

**TO: JOHN R. NICHOLAS, COMMISSIONER
DEPARTMENT OF HEALTH and HUMAN SERVICES
STATE HOUSE STATION 11
221 STATE STREET
AUGUSTA, ME 04333**

**RE: Essex Street Boarding Home
Audit for FY ending 12/31/03**

ORDER OF REFERENCE HEARING RECOMMENDED DECISION

An Order of Reference hearing was held on October 27, 2005 in Bangor, Maine in the case of Essex Street Boarding Home before Hugh B. Hooper, Hearing Officer. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner, Department of Health and Human Services.

CASE BACKGROUND AND ISSUE:

Essex Street Boarding Home is a Residential Care facility that provides care to its residents who all have some form of brain injury. MaineCare payments are paid to the facility throughout the year based on projected costs provided by the facility at the beginning of the year. At the end of the facility's fiscal year the Department performs an audit, based on a cost report submitted by the facility that reflects actual operating costs, in order to reconcile the projected costs with the facility's actual operating costs.

An audit of the operating costs for Essex Street Boarding Home between January 1 and December 31, 2003 was completed by the Department on April 15, 2005 and resulted in three findings that were contested by Essex Street.

Essex Street requested an Informal Review of the audit results. The Informal Review Decision upheld the audit results. Essex Street then filed this Administrative appeal of the Informal Review Decision.

On August 1, 2005 an Order of Reference was drafted instructing the Office of Administrative Hearings to conduct an administrative hearing and submit to the Commissioner written findings of fact and recommendations on the following issue:

Was the Department correct when it reclassified Kim Colson's wages to direct care and reclassified Judy Smith's wages to the Administration and Management allowance and the removal of legal fees during the MaineCare audit for the fiscal year ending December 31, 2003?

The parties agreed, orally on the hearing record, to amend the August 1, 2005 Order of Reference to reflect that the issue of the Department's disallowance of certain legal fees during the 2003 audit had been resolved by the parties and was no longer an issue to be resolved at hearing.

The record of this hearing was kept open until November 10, 2005 to allow both parties to submit written closing arguments. Those documents have been received, made part of the record and considered.

APPEARING ON BEHALF OF APPELLANT:

Judith Smith, Executive Director
Edward Gould, Esq., Counsel for Essex Street Boarding Home
Mark Poulin, Essex Street Boarding Home Director – observer only

APPEARING ON BEHALF OF THE AGENCY:

Linda Gray, Auditor of Record, DHHS Division of Audit
Terry Kilcoyne, Auditor III, DHHS Division of Audit
Jane Gregory, Esq., AAG, Counsel for the Department

ITEMS INTRODUCED INTO EVIDENCE:

BY THE HEARING OFFICER:

- HO 1. Copy of 8/2/05 Notice of Hearing
- HO 2. Copy of 8/1/05 Order of Reference
- HO 3. Copy of 8/1/05 Hearing Report
- HO 4. Copy of 5/20/05 Informal Review request with attachments
- HO 5. Copy of 6/22/05 Informal Review Decision
- HO 6. Copy of 7/21/05 hearing request
- HO 7. Copy of 7/26/05 acknowledgment of hearing request – Mr. Bivins
- HO 8. 9/22/05 continuance request (e-mail) – Attorney Gregory and 9/22/05 response – Mr. Hooper
- HO 9. Copy of 9/28/05 rescheduling letter

BY THE DEPARTMENT:

- DHS-1. Copy of FY 2003 Essex Street Cost Report
- DHS-2. Copy of 4/15/05 Audit Report Transmittal
- DHS-3. Copy of 5/20/05 Informal Review Request with attachments
- DHS-4. Copy of 6/22/05 Informal Review Decision
- DHS-5. Copy of 7/21/05 hearing request
- DHS-6. 11/1/03 Principles of Reimbursement for Residential Care Facilities-Room and Board Costs
- DHS-7. 7/1/01 Principles of Reimbursement for Residential Care Facilities-Room and Board Costs
- DHS-8. 3/19/03 Principles of Reimbursement for Residential Care Facilities-Room and Board Costs
- DHS-9. Copy of 9/23/04 memo – Judith Smith to Linda Gray
- DHS-10. Copy of “Questions for Interview/Judy Smith” by Linda Gray
- DHS-11. Copy of Audit Work Papers
- DHS-12. Copy of 4/7/98 letter – Judith Smith to Deborah Couteure
- DHS-13. Copy of Copy of 10/10/03 Recommended Decision – Essex Street FY 2001 audit
- DHS-14. Copy of Copy of 1/5/04 Final Decision – Essex Street FY 2001 audit
- DHS-15. Copy of 12/4/02 letter – Catherine Cobb to Judith Smith

OTHER DOCUMENTS IN THE HEARING RECORD:

- 1. 11/9/05 closing arguments – Essex Street
- 2. 11/10/05 closing arguments – DHHS

RECOMMENDED FINDINGS OF FACT:

- 1. Essex Street Boarding Home (Essex Street) is a Residential Care facility that is licensed by the Department to provide services to its six brain injured residents.
- 2. The Department makes prospective MaineCare payments to residential care facilities throughout the year based on projected costs provided by the facility at the beginning of their fiscal year. At the end of their fiscal year the facility submits a cost report to the Department. An audit is then performed by the Department to reconcile the projected costs of the facility with the facility’s actual costs as shown on the facility’s cost report. That audit may result in additional payments due the facility or reimbursement by the facility to the Department if the facility’s allowable operating costs are less than projected.
- 3. On June 1, 2004 Essex Street filed a Cost Report for FY 2003 (January 1, 2003 – December 31, 2003). Judith A. Smith signed the Cost Report as Executive Director of the facility.¹

¹ See DHS exhibit # 1

4. The Essex Street Cost Report listed Judith A. Smith as the Administrator of the facility between January 1st and March 31, 2003.²

5. Essex Street listed Judith A. Smith as the Bookkeeper and Program Manager of the facility beginning April 1, 2003.

6. The Essex Street Cost Report listed Kim Colson as the Administrator of the facility beginning April 1, 2003.³

7. The parties agree that the *Principles of Reimbursement for Residential Care Facilities* do not allow reimbursement to the Administrator of a facility for other services, including those of bookkeeper and program manager, performed by the Administrator.

8. The governing rules allow for a standardized allowance for certain operating costs, including that of the facility's administrator, of a residential care facility rather than allowing the actual payment made by the facility. The 2003 Administrative and Management allowance for a 6 bed residential care facility was \$26,839.00.

9. On April 15, 2005 the Department's Division of Audit completed an audit of Essex Street's January 1, 2003 – December 31, 2003 operating costs based on their FY2003 Cost Report.⁴

10. During the 2003 audit the Department determined that although Kim Colson was listed by Essex Street Boarding Home as their Administrator, Judith A. Smith continued to perform the duties of an administrator for the period between April 1st and December 31, 2003.⁵

11. During the 2003 audit the Department reclassified the salary, taxes and benefits paid to Judith A. Smith for her services as Bookkeeper and Program Manger at Essex Street between April 1st and December 31, 2003 from the Direct Care classification and substituted the Administrative and Management allowance of \$26,839.00 as the allowable cost for the Administrator's expense.⁶

12. During the 2003 audit the Department reclassified the salary, taxes and benefits paid to Kim Colson from that of Administrator to the Direct Care classification.⁷

13. Essex Street appealed the Department's audit findings to an Informal Review which, by a June 22, 2005 Informal Review Decision,⁸ upheld the Department's audit findings.

² See DHS exhibit # 1, page 2

³ See DHS exhibit # 1, page 2

⁴ See DHS exhibit # 1

⁵ See DHS exhibit # 2, page 2

⁶ See DHS exhibit # 2, Schedule F, line 6

⁷ See DHS exhibit # 2, Schedule F, line 6

⁸ See HO exhibit # 5 and DHS exhibit # 4

14. Essex Street's job description for Administrator listed the salary range as \$18,000.000 to \$23,000.00 per year. The job description of Administrator, as listed by Essex Street, was: "Responsible to administer the day-to-day operations of the home, policy development, procedures and financial affairs". The specific responsibilities of the Administrator included the hiring and training of staff; assuring that each resident had an initial needs assessment and current ongoing care plan; protection of resident rights; scheduling of staff hours; ensuring that facility records were accurate; reporting to the Board of Directors and all other duties as assigned.⁹

15. Essex Street's job description for Program Manager listed the salary range as \$45,000.00 to \$58,000.00 per year. The job description of Program Manager, as listed by Essex Street, was: "Provide direction for the program of services including but not limited to staff training, individualized resident service plans, policy and procedure development". The specific responsibilities of that job included providing for regular and timely flow of information to the Board of Directors; attending board meetings; assisting with the assessment of new residents; assisting with the development of, and changes to, specialized resident service plans; documenting monthly progress reports; completing discharge plans and reports; advocating for resident rights; assisting with communication between family members and providers; assuring compliance with licensing regulations; assisting with program development as necessary; assisting with maintenance of records to remain in compliance with regulatory rules; providing for staff orientation and training; acting as a liaison with the community; being on call at all times to assist staff as needed; covering staff absences; networking with other agencies regarding issues pertinent to health care matters and all other duties assigned or deemed necessary by the Board of Directors.¹⁰

16. Essex Street's job description for Bookkeeper listed the salary range as \$20.00 to \$40.00 per hour. The job description of bookkeeper, as listed by Essex Street, was: "Responsible for general bookkeeping duties including but not limited to payroll, billing, accounts payable, accounts receivable, and monthly and annual financial reports. Provide for typing, filing, completing all financial reports, information, etc."¹¹

17. Judith Smith attended the May 16th; June 23rd and August 6, 2003 Essex Street Directors meetings.

18. Kim Colson did not attend the May 16th; June 23rd and August 6, 2003 Essex Street Directors meetings.

19. Judith Smith did function as the Administrator of Essex Street between April 1st and December 31, 2003.

20. Kim Colson did not function as the Administrator of Essex Street between April 1st and December 31, 2003.

⁹ See DHS exhibit # 9

¹⁰ See DHS exhibit # 9

¹¹ See DHS exhibit # 9

**RECOMMENDED DECISION - BASED ON EVIDENCE AND TESTIMONY
PRESENTED AT HEARING:**

I recommend that the Commissioner affirm the Department's reclassification of Kim Colson's wages to direct care and the reclassification of Judith A. Smith's wages to the Administrative and Management allowance during their FY 2003 audit of Essex Street Boarding Home.

REASON FOR RECOMMENDED DECISION:

This appeal centers around Essex Street Boarding Home's position that the Department had no basis to conclude that Judith Smith continued to act as the facility's Administrator after April 1, 2003. That conclusion resulted in the Department reclassifying Ms. Smith's wages, taxes and benefits, as Bookkeeper and Program Manager to the Administrative and Management Allowance, and the Department's reclassification of Kim Colson's Administrative and Management allowance as Administrator to her former position as house manager which is a direct care position (expense).

Essex Street also points to a January 5, 2004 Final Decision by, then, DHS Acting Commissioner Peter Walsh on Essex Street's appeal of their FY 2001 audit. That Decision allowed wages and benefits paid to Judith Smith, who was also the facility's Administrator at that time, for her duties as bookkeeper and program manager as an allowable cost to the facility. That Final Decision stated, in pertinent part, "...I find that because the Department failed to respond to the April 7, 1998 letter from Judith Smith inquiring about the particularly difficult situation Essex Street Boarding Home found itself in with regards to a management issue at the time (see State's Exhibit # 9), that the bookkeeper and program manager wages and benefits paid to Judith Smith in the amount of \$58,281.00 were allowable".¹² Essex Street argues that Acting Commissioner Walsh reached his Decision "...due to Essex Street's particularly difficult management situation in 1998 and because of the Department's failure to address Essex Street's inquiries, the agency's practice of compensating Ms. Smith for the work which she performed would be permitted, despite the fact that it ran contrary to the *Principles of Reimbursement*".¹³ The Department argues that the January 2004 Decision "...rested on lack of notice and that the notice was provided on December 4, 2002 (DHS-15), prior to 2003, so that the 2003 audit could be conducted in accordance with the Medicaid regulation – is entirely reasonable".¹⁴ DHS exhibit 15 is a December 4, 2002 letter from Catherine Cobb to Judith Smith confirming that the governing rules clearly say that the only compensation for the administrator is from the administrative allowance and that she (Ms. Cobb) would not have knowingly approved a situation that was contrary to the rules. I find the Department's argument persuasive, and am convinced that the fact that the Department failed to respond to Ms. Smith's April 1998 letter was the deciding factor in Acting Commissioner Walsh's Decision.

¹² See DHS exhibit # 14

¹³ See Essex Street closing argument, page 5

¹⁴ See DHS closing argument, page 8 § IV

Section 14.36 of the July 1, 2001; March 24, 2003 and November 1, 2003 *Principles of Reimbursement for Residential Care Facilities* allows the Department to require compliance with its rules even if the Department has previously failed to insist on compliance with a particular rule. In other words, the Department is not required to continue to allow additional wages to be paid to Ms. Smith for her bookkeeper and program manager duties simply because it had previously allowed that practice.

The parties agree that all three revisions of the governing regulations preclude payment to the Administrator of a residential care facility for other services that are performed by the Administrator. Furthermore, although the Department asserts that Ms. Smith functioned as Essex Street's Administrator, it does not dispute that Ms. Smith performed the duties of bookkeeper and program manager between April 1st and December 31, 2003.

Section 17.12 of all three revisions of the rules mandates that costs must not be of the type conceived for the purpose of circumventing the regulations and such costs will be disallowed under the principle that substance of any transaction will prevail over form.

Section 20.70 et.seq. of the November 1, 2003 rules and Section 20.90 et.seq. of the March 24, 2003 and July 1, 2001 rules include in the definition of Administrative functions those duties that are necessary to the general supervision and direction of the current operations of the facility, including, but not limited to administration of the policies of the facility; day to day operation and management; control, conversion and utilization of the physical and financial aspects; obtaining adequate personnel; discharge of such functions as the licensee may be properly delegated; completion of any duties/responsibilities described by the applicable licensing regulations as being the responsibility of the administrator; administrators, assistant administrators, business managers, controllers, office managers, personnel directors and purchasing agents, personal secretaries to any of the above, typify those who are included in the administrative function category; policy-making, planning and decision-making activities necessary for the general and long term management of the facility including financial management, personnel policies and expansion planning and financing. Bookkeepers, secretaries, clerks, telephone operators, etc., are not included in this category and the administrative allowance is not to include individuals whose prime duties are not of an administrative nature, who may be responsible for hiring or purchasing for their department.

The Department's action was based, primarily, on information (including job descriptions and Board of Director meeting minutes) obtained from Judith Smith by Linda Gray (the auditor of record in this matter). Kim Colson was not interviewed by Ms. Gray as she was no longer employed by Essex Street at the time of Ms. Gray's interview. Ms. Gray concluded that although Kim Colson was listed as the Administrator of Essex Street and Judith Smith was listed as Bookkeeper and Program Manager beginning April 1, 2003, Ms. Smith was in fact continuing to function as the facility's Administrator. Ms. Gray concluded that Ms. Smith's duties as Program Manager were more suited to a description of administrative duties; that Kim Colson's duties as Administrator were more suited to her previous position as House Manager; that Ms. Smith's duties were assigned by the

Board of Directors; that it was unclear who assigned Ms. Colson's duties; that Ms. Smith answered to the Board of Directors and attended Board meetings; that in other residential care facilities direct care and routine personnel answer to the Administrator; that Ms. Colson did not attend any Board meetings even though she allegedly reported to the Board of Directors as needed; that Ms. Smith's hourly rate of pay as Program Manager was \$34.61 and as bookkeeper was \$34.55; that Ms. Colson's hourly rate of pay as Administrator was \$12.73 and that it was unreasonable that the Administrator's rate of pay would be only 36.79% of the rate paid for a bookkeeper and program manager; that it was unreasonable that the bookkeeper for an eight-bed facility (sic) would be paid \$34.61 an hour; that Ms. Smith's salary was not adjusted to reflect her change in duties from Administrator to Bookkeeper and Program Manager.¹⁵ Ms. Gray concluded that seven specific responsibilities contained in the Program Manager's job description were administrative duties. Of those seven duties, three (providing for regular and timely flow of information to the Board of Directors; attending Board meetings and advocating for resident rights) are not listed as part of the regulatory definition of Administrative Functions. It is noted that there are considerable similarities between many of the duties of Program Manager and Administrator in the facility's job descriptions. I agree with Ms. Gray that it seems unusual for a facility's bookkeeper to earn a much higher rate of pay than the Administrator and that it seems unusual that Ms. Smith's pay was not reduced when her job title changed. I, also, have concerns around whether Ms. Smith's salary as bookkeeper and Program Manager is reasonable (See rule sections 17.11 & 17.14). I conclude that it is more likely than not that they are not. The qualifications (education; experience, etc.) required for those positions, as listed on the facility's job description are considered in reaching that conclusion. The question of whether her job title changes were merely an attempt by Essex Street to be able to claim a greater portion of her salary as an operating expense is also given a great deal of consideration (See rule section 17.12). The facility's position that there are no rules limiting the amount of money that a facility can pay any of their employees or that require any particular employee (such as the Administrator) to receive greater compensation than any other employee (such as the bookkeeper or Program Manager) is not disputed by the Department and is correct. However, just because there is no rule that mandates an employees' rate of pay does not, automatically, cause the Department's determination to be wrong. I conclude that it simply is not reasonable that any facility, especially one that is experiencing an "... extremely tight cash flow..."¹⁶ problem, would pay its bookkeeper and program manager approximately three times what it paid its Administrator. Furthermore, that Ms. Smith volunteered to not cash her paychecks in order to improve the cash flow situation at Essex Street; her role in financial planning and her role in resolving the facility's 2001 audit appeal are all seen as indicative of her role in policy making (an Administrative function under the rules) rather than a role as a bookkeeper or program manager.¹⁷

In order to prevail in this matter the Department must support their determination that Judith Smith continued to act as the Administrator at Essex Street throughout 2003 by a preponderance of the hearing evidence. As pointed out by Mr. Gould, the Department's

¹⁵ See DHS exhibit # 4 and Gray testimony at hearing

¹⁶ See DHS-9, 5/16/03 Directors Meeting minutes

¹⁷ See DHS-9, 5/16/03 Directors Meeting minutes

decision must be based upon substantial evidence in the record and must be in compliance with applicable law. I conclude that the Department has put forth substantial evidence in support of their position. Of particular importance in reaching that conclusion is Ms. Smith's role in policy-planning functions at the 2003 Directors Meetings. She clearly was heavily involved in dealing with the 2001 audit appeal; the cash flow problem at Essex Street; the issue of initiating political involvement with the facility's problems and whether to involve residents and/or their guardians in Essex Street issues. Also considered was the fact that Kim Colson did not attend any of the Directors meetings after April 1, 2003 even though her job description required her to report to the Board of Directors as needed. In summary, I conclude that the Department has shown that it is more likely than not that Judith Smith did, indeed, function as Essex Street Boarding Home's Administrator after April 1, 2003. For that reason the Department's reclassification of her salary, taxes and benefits to the Administrative Allowance was correct. It, then, follows that the Department's reclassification of Kim Colson's wages to direct care was also correct.

For the above reasons I recommend that the Commissioner affirm the Department's reclassification of bookkeeper and program manager wages and benefits paid to Judith Smith to the Administrative and Management Allowance and when it reclassified Kim Colson's wages to direct care, during their 2003 audit of Essex Street Boarding Home.

MANUAL CITATIONS:

Principles of Reimbursement for Residential Care Facilities – Room and Board Costs
(Effective November 1, 2003)

Sections: 14.36; 17.11; 17.12; 17.14; 20.61; 20.62; 20.70

Principles of Reimbursement for Residential Care Facilities – Room and Board Costs
(Effective July 1, 2001)

Sections: 14.36; 17.11; 17.12; 17.14; 20.81; 20.90

Principles of Reimbursement for Residential Care Facilities – Room and Board Costs
(Effective March 24, 2003)

Sections: 14.36; 17.11; 17.12; 17.14; 20.81; 20.90

RIGHT TO FILE RESPONSES AND EXCEPTIONS:

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS WITHIN 20 DAYS OF RECEIPT OF THIS RECOMMENDED DECISION. THIS TIME FRAME MAY BE ADJUSTED BY AGREEMENT OF THE PARTIES. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE OFFICE OF ADMINISTRATIVE HEARINGS, STATE HOUSE STATION # 11, AUGUSTA, ME 04333-0011. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

SIGNED:

**Hugh B. Hooper
Hearing Officer**

DATE: December 9, 2005

**Pc: Herbert Downs, Director, Division of Audit
Jane Gregory, Esq., AAG, Department of the Attorney General
Edward Gould, Esq., Gross, Minsky & Mogul, Attorneys at Law, 23
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