Trustee have authority to distribute any principal to the Grantor

F. Notwithstanding the foregoing, the Grantor reserves a **special power of appointment** ..., exercisable during her lifetime by written instrument delivered to the Trustee, to appoint the remaining principal and any undistributed income of the Trust, outright or upon trusts, power of appointments, conditions or limitations, to such person or persons (whether in equal or unequal shares) among the members of the class consisting of the Grantor's issue of all generations or charitable organizations other than governmental entities, but no such power or payment shall be used to discharge a legal obligation of the Grantor.

Exhibit 4E, Art. 4.

Analysis and Conclusions of Law

Medicaid Law

The purpose of Medicaid is to provide medical assistance to those "whose income and resources are insufficient to meet the costs of necessary medical services." 42 USC § 1396-1 (2014). To

accomplish this purpose, MassHealth is only available to individuals over the age of sixty five if they have less than $2,000 in assets. 130 CMR 520.003. An applicant becomes eligible for long-term-care benefits "as of the date the applicant reduces his or her excess assets to the allowable asset limit without violating the transfer of resource provisions for nursing-facility residents … ." 130 CMR 520.004(A)(1)(A). Furthermore, a five-year "lookback period" allows the agency to review the applicant's financial records to see whether assets were given away in order to qualify. See 130 CMR 520.019(B); 130 CMR 520.023(A).

Congress found that people were artificially impoverishing themselves through the use of trusts, and created rules for reviewing trusts to determine whether the applicant had truly given away their resources before the look-back period. See Cohen v. Comm'r of the Div. of Med. Asst., 423 Mass. 399, 402-403 (1996). The test applied in Cohen looked solely to determine whether a trustee had discretion at any time to make distributions, and if so determined those distributions to be countable. Id.

The current test looks to see whether any resources held in a trust could be paid to or on behalf of an applicant. For revocable trusts, this means the entirety of the trust's holdings are countable. 130 CMR 520.022(A). For irrevocable trusts:

> if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income (I) to or for the benefit of the individual, shall be considered income of the individual, and (II) for any other purpose, shall be considered a transfer of assets by the individual.

42 USC § 1396p(d)(3)(B)(i).

Furthermore, this test is applied "without regard to—(i) the purposes for which a trust is established, (ii) whether the trustees have or exercise any discretion under the trust, (iii) any restrictions on when or whether distributions may be made from the trust, or (iv) any restrictions on the use of distributions from the trust." 42 USC § 1396p(d)(2)(C).

This is commonly referred to as the "any circumstances" test. Daley v. EOHHS, 477 Mass. 188, 193-194 (2017); Heyn v. Dir. of Medicaid, 89 Mass. App. Ct. 312, 315 n.7 (2016). This test was devised by Congress to further restrict the use of trusts in Medicaid planning that had been allowed under the "trustee's discretion" test. See Cohen, 423 Mass. at 403; see also 42 USC 1396a(k) (1992 Supp. II). The "any circumstances" test allows MassHealth to review a trust to determine whether "the trustee is afforded even a 'peppercorn of discretion' to make payment of principal to the applicant, **or** if the trust allows such payment based on certain conditions, then the entire amount that the applicant could receive under 'any state of affairs' is the amount counted for Medicaid eligibility." Daley at 193 (citing Cohen, 423 Mass. at 413) (emphasis added). This test is applied without regard to whether the circumstances have ever occurred, "it is enough that the amount could

be made available to [the donor] under any circumstances." Heyn, 89 Mass. App. Ct. at 315 (citing Lebow v. Comm'r of the Div. of Med. Asst., 433 Mass. 171, 177-178 (2001)).

However, if under "any circumstances," payment may be only made from income, then MassHealth may only count the amount of income distributable and it must treat the distributions as income received. Daley at 194 (citing Guerriero v. Comm'r of the Div. of Med. Assist., 433 Mass. 628, 632 n.6 (2001); 130 CMR 520.026). The difficulty in applying the any circumstances test is in determining when a trust allows for distributions.

The parties particularly focused on two cases that have applied the "any circumstances" test recently: Heyn and Braiterman. Both cases involved powers of appointment being used to pay money out to someone other than the donor with the expectation that the money would be used for the donor's benefit.

In Heyn the power of appointment was "free of Trust," and the court held that such an appointment was akin to an outright gift, and the fact that principal could be removed from trust did "not by its nature make [trust principal] available to the grantor, any more than if the grantor had gifted the same property to such a person when she created the trust, rather than placing it in trust." 89 Mass. App. Ct. at 318; see also Guerriero v. Comm'r of the Div. of Med. Asst., 433 Mass. 628, 629-632 (2001). More generally, the court noted that "for purposes of computing countable assets, Medicaid does not consider assets held by other family members who might, by reason of love but without legal obligation, voluntarily contribute monies toward the grantor's support." 89 Mass. App. Ct. at 318.

In Braiterman, the applicant was both the donor and a trustee, but she retained no interest in either the principal or income of the trust, nor the power to revoke or alter the trust. However, she did reserve "'the power, exercisable at any time . . . , to appoint any part or all of the principal of the Trust Fund, outright or upon trusts, conditions or limitations, to any one or more of the Legatees,' including "the power to make lifetime gifts.'" 145 A. 3d at 685. The trust also included language evincing the donor's "general intent" that the trust's resources be used for her benefit in an emergency.[8] Id. at 685, 691. Relying upon Doherty and the clear statement of general intent in the trust, the court held

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[8] Clause 4.1.1 of the Braiterman Trust read:

> If, at any time during the lifetime of the [applicant], the [applicant] may lose or may lose eligibility for substantial cash benefits or medical or other services by reason of the existence, size or terms of this Trust, the [applicant] suggests that the Trustee consider taking action to terminate the Trust by distributing the principal and accumulated income of the Trust Fund, if in the judgment of the Trustee such loss of eligibility would likely necessitate expenditures from the Trust for or on behalf of the [applicant] at a rate expected to deplete the Trust substantially and to defeat its supplemental and long-term purposes. The [applicant] expresses the hope that if the Trust is terminated during the lifetime of the [applicant], any persons taking under this paragraph will use a portion of her gift to supplement the income and the governmental benefits and services to which the [applicant] may be entitled by reason of age, disability or otherwise. It is not the intention of the [applicant], however, to impose any legal obligation or trust.

that the donor could exercise her power of appointment to a lifetime beneficiary upon the condition that the appointment be used for her benefit. Id. at 693-694.

Braiterman specifically distinguishes Heyn in three ways:

> [T]he trust in Heyn expressly precluded the trustee from distributing any part or all of the principal to the applicant. [89 Mass. App. Ct. at 314 n.8.] Moreover, unlike the Trust in this case, which conceivably allows the applicant to condition a distribution to a Legatee upon that Legatee using the distribution for her benefit, the trust in Heyn did not authorize the applicant to impose any conditions upon the appointment of principal to her issue. See id. at [318]. Further, Clause 4.1.1 of the Trust in this case evinces the applicant's general intent that Trust disbursements be used for her benefit, see Doherty, [74 Mass. App. Ct. at 441]; there is no indication that the trust in Heyn contained a similar clause. Nor is there any evidence that the applicant in Heyn was ever one of the trust's trustees.

145 A. 3d at 692-693.

Parties' Arguments

MassHealth's primary argument is that Art. 4(F) is sufficiently similar to the power of appointment reviewed in Braiterman to warrant the trust being countable because the appellant could appoint principal to a child upon the condition that it be used for her benefit. MassHealth cites Doherty as support for its argument that a trust's corpus may be countable "notwithstanding the trust's general prohibition against a corpus payment to the applicant ... ." Exhibit 6, p. 4. MassHealth also argues that "this power [of appointment] is not subject to fiduciary duties because the power is specifically reserved by the Donor, not the Trustee." Id. at 5. MassHealth distinguishes Heyn, arguing that the power of appointment there was a "*normal* power of appointment," as opposed to "the *special* power of appointment [that] *explicitly* allows the applicant to create a legal obligation the Heyn Court found missing." However, MassHealth argues that this "legal obligation" is not the same kind of legal obligation that Art. 4(F) prohibits from being discharged through an appointment. Id. at 6.

The appellant responds that both Braiterman and Doherty relied upon a finding of "general intent" after reading the trust "as a whole." In essence, MassHealth may not ignore the explicit prohibitions on distributing principal to a donor in the absence of some explicit indication in the trust that the donor had always intended for the trust principal to be invaded in the event of an emergency. Exhibit 7, pp. 2-5, 8-9. MassHealth also misunderstands the legal meaning of a "special power of appointment." The appellant offers a definition of powers of appointment that clarifies that a "special" power is a more restricted power than a "general" power. Id. at 3 (quoting NEWHALL'S SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS § 34.2). Furthermore, under Massachusetts' law, the holder of a power of appointment is a presumptive fiduciary in exercising that authority. Id. at 4 (citing MGL Ch. 203E § 808(c)). The appellant also raises arguments regarding the agency's obligation to provide administrative consistency. Id. at 14.

Analysis

The appellant has successfully rebutted MassHealth's arguments regarding how the power of appointment to children should make the trust countable, and I am persuaded by the appellant's reading of precedential case law. Doherty instructed that the "any circumstances" test be applied after reading "the trust instrument as a whole." 74 Mass. App. Ct. at 441. In doing so, the explicit prohibition on using trust assets to benefit the donor were only ignored because "the trust vehicle, considered as a whole, **evidences Muriel's expectation or intent** that the trustees will invade trust assets when necessary to ensure Muriel's comfort." Id. at 442 (emphasis added). It was further required that there be a contradictory or unclear clause that would also provide an avenue of distribution—in Doherty it was the trustee's power to terminate the trust and distribute proceeds to any beneficiary, without distinguishing between income and principal beneficiaries. See id. at 442 n.6.

However unclear Doherty may have been in a vacuum, Braiterman cited Doherty when it relied upon explicit language in the trust to evidence "the applicant's general intent that Trust disbursements be used for her benefit ... ." 145 A. 3d at 693. This was one of three grounds upon which it distinguished Heyn; the appellant's trust satisfies one of the other reasons as well—the appellant is explicitly precluded from receiving trust principal. MassHealth is correct that Doherty allows the agency to ignore an explicit prohibition on the use of trust principal to benefit a donor, but under Braiterman there must be some reason documented in the trust for doing so.[9]

Finally, the holder of a power of appointment is a presumptive fiduciary under Massachusetts' Uniform Trust Code. See MGL Ch. 203E § 808(c). MassHealth argues that they are not, but offers no written legal basis for doing so.[10]

MassHealth acknowledged that its alternative argument was weaker, as it would necessarily require the power of appointment be exercised to discharge the donor's legal obligation to pay for nursing

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[9] This interpretation is also in congruence with Cohen. The trusts there all sought "to limit the trustees' discretion just insofar as the exercise of that discretion may make the grantor ineligible for public assistance." 423 Mass. at 407. In reviewing Kokoska's trust, a Probate Court had ruled that the trustee had no discretion, under trust law, to distribute any money that would make Kokoska ineligible for Medicaid benefits. Cohen, disregarded this trust law outcome because, "although Kokoska's trust limits the trustee's discretion, the MQT statute as we interpret it requires that the division disregard such a limitation when assessing availability. The statute asks only what the maximum amount of funds available to the beneficiary are in any circumstances pursuant to the exercise of the trustee's discretion." 423 Mass. at 421, 424. To say that any limitations in a trust are ignorable if a single clause appears to create a possible avenue of distribution is a leap of reasoning from this holding that a termination of an existing avenue of distribution may be ignored. Doherty and Braiterman offer a significantly more constrained step in reasoning that relies upon explicit statements of intent in the trust to allow otherwise valid prohibitions in distribution to be disregarded.

[10] At the hearing, MassHealth's attorney argued that fiduciary duties and state law restrictions should be ignored wholesale as preempted by Medicaid's detailed regulatory scheme. MassHealth's argument in writing, however, appears to concede that fiduciary duties are applicable in applying the "any circumstances" test.

Because the appellant raised concerns regarding administrative consistency, I will note that the agency has presented a comprehensive interpretation of the "any circumstances" test that I have found more persuasive than the one arrived at relying solely upon somewhat murky caselaw. See Appeal Nos. 1714393 (Mar. 14, 2018), 1718568 (Sept. 20, 2018), and 1808971 (Oct. 4, 2018).

facility care at a charitable nursing facility. Such a payment is precluded by Art. 4(F) and the fact that the donor is a presumptive fiduciary according to state law. The analysis above similarly applies to prevent MassHealth from ignoring this prohibition, and nothing in Daley requires a different outcome. The parties provided various arguments regarding the nature of charities and the holding of Daley, most of which no longer need be analyzed. It is sufficient to note that Daley did **not** hold that Nadeau's power of appointment to a nonprofit organization made his trust countable. Had it done so, there would have been no reason to remand the matter "for MassHealth **to consider whether** this possibility fits within the 'any circumstances' test." 477 Mass. at 203 (emphasis added).

For these reasons, the power of appointment retained to the appellant in her trust does not make her trust countable under the "any circumstances" test. This appeal is APPROVED. The appellant's only other assets were a bank account with less than $2,000, and she is therefore asset eligible for MassHealth.

Order for MassHealth

Find the appellant asset eligible and continue processing her April 2, 2018 application.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings, at the address on the first page of this decision.

Christopher Jones
Hearing Officer
Board of Hearings