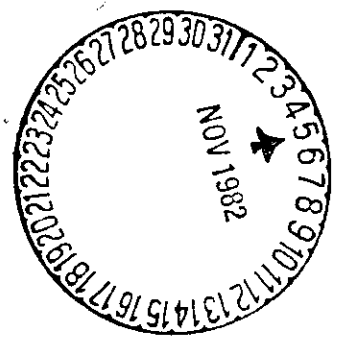

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Kathleen Dow,

Plaintiff,

vs.

The Public Housing Agency of the City of Saint Paul, and Marshall Anderson, individually and in his official capacity as Executive Director of the Public Housing agency of the City of Saint Paul,

Defendants.

Civil 4-81-119

ORDER

Timothy L. Thompson and Berry Friesen, Southern Minnesota Regional Legal Services, Inc., 60 East Fourth Street, St. Paul, MN 55101.

Cheryl P. Coughlan, Assistant City Attorney, 647 City Hall, St. Paul, MN 55102.

INTRODUCTION

Plaintiff filed this action for declaratory, injunctive and compensatory relief, in order to establish her right to receive benefits under the Section 8 Existing Housing Program; this is a low-income housing program established by Congress under Section 8 of the United States Housing Act, 42 U.S.C. §1437f. Plaintiff has been denied Section 8 funds by Public Housing Authority (PHA) acting under its "repayment policy." Under this policy, PHA withholds the certificate necessary for participation in the program from any applicant who has previously lived in public housing and owes rent for that housing. 1/ Both parties moved this Court to grant summary judgment. This Court took both motions under advisement on June 3, 1982.

The conventional public housing program was instituted by Congress in the National Housing Act of 1934, 42 U.S.C. §§1441, et seq. The policy of bringir safe and sanitary housing was articulated in the Housing Act of 1937 as follo

> It is ... to be the policy of the United States to promote the general welfare of the nation by employing its funds and credit ... to remedy the unsafe and insanitary [sic] housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low incomes, in urban, rural, nonfarm, and Indian areas that are injurious to the health, safety, and morals of the citizens of the nation....

42 U.S.C. §1401 (1969). This policy was expanded and strengthened by the Housing Act of 1949, 42 U.S.C. §§1441 et seq. and reaffirmed in the Housing and Urban Development Act of 1968, 42 U.S.C. §1441a.

By enacting the Section 8 program in 1974, Congress asserted an additional goal of promoting economically mixed housing:

> For the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing, newly constructed, and substantially rehabilitated housing in accordance with the provisions of this action.

42 U.S.C. §1437(a).

Section 8 has many subprograms including existing housing, new construction and substantial rehabilitation. This case involves the statutory provisions and federal regulations regarding the existing housing programs.

The Section 8 Housing Program provides rent subsidies for lower income families through the payment of housing assistance directly to owners of existing rental units. This program is administered through local Public Housing Agencies (PHA). The PHA is compensated by HUD under annual contribution contracts. 24 C.F.R. §§882.116, 882.201-.206.

Defendant Public Housing Agency of the City of St. Paul constitutes a PHA as the term is defined in HUD regulations. Defendant PHA operates approximately 4,400 public housing units under the conventional public housing program. Defendant PHA also operates a Section 8 Existing Housing Program pursuant to an Annual Contributions Contract (ACC) with HUD. The Section 8 program is fiscally distinct from the conventional housing program and funding is provided under separate annual contribution contracts. (Answer to Inter-

STATEMENT OF FACTS

Plaintiff and her family resided in conventional public housing operated by PHA from August 1, 1974, until June 1976. In a letter dated January 30, 1976, she was informed that her rent would be increased from $42.00 to $92.00. This increase was based on a determination by PHA that plaintiff had earned income from "labor pool." Plaintiff claimed she did not have earned income in amount alleged and informally complained. Due to her claimed inability to pay the rent, plaintiff left conventional public housing during May 1976, never paying the rent or any part of it. Plaintiff did not request a grievance hearing and was not informed by the defendants that failure to satisfy or contest her alleged liability would bar future participation in the Section 8 housing program.

Plaintiff applied on January 22, 1979, for a certificate of family participation in the Section 8 Existing Housing Program as administered by defendant PHA. Based on the unverified information furnished by the plaintiff, she was qualified for a certificate. Pursuant to PHA policy effective at the time, defendant determined plaintiff owed $377.70; consequently, her name was not placed on the waiting list. In November of 1979, when the policy was changed to the current "repayment policy," plaintiff's name was put on the waiting list. During August of 1980, plaintiff contacted PHA and was informed that the certificate would not be issued until she paid the full amount owed. After receiving this notice, plaintiff requested a hearing. After initially denying plaintiff's request, PHA granted a hearing on December 8, 1980.

Testifying on behalf of PHA was Edith Pierce, Leasing and Occupancy Coordinator for PHA. She explained that the plaintiff was indebted to PHA in the amount of $377.70 for unpaid rent and maintenance cost and stated that although plaintiff was eligible for a Section 8 certificate, she would not receive it until this amount was paid.

Plaintiff testified that she believed she owed $190.00 rather than the amount claimed. (Affidavit of Plaintiff, No. 10.) She offered testimony

The hearing officer found that the PHA was acting properly and within the framework of applicable regulations and policy to defer issuing the certificate until such time as plaintiff paid in full all sums owed by her. The decision did not address the issue of plaintiff's ability to pay the alleged debt prior to receipt of a certificate.

Plaintiff has lived at her present residence since March 1979. She paid full market rent from March 1, 1979, through August 1981. Beginning September 1, 1981, her portion of the monthly rent was reduced under a HUD program to assist financially troubled private housing developments. Plaintiff desires to move her family from her present residence and is therefore still in need of a certificate of family participation in the Section 8 Existing Housing Program.

DISCUSSION

Both parties have moved for summary judgment. Summary judgment is appropriate where the record shows no genuine issue as to a material fact. Rule 56c of the Federal Rules of Civil Procedure provides, in part, that:

> ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

The moving party has the burden of affirmatively demonstrating the absence of any genuine issue of material fact when the evidence available is viewed in the light most favorable to the opposing party. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Percival v. General Motors Corp., 539 F.2d 1126 (8th Cir. 1976). The pleadings, defendant's answers to interrogatories, documents produced by defendant, and the affidavit of plaintiff show there is no genuine issue as to any fact material to plaintiff's claim. Summary judgment is, therefore, an appropriate means of determining plaintiff's claims.

Before reaching the merits of plaintiff's claim, defendant PHA's asser-

in a new dwelling. See generally 24 C.F.R. §882. Ms. Dow wishes to leave her present apartment due to her dissatisfaction with the apartment complex management and the size of the apartment.

The Supreme Court clarified the standards of mootness in County of Los Angeles v. Davis, 440 U.S. 625 (1979). The Court concluded that jurisdiction, properly acquired, may abate if the case becomes moot because (1) "it can be said with assurance that there is no reasonable expectation that the alleged violation will recur" and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." 440 U.S. at 631. The facts of the present case do not satisfy these criteria. The defendant is still working under the "repayment policy"; plaintiff is still in need of housing assistance and has not been given the certificate. Therefore, the alleged violation could easily recur. In addition, since plaintiff wishes to move to another spot which is only possible if she received a Section 8 existing housing certificate, the effects of the violation still exist. This claim is not moot and is properly before this Court.

Plaintiff challenges defendant PHA's "repayment policy" on several grounds: 2/ First, that this policy violates federal statutory law by creating a new eligiblity requirement not authorized by federal statute; second, that defendant PHA's practice violates the equal protection clause of the fourteenth amendment by creating a classification not rationally related to the purpose of the Section 8 program; third, that defendant PHA's policy is applied in such a wooden manner that it is irrational and arbitrary as applied in violation of the due process clause of the fourteenth amendment; and fourth, even if defendant PHA's practice is valid under some circumstances, defendant PHA's action violated plaintiff's due process rights by denying her the opportunity to present evidence at her hearing regarding the validity of the alleged debt.

The purpose of the Section 8 Existing Housing Program is to aid "lower income families in obtaining a decent place to live and of promoting economi-

participating owners of existing rental housing. 42 U.S.C. §1437(a). To this end, Congress set up specific eligibility criteria for the PHA to use in determining who may participate in the program. To receive these benefits a family must qualify as a "low income family" as defined by the program's authorizing statute, 42 U.S.C. §1437f(c)(4) and implementing regulations, 24 C.F.R. §882.102 (definition of family) and §889.102 generally (definition of income). The Senate Report on the Section 8 bill sets out the standard to be used by a PHA to determine tenant eligibility:

> Eligibility for participation by a low income family in the program set out in this section will be determined by whether such family has a gross annual income which is not more than four times the annual fair market rental established by the Secretary or a public housing agency for a dwelling unit suitable in size to the housing needs of such family.

S.Rep.No. 693, 93rd Cong. 2d Sess., reprinted in 1974, U.S. Code Cong. & Ad. News 4273, 4315.

There is no apparent discretion granted the PHA in determining eligibility. The only determination left to the local PHA is the annual fair market value for a dwelling of particular size. In addition, there is evidence in the legislative history that Congress intended to put responsibility for administering the program in the Secretary of HUD and not the local PHA. This is found in this report by the Joint Conference Committee:

> The Senate bill placed maximum responsibility for administration of the new program in local housing authorities, but permitted HUD to assume local responsibility where it determined that a local housing authority was unable to implement the program or where no authority existed. The Housing Amendment placed primary responsibility for program administration in the Secretary of HUD. The Conference report contains the House provisions.

Joint Conference Committee Report on Housing and Community Development Act of 1974, J.Conf.Rep.No. 1279, 93rd Cong., 2nd Sess. 138 (1974).

Defendant PHA claims that this discretion to add criteria to the determination of eligibility is vested through the Declaration of Policy which states in pertinent part that:

of regulation by HUD which interprets the statute as granting PHA this authority. While examining the appropriate regulations it must be recognized that if a federal regulation conflicts with the authorizing statute, it is invalid. Brown v. Harris, 491 F.Supp. 845, 847 (N.D. Cal. 1980) (Section 8 existing housing eviction procedures).

Defendant PHA cites the following regulations in support of its policy. Section 882.209(f) provides, "... if an applicant is determined by the PHA to be ineligible on the basis of income or family composition, or for any other reason...." 24 C.F.R. 882.209(f) It has been suggested that this regulation provides evidence that income is not the only criteria a housing authority may use. There is, however, an interpretation which would be consistent with plaintiff's reading of the statute. The only obligations of the participating family are those set out in the certificate of family participation. Ferguson v. Metro. Develop. and Housing Authority, 485 F.Supp. 517, 525. See also 24 C.F.R. §882.118. If a participating family violates these obligations which are simply requirements of cooperation with the administration of the program (by, for example, failing to document family income), a certificate could be denied as an "other reason" provided for in §882.209(f). Section 882.204 of 24 C.F.R., subsection b(1)(i)(C), requires that an equal opportunity housing plan be included with the application for funds and contain, among other things, policies and procedures for "selecting among eligible applicants those to receive Certificates of Family Participation including any provisions establishing local requirements for eligibility or preferences for selection in accordance with §882.209(a)(3)." This section has also been cited as an example of the intention of HUD that PHAs can add eligibility criteria. The phrase "local requirements for eligibility," however, only has meaning within the context of this section, and, as previously indicated, can only have validity if read in conformance with the authorizing statute. This provision must also be read in the context of section 882.209(a)(3).

Section 1437d(c)(4)(B) has also been cited as giving support to the policy in question. That section requires authorities to develop sound and efficient management programs and practices to assure rental collection for the conventional public housing program. Notwithstanding the lack of any explicit authorization for this policy, this section refers to conventional public housing and section 1437f(h) provides that any provisions of §1437d not consistent with the Section 8 chapter shall not apply to the administration of that section. 42 U.S.C. §1437f(h).

There is no apparent authority under Section 8 of the United States Housing Act, 42 U.S.C. §1437 for a local PHA to include payment of arrearages as a criterion to the issuance of a certificate. In addition, although HUD has informally approved defendant's "repayment policy" in its handbooks, there is no formal interpretation by HUD that this policy is consistent with the Housing Act. As well as there being a lack of apparent authorization for this "repayment policy," this policy frustrates the purpose of the Act. The purpose of the Section 8 housing program is to free lower income families from their economic position enough to guarantee safe, sanitary housing outside of conventional public housing. See 42 U.S.C. §1401 (1969); 42 U.S.C. §1437(a). This "repayment policy" denies this housing on the basis of a past debt incurred because of the family's alleged low income status. Defendant PHA in its role as administrator of a federal program is withholding federally guaranteed funds in order to compel payment due it as a former landlord. Defendant PHA is thereby contravening the clear purpose of the Section 8 program in order to improve the fiscal integrity of a completely distinct program. The purpose of the Section 8 program is not to insure the fiscal integrity of the conventional public housing program, but to insure safe, sanitary housing to low income families.

Although this Court finds merit in plaintiff's claim that defendant PHA's "repayment policy" is not authorized by §8 of the Housing Act, it is constrained

Policy. 42 U.S.C. §1437. This section in pertinent part reads: "It is the policy of the United States ... to vest in local public housing agencies the maximum amount of responsbility in the administration of their housing programs." Id. The court found additional support for its holding in the various federal regulations previously cited and in the section of the Housing Act referring to fiscal management. See 24 C.F.R. §882.209(f); 24 C.F.R. 209(a)(3) and 42 U.S.C. §1437d(c)(4)(B). 663 F.2d at 439-440.

The Sixth Circuit in Baker v. Cincinnati Metropolitan Housing Authority, 675 F.2d 836 (6th Cir. 1982), followed the reasoning of Vandermark and held that a similar repayment policy was authorized under the statute and federal regulations. 675 F.2d at 841-42.

In view of the opinions of the Third and Sixth Circuits, this Court holds that the PHA's "repayment policy" is authorized under Section 8 of the Housing Act. 42 U.S.C. §1437f.

Plaintiff Dow further asserts that defendant PHA's "repayment policy" violates the equal protection clause of the fourteenth amendment. This issue was also raised in Vandermark. The court found that defendant PHA's use of its "repayment policy" constituted state action. However, it also found a rational relationship between the denial of the funds to those owing payments to the PHA and the purpose of Section 8 of the Housing Act. 663 F.2d at 441-42. The circuit court quoted the lower court by identifying the governmental interest as being "to foster fiscal responsibility in the administration of the Section 8 Existing Housing Programs, to ensure to landlords and the public the intent to administer a sound program, and to maintain a visible program providing maximum assistance to the largest amount of people." 663 F.2d at 442, quoting Vandermark v. Housing Authority of City of York, 492 F.Supp. 359.

In view of the Third Circuit's holding, this Court holds that the "repayment policy" does not violate the equal protection clause of the fourteenth amendment.

that the hearing was constitutionally defective in that she was denied opportunity to be heard on a critical eligibility condition and in that the hearing officer failed to apply the "repayment policy" in a fair and flexible manner.

In order for the protection of the fourteenth amendment to apply, there must be governmental action which deprives the plaintiff of a property interest in which she has a claim of entitlement under the due process clause. The modern analysis of the application of the Due Process Clause is set forth in Goldberg v. Kelly, 397 U.S. 254 (1970). There can be no doubt that the administration of the Section 8 program constitutes state action. Baker v. Cincinnati Metropolitan Housing Authority, 675 F.2d 836 (6th Cir. 1982); Vandermark v. Housing Authority of City of York, 663 F.2d 436 (3rd Cir. 1981); Kohl v. Housing Authority of City of Bloomington, Ill., 537 F.Supp. 1207 (C.D. Illinois 1982); Ferguson v. Metro Develop. and Housing Authority, 485 F.Supp. 517 (1980).

In order for the plaintiff to have a property interest in the Section 8 certificate, she must have a claim of entitlement. For the entitlement to exist, the laws or rules in issue must require that a benefit be conferred once the defining condition is found to exist. Arnett v. Kennedy, 416 U.S. 134, 182 (1974). Thus, where objective eligibility criteria exist, applicants are entitled to protection under the due process clause.

> An entitlement is a legally enforceable interest in receiving governmentally conferred benefit, the initial receipt or the termination of which is conditioned upon the existence of controvertible and controverted fact. Such an interest cannot be impaired or destroyed without prior notice to the beneficiary and a meaningful opportunity for him to be heard for the purpose of resolving the factual issue.

Geneva Towers Tenants Organization v. Fed. Mortgage Inv., 504 F.2d 483, 495 496 (9th Cir. 1974).

The source of the entitlement in this case is Section 8 of the Community Development Act of 1974, 42 U.S.C. §1437f. The Act defines the criteria for determining eligibility as follows:

> The assistance contracts shall provide that assistance may be made only with respect to a dwelling unit under lease for occupancy by a

Baker v. Cincinnati Metropolitan Housing Authority, 675 F.2d 836, 841 (6th Cir. 1982).

This Court agrees that the denial of a Section 8 certificate must satisfy the due process requirements of the fourteenth amendment.

Since it is determined that the due process protection is applicable to defendant PHA's denial of the certificate, it is necessary to determine what type of procedure is required.

Due process is a flexible concept that requires such procedural protection as the particular situation demands. As the Supreme Court has emphasized,

> The function of the legal process, as that concept is embodied in the constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 13 (1979). Where, as in the instant case, questions of fact are directly relevant to the application of an eligibility standard, the accepted principles of due process require an evidentiary hearing.

> The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and a meaningful manner.... These principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination and effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or parties to the facts of particular cases.

Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970).

Federal regulations already require defendant PHA to convene a hearing when it determines an applicant to be ineligible. 24 C.F.R. §882.209(f). Therefore the only question remaining is whether it was proper for the hearing examiner to exclude the evidence pertaining to the discrepancy in the alleged debt. Defendant PHA admits that the plaintiff qualifies for the certificate in all

than in the criminal area. Fuentes v. Shevin, 407 U.S. 67 (1973). Thus, in the civil area, the Supreme Court has said that: [W]e do not presume acquiescence in the loss of fundamental rights." Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 307 (1937).

In D.H. Overmyer Co., Inc., of Ohio v. Frick Company, 405 U.S. 174 (1972), the Court applied the standards governing waiver of constitutional rights recognized in criminal cases in a civil context. That standard is most clearly stated by the Court in Bradly v. Maryland, 397 U.S. 742 (1970):

> Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevent circumstances and likely consequences.

Bradly, 397 U.S. at 748.

The time when plaintiff was to bring the formal grievance hearing was four years before the denial of the certificate. There was no notice given or available to plaintiff at the time she informally objected to the amount of the debt that her failure to request a formal grievance hearing would in any way affect her ability to object to the denial of a certificate at some future time. Further, plaintiff was not aware that her debt to the PHA or her objection to that debt had any relevance to her ability to receive a Section 8 certificate in the future. This failure to request a hearing in 1976 could in no way be said to be a voluntary, knowing waiver of her due process rights to testify concerning the accuracy of the debt at the subsequent hearing. To apply such a concept of waiver, which approaches a strict application of exhaustion of the remedies, requires that the plaintiff possess the expertise of a lawyer in her day-to-day dealings with the agency. It is therefore held that the plaintiff did not waive her due process rights and the ruling of the hearing examiner denying the submission of the relevant evidence is a denial of due process.

Since the hearing is already required, there is little added cost in

classes must also have a rational relationship to a legitimate purpose. Schweiker v. Wilson, 450 U.S. 221 (1981).

The Third Circuit determined that the defendant's policy was valid under the equal protection clause because it had the rational purpose of fostering the "fiscal responsbility in the administration of the Section 8 Existing Housing Programs," by encouraging tenants to meet their lawful obligations so as to maximize the effective use of the available federal financial assistance. Vandermark, 663 F.2d at 442, n. 5. HUD prohibits the PHAs to establish selection criteria based on the applicant's expected behavior as a tenant. See U.S. Department of HUD Transmittal No. 7420-7 "Public Housing Administrative Practices Handbook for the Section 8 Existing Housing Program" Chapter 4, p. 11. Therefore, this policy must be encouraging the fiscal responsibility of the program by encouraging the payment of the debt. If that were not the case, the denial of the certificate would be a punitive measure invoked for failure to pay the alleged debt. Clearly this was not intended by the Third Circuit.

The use of defendant PHA's "repayment policy" is only rationally related to promoting the fiscal integrity of the program if it can reasonably encourage the payment of the debt. To apply the policy without consideration of plaintiff's ability to pay the debt before and after receipt of the certificate would not be using the policy to achieve the end desired.

The District Court in Vandermark v. Housing Authority of City of York, 492 F.Supp. 359 (1980), aff'd 663 F.2d 436 (3rd Cir. 1981), required that a detailed evidentiary hearing be held on the circumstances surrounding the applicant's ability to pay the past rent. [3/] Id. at 363. This portion of the district court's opinion was affirmed by the circuit court on appeal. 663 F.2d 442. The court cited Neddo v. Housing Authority of the City of Milwaukee, 335 F.Supp. 1397 (E.D. Wis. 1971), which held that the housing authority's policy of automatically rejecting applicants owing back rent was arbitrary and

pay in the future. The court went on to say that "an automatic rejection based on the existence of the debt coupled with a hearing that does not afford an applicant the opportunity to explain is arbitrary and unreasonable. Neddo, supra at 1400." Vandermark, supra, 492 F.Supp. at 364.

The Supreme Court has mandated that local administrative requirements be applied in individualized determinations and in a reasoned manner, in both a substantive due process and equal protection analysis. U.S. Dept. of Agriculture v. Murry, 413 U.S. 508 (1973). In Murry the Court reviewed the section of the Food Stamp Act of 1964 which denied eligiblity to persons seeking Food Stamps who had been claimed as "dependent" for Federal Income Tax purposes during the previous year by taxpayers who were themselves ineligible for Food Stamp relief. The Court stated that the statute was irrational and violative of the due process clause since it failed to account for the fact that the individual may be currently destitute. Id at 514.

This Court has applied the same analysis and holds that application of defendant PHA's "repayment policy" without consideration of plaintiff's ability to pay the debt is violative of both the equal protection and due process clause.

Further, plaintiff's ability to pay the alleged debt must be completely aired at an evidentiary hearing in order to satisfy the due process requirements of the fourteenth amendment.

IT IS HEREBY ORDERED That this matter is remanded to defendant PHA for administrative hearings in keeping with this opinion.

Dated: November 3, 1982

Miles W. Lord

MILES W. LORD, CHIEF JUDGE