Case No. 07-11368

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TERESA BASCO and JOSEPH BASCO, her husband,

Plaintiffs-Appellants,

v.

GIL MACHIN, in his official capacity as Director of Section 8 Housing of Hillsborough County, Florida
and
PATRICIA G. BEAN, in her official capacity as Administrator of Hillsborough County, Florida,

Defendants-Appellees.

On Appeal From The United States District Court
For The Middle District of Florida

BRIEF OF APPELLANTS

— DRAFT — 2 May 2007 09:28 —

C. Martin Lawyer, III, Esquire
Linda S. Mann, Esquire
BAY AREA LEGAL SERVICES, INC.
829 West M. L. King Blvd., Suite 200
Tampa, FL 33603-3336
(813) 232-1343, Ext. 109, 115
FAX: 232-1403
Attorneys For Appellants

CERTIFICATE OF INTERESTED PERSONS

Appellants, in accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 28-1(b), hereby certify that, to their knowledge, the following persons have an interest in the outcome of this appeal:

Honorable Susan C. Bucklew, United States District Judge, Trial Judge

Teresa Basco, Plaintiff-Appellant

Joseph Basco, Plaintiff-Appellant

C. Martin Lawyer, III, Attorney for Plaintiffs-Appellees

Linda S. Mann, Attorney for Plaintiffs-Appellees

Bay Area Legal Services, Inc., Law Firm of Attorneys for Plaintiffs-Appellees

Gil Machin, Defendant-Appellee

Patricia G. Bean, Defendant-Appellee

County of Hillsborough County, Florida, Employer of Defendants-Appellees

Louise B. Fields, Attorney for Defendants-Appellees

Hillsborough County (Florida) Attorney's Office, Law Firm for Defendants-Appellees

REQUEST FOR ORAL ARGUMENT

Appellants, pursuant to Fed R. Civ. P. 34 and Eleventh Circuit Rule 28-1(c), hereby request oral argument. In support of this request, Appellants submit that because the federal housing subsidy at issue here is vital to them, they desire to avoid any possibility that there would be concerns of the Court which might not be directly addressed by the briefs.

Further, since the issues in the case at bar are ones of first impression, counsel for Appellants wish to emphasize that the Court's decision herein will affect all low-income households throughout the Eleventh Circuit who hold federal Section 8 housing vouchers, as well as future low-income households who will be issued federal housing vouchers. Thus, there could be dire consequences from counsel not having effectively communicated their respective arguments in the briefs alone.

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and Federal Rules of Appellate Procedure 3(a) and 4(a) in that Appellants bring this appeal from a final decision of the District Court by the timely filing of their Notice of Appeal.

Subject matter jurisdiction is conferred herein by 28 U.S.C. § 1331 in that this is a "federal question" litigation comprising a civil action arising under the laws of the United States. Jurisdiction is also conferred by 28 U.S.C. § 1343(a)(3,4). Appellants' claims in the trial court for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202.

STATEMENT OF THE ISSUES

Whether a hearing decision held pursuant to 24 C.F.R. § 982.555, to be consistent with the Due Process Clause of the Fourteenth Amendment, can permit a federal housing entitlement subsidy to be terminated upon hearsay evidence alone.

a. Does § 982.555 place the burden of proof upon the public housing authority to prove that the entitlement voucher holder committed an act that is ground for termination of the subsidy?

b. Can the Hillsborough County Administrative Plan, as approved by the U.S. Department of Housing and Urban Development, legitimize the shifting of the burden of proof to the entitlement voucher holder and then terminate the subsidy based upon hearsay evidence alone?

STATEMENT OF THE CASE

1. The Course of Proceedings[1]

On February 16, 2006, the Appellants filed a Complaint for Declaratory and Injunctive Relief (D-1, RE-2) in the United States District Court for the Middle District of Florida. By this Complaint, Appellants sought to enjoin the Appellees to re-instate Appellants' federal housing entitlement subsidy under the "Section 8 Housing Choice Voucher" program authorized by 42 U.S.C. § 1437f and administered nationally by the United States Department of Housing and Urban Development (hereafter "HUD"). *Id.* Appellants asserted in the Complaint that Appellants had been using a housing entitlement voucher issued by the Section 8 program of Hillsborough County, Florida (called the "Public Housing Agency" or "PHA" in HUD parlance). *Id.* Appellants further asserted in their Complaint that Appellees[2], as the Hillsborough County officials who are local administrators of housing vouchers for the PHA, violated Appellants' constitutional Due Process rights and

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[1] **Citations in this Brief.** In this brief, Appellants will refer to the parties as they appear before this Court – Appellants and Appellees. Citations to the District Court Docket will be to the Docket number, followed by the page number (*e.g.,* D-2 at 1). Appellants will use similar citations to the Record Excerpts (*e.g.,* RE-2 at 1) and to the Appendices attached to this Brief in the form of the applicable regulation and unpublished District Court opinions (*e.g.,* App. 2-A at 1). Where a document has exhibits, Appellants will also use the exhibit number followed by the page number of the exhibit (*e.g.,* RE-2, Ex. 2 at 10).

[2] Appellee Machin is the administrator of the County Section 8 program. Appellee Bean is the County Administrator for the entire Hillsborough County government.

their rights under the applicable HUD regulation – 24 C.F.R. § 982.555 (App. 1). *Id.*

On April 7, 2006, the Appellees filed an Answer with Affirmative Defenses (D-12, RE-3) in which Appellees denied all essential allegations of the Complaint and, additionally, asserted two affirmative defenses to the effect that Appellees' conduct was approved by HUD by HUD's having approved of the County's Section 8 "Administrative Plan", as well as that Appellants were said to not be entitled to injunctive relief.

The parties proceeded to take discovery, including numerous depositions. D-40, D-52, D-54, D-55, D-56, D-57.

On December 1, 2006, Appellees filed a Motion for Summary Judgment (D-34). Appellees filed several affidavits in support of their motion. D-35, D-36, D-37, D-38. Appellees also requested (without opposition from Appellants) that the Court take judicial notice of the said HUD regulation (App. 1) and the County Administrative Plan (RE-6)[3]. D-41.

[3] RE-6 contains the portion of the County's Administrative Plan that is at issue in this appeal. It is not clear to Appellants whether Appellees did supply the trial court with the full 186-page Administrative Plan. Appellants do not here protest any possible lack of inclusion of the full Administrative Plan in the Record.

On January 8, 2007, Appellants filed a Memorandum in Opposition to the Motion for Summary Judgment (D-45). Appellants filed several affidavits in support of their memorandum, as well as some depositions taken in the case of *Tomlinson v. Machin*, Case No. 8:05-cv-1880 (M.D. Fla.), which had similar issues. D-48, D-49, D-50, D-51, D-53, D-56.

On February 6, 2007, the Court entered an Order (D-58) granting Appellees' Motion for Summary Judgment; and on February 7, 2007, the Court entered Judgment in favor of Appellees (D-59). On February 16, 2007, Appellants filed a Motion for Rehearing (D-60). On March 5, 2007, the Court entered an Order (D-62) denying Appellants' Motion for Reconsideration. Appellants filed a timely Notice of Appeal (D-63) on March 23, 2007.

2. Statement of the Facts

As relevant to this appeal, the Section 8 Housing Choice Voucher Program subsidy process began when Appellants made an application for their Section 8 voucher to receive the housing subsidy at their current dwelling in 1995, which application was approved by the PHA (*i.e.,* the County herein). D-46 at 5, D-49 at 1, D-50 at 1. Entitlement to this voucher subsidy is limited to those families who are "low-income" – those whose family incomes are below 80% of the "area median income". 42 U.S.C. §§ 1437f(o)(4), 1437f(a), 1437a(b)(2).

The PHA then inspected the dwelling for compliance with Housing Quality Standards ("HQS"). 42 U.S.C. § 1437f(o)(8); 24 C.F.R. §§ 982.401 *et seq.* After the PHA approved the dwelling, a lease was signed (and renewed annually) by Appellants, the landlord, and the PHA. 42 U.S.C. § 1437f(o)(7); 24 C.F.R. § 982.-308; D-46 at 5, D-49 at 1, D-50 at 1. As voucher holders, Appellants' rental payments plus utility costs must not (subject to limited exceptions) exceed 30% of Appellants' adjusted income. 42 U.S.C. § 1437f(o)(2)(A). The PHA pays the remainder of the contract rent under the Housing Assistance Payments (HAP) contract between the PHA and Appellants' landlord. *Id.* The PHA may terminate assistance only for grounds set out in 24 C.F.R. § 982.552 and § 982.553.

Appellants reside in Tampa, Hillsborough County, Florida. RE-2 at 2. Appellants' family is comprised of themselves and their four minor children. RE-2 at 2,3. Since 1995, Appellants and their family have occupied their current single-family home under the Hillsborough County Section 8 Program. RE-2 at 9.

On February 28, 2005, when Appellant Teresa Basco's teenage daughter (and Appellant Joseph Basco's step-daughter), Tessa Beckner, ran away from home, the concerned Appellants called the police department and filed a missing person report. RE-2, Ex. 2 at 8. Mr. Basco reported to the police that he believed Ms. Beckner's boyfriend, Elonzell Jones, was with her. *Id.*

On July 18, 2005, Mr. Basco called the police after Ms. Beckner became verbally and physically abusive toward him. RE-2, Ex. 3, at 9). Elonzell Jones was present during this incident. *Id.*

On December 2, 2005, Sherry Hanson, Senior Housing Counselor for the County Section 8 Program, sent a letter to Appellants titled "Notice of Intent to Terminate Section 8 Benefits". RE-2, Ex. 1. The notice alleged an unauthorized resident in the unit. *Id.* The Notice of Intent to Terminate gave Appellants until December 16, 2005 to request an "Informal Hearing" to contest the termination. *Id.*

After Appellants' timely request, the "Informal Hearing" was held on December 15, 2005. RE-2, Ex. 6. The only persons present for the hearing were: Teresa Basco, Appellant; Donna VanDerLaan, Appellants' landlord (who is also Ms. Basco's mother); Sarah Matalon, County Section 8 Housing Counselor; and Tanya Ludwig, Hearing Officer, who is employed by the Housing Authority of the City of Tampa.[4] RE-2, Ex. 6. It is undisputed that there were no witnesses on behalf of the Section 8 Program present for the hearing, other than counselor Sarah Matalon who cited documents in the file and had no direct knowledge of any material issue. *Id.*; D-39 (hearing transcript).

[4] Appellants were not represented by counsel at the hearing.

The hearing began with Sara Matalon's presentation of the "evidence" against Appellants. RE-2 at 11; D-39. The only "evidence" presented consisted of two police reports, the authors of which are unknown. *Id.*

The police reports list Elonzell Jones' home address as the same as Appellants'. RE-2, Ex. 2 at 3 and RE-3, Ex. 2 at 3. One report lists "Emanual Lewis Jones" as a "white male" born in "1990". RE-2, Ex. 2 at 4. The other report lists "Elonzel L. Jones" as a "black male" born on "Sep-07-1989". RE-2, Ex. 3 at 3. One of the reports alleges that Mr. Basco gave a "sworn statement" that Elonzell Jones was "staying" at Appellants' house. RE-2, Ex. 2 at 5.

After presenting the conflicting police reports, the Hearing Officer asked Ms. Basco to prove that Elonzell Jones did not live at Appellants' residence. RE-2 at 12; D-39 at 15. Seeking to prove a negative and having no one to cross-examine, Ms. Basco testified that Elonzell Jones did not live at the residence. RE-2 AT 12-13; *see, generally throughout* D-39. Ms. Basco's landlord, Donna VanDerLaan, also testified that Elonzell Jones did not live at the residence. *Id.*

In support of Ms. Basco's and Ms. VanDerLaan's testimony, Ms. Basco presented two pieces of documentary evidence: (1) a notarized statement from Joann Jones, Elonzell Jones' mother, stating that all times material to the period of time involved, Elonzell Jones was a minor who lived only with Ms. Jones or Ms. Jones'

mother (RE-2, Ex. 4); and (2) an affidavit of Appellants that their household was comprised only of them and their minor children, and that Elonzell Jones had never spent one night at their home. RE-2, Ex. 5.

Ms. Basco then asked permission for Mr. Basco to testify by telephone so that he could refute the alleged statement contained in one of the police reports that Elonzell Jones was "staying" at the dwelling. RE-2 at 13; D-39 at 17-18. Although Mr. Basco, who was not at the hearing because the Appellants' disabled son requires supervision after school, could have been reached immediately by telephone, the Hearing Officer refused to allow Mr. Basco to testify. *Id.*; D-50 at 3 (¶ 17). The Hearing Officer then closed the hearing. D-39 at 19.

In a Decision dated December 15, 2005, the Hearing Officer terminated the Appellants' benefits because the Appellants could not prove that Elonzell Jones did not live at their home. RE-2, Ex. 6. Appellants' notice of the Hearing Officer's decision by mail was accompanied by a letter dated December 28, 2005 from Senior Housing Counselor, Sherry Hanson, confirming the termination. RE-2, Ex. 7.

On January 16, 2006, Appellants met with Appellee Machin to discuss the Appellants' termination from the Section 8 Program. RE-2, Ex. 10. Machin told the Appellants that they were responsible for proving that the police reports were inaccurate. *Id.* Appellee Machin then left a telephone message for Attorney Martin

Lawyer in which he restated what he had told the Appellants about "discrediting a police report" and referred the Appellants to Attorney Lawyer for further assistance. *Id.*

On January 20, 2006, Attorney Lawyer sent a letter to Appellee Machin and Senior Housing Counselor Sherry Hanson that objected to the termination of Appellants' subsidy and asked Appellees to reject the recommended decision of the hearing officer. RE-2, Ex. 8. The letter specifically pointed out that the shifting of the burden of proof was improper and that the sole evidence on which the termination decision was based was not just hearsay, but triple hearsay. RE-2, Ex.8 at 3. Appellee Machin rejected the request to reconsider the decision. RE-2, Ex. 9. The reason Machin gave for his rejection was a provision in the County Section 8 Administrative Plan that states, in part: ***". . .The burden of proof that the individual is a visitor rests on the family. In the absence of such proof, the individual will be considered an unauthorized member of the household. . ."*** (Emphasis in the original). *Id.*; *see, also,* App. 1 hereto. This letter is almost a verbatim copy of a letter Appellee Machin sent to Attorney Linda Mann in reply to her request that Appellees reject the hearing officer's recommended decision in a previous unrelated termination case. RE-2, Ex. 11.

Appellants and their family are currently residing in the same dwelling without Section 8 subsidy. RE-2 at 16-17. They have received some rental assistance from another County agency, but the assistance was for only one month and was for less than the contract rent. *Id.*

Mr. Basco is disabled and unable to engage in substantial gainful employment. RE-2, Ex. 2 at 2; D-57 at 4. Ms. Basco is not able to work due to the high cost of childcare. RE-2 at 17. As a result, Appellants cannot afford market rent to house a family of six. Therefore, without their housing subsidy, Appellants are facing possible homelessness.

3. Scope of Review

The Court of Appeals' review of the District Court's grant of summary judgment herein is *de novo*, considering the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party, in this case the Appellants. *Lofton v. Secretary of the Dept. of Children & Family Services*, 358 F.3d 804, 809 (11th Cir. 2004).

The decision to grant or deny an injunction is reviewed for clear abuse of discretion, but underlying questions of law are reviewed *de novo*. *See, United States v. Gilbert*, 244 F.3d 888, 908 (11th Cir. 2001).

SUMMARY OF THE ARGUMENT

The procedures to be used in terminating a federal housing entitlement subsidy are governed by *Goldberg v. Kelly*, 370 U.S. 254, 255-256. 260-266, 268, 269, 270 (1970). The only logical and reasonable way to apply the *Goldberg* "right of confrontation and cross-examination" principles to HUD regulation 24 C.F.R. § 982.555 is to:

(a) Require the PHA (Appellees herein) to have the burden of proof; and

(b) Hold that the burden can not be satisfied by proof that consists solely of documentary (hearsay) evidence.

Because the only evidence against Appellants was documentary hearsay, the termination of Appellants' federal Section 8 housing voucher subsidy should be reversed. This Court, therefore, should reverse the District Court Judgment herein with directions to order the reinstatement of the subsidy effective February 1, 2006.

ARGUMENT

A federal housing entitlement subsidy should not be terminated upon only hearsay evidence.

This is a case of first impression. No federal appellate court has ever construed 24 C.F.R. Part 982, nor § 982.555 in particular, as to what evidence is sufficient to terminate the entitlement housing subsidy of a Section 8 voucher holder and the voucher holder's family. Specifically, no federal appeals court has ruled at all upon either the issue of burden of proof or the issue of whether a voucher subsidy hearing termination decision can be based solely upon uncorroborated hearsay evidence. In fact, Appellants could not locate any federal court appeals decision that ever considered the Due Process requirements for termination of a federal housing subsidy.

A number of United States District Courts have ruled upon these issues; and there is a split of authority, even within the District within which Appellants reside. *Norton v. Johnson*, Preliminary Injunction, Case No. 93-1263-Civ (M.D. Fla. 1993) (attached as Appendix "2-C" hereto); *Tomlinson v. Machin*, Order, Case No. 8:05-cv-1880 (M.D. Fla. 2007) (attached as Appendix "2-D" hereto); *Basco v. Machin*, Case No. 8:06-cv-260, Orders (granting summary judgment and denying motion for

rehearing) (M.D. Fla. 2007) (the case at bar) (RE-4, RE-5); *Edgecomb v. Housing Authority of Town of Vernon*, 824 F. Supp. 312 (D. Conn. 1993); *Barnhart v. Housing Authority of Union County*, Memorandum and Order, Case No. CV-94-1638 (M.D. Pa. 1994) (attached as Appendix "2-A" hereto); *Litsey v. Housing Authority of Bardstown*, Memorandum Opinion, Case No. 3:99CV-114 (W.D. Ky. 1999) (attached as Appendix "2-B" hereto); *Williams v. Housing Authority of City of Raleigh*, Order, Case No. 5:05-CV-219 (E.D.N.C. 2005) (attached as Appendix "2-E" hereto).

Analysis of Constitutional Fourteenth Amendment Due Process standards for termination of federal entitlement benefits should begin with the landmark case of *Goldberg v. Kelly*, 370 U.S. 254 (1970). *Goldberg* involved the adequacy of a pre-termination procedure for federal Aid to Families with Dependent Children (AFDC) as administered by the State of New York and, additionally, the City of New York's administration of similar benefits. *Id.* at 397 U.S. 255-256. The standards enunciated by the Court in *Goldberg* apply to "welfare" benefits. *Id.* at 260-266. The Court included "housing" as an "essential" need of qualified recipients. *Id.* at 264. The trial court in the present case recognized the applicability of *Goldberg* to the case at bar. *Basco v. Machin*, Order (granting summary judgment) (RE-4 at 10).

Goldberg is replete with statements about the importance of the right of confrontation and cross-examination of adverse witnesses. *Id.* at 259-260 (text and

n.4.), 268, 269, 270. Thus, it was "fatal" for the City of New York procedures to not include the right to confront or cross-examine adverse witnesses. *Id.* at 268. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* at 269.

Likewise, as to the State-administered benefits, the Court recognized, at 397 U.S. 270, citing *Green v. McElroy*, 360 U.S. 474, 496-497 (1959), that

> the requirements of confrontation and cross-examination . . . have ancient roots. . . . This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.

Thus, *Goldberg* held that, "Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department." *Id.*

One significant aspect of *Goldberg* that is frequently overlooked is that *Goldberg* focused on whether this essential right of confrontation and cross-examination of adverse witnesses was applicable to *pre*-termination hearings. *Id.* at 261. All parties, including the State of New York, *assumed* that the entitlement welfare recipient had this right of confrontation and cross-examination of adverse witnesses at *some* point in the termination process. *Id.* at 259 (n.4., n.5.), 260 (text and n.7.), 261. New York had contended that it was sufficient to provide this and other essential due process rights *after* the termination of benefits. *Id.* at 261 (n.7.)

It would indeed be sadly ironic if Mr. and Mrs. Basco here were denied at a *pre*-termination entitlement hearing the right of confrontation which all parties in *Goldberg* acknowledged was applicable to a *post*-termination hearing. Looking at the matter from that light, Appellants here would have been better off to have had their benefits terminated and then, thereafter, had been given a *post*-termination hearing at which they could have effectively exercised their right of confrontation and cross-examination to reinstate their housing entitlement benefits. There is no avoiding the fact in the case at bar that there was no witness with personal knowledge of any material fact at the *pre*-termination hearing herein.

Next, we invite the Court's attention to the Regulation adopted by the U.S. Dept. of Housing and Urban Development (HUD) to implement the pre-termination of Section 8 voucher entitlement subsidies — 24 C.F.R. § 982.555. (The applicable statute for Section 8 housing entitlement subsidies, 42 U.S.C. § 1437f, contains no language as to the procedure to be used by a PHA for termination of these subsidy benefits.)

In 1984 HUD promulgated regulations for the termination of Section 8 participants (voucher holders) in response to a court order to provide Section 8 participants with the Fourteenth Amendment procedural due process protections outlined in *Goldberg*. *See* 49 Fed. Reg. 12215 (Mar. 29, 1984) (citing *Nichols v.*

Landrieu, No. 79-3094 (D.D.C. Sept. 12, 1980)). The regulations have gone through only minor changes since 1984. These regulations have continued to guarantee that participants in the Section 8 Program are entitled to due process as outlined in *Goldberg* and its progeny. See 24 C.F.R. §§ 982.552, *et seq.*.

Thus, we should begin with the presumption that HUD drafted § 982.555 to conform to the Constitution as interpreted and applied by the *Goldberg* court. When there are two reasonable constructions for a statute or regulation, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001).

Therefore, when § 982.555(e)(5) says that "The . . .family . . . may question any witnesses", we should conclude that HUD assumed to have understood and appreciated the strong language in *Goldberg* about the importance of the right of the federal entitlement benefit recipient to confront and cross-examine witnesses. It is certainly reasonable to assume that HUD would not consciously have drafted the regulation to allow the PHA to evade and thwart this essential right by choosing to not present *any* witnesses at a termination hearing. Thus, at a minimum, the PHA should not be allowed to rely upon any uncorroborated hearsay to establish any material fact. *Goldberg, supra,* at 370 U.S. at 269.

Likewise, when § 982.555(e)(6) says that "Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing", we should conclude that HUD understood from *Goldberg* that HUD was assigning the burden of proof to the PHA. *Goldberg, supra* (assumed by the Court throughout the opinion).

Therefore, the only logical way to combine these two important principles is to conclude that a hearing decision predicated upon hearsay alone cannot work to terminate a federal entitlement subsidy.[5] Appellant Machin had the opportunity to

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[5] This, in essence, is the holding of the district court decisions favorable to Appellants. *Edgecomb v. Housing Authority of Town of Vernon*, 824 F. Supp. 312, 315-316 (D. Conn. 1993) (The only evidence presented by the Housing Authority was a police report, two newspaper articles, and the testimony of the Section 8 coordinator, who had no first-hand knowledge. "Denying the tenant the opportunity to confront and cross-examine persons who supplied information upon which the housing authority's action is grounded is improper.") *Norton v. Johnson*, Preliminary Injunction, Case No. 93-1263-Civ (M.D. Fla. 1993) (App. 2-C at 2,5, citing *Goldberg, supra,* 397 U.S. at 268) (Only documentary evidence was presented by the PHA. "If the [Section 8] participant cannot confront and cross examine adverse witnesses, he or she has not been afforded 'an effective opportunity to defend.'") *Barnhart v. Housing Authority of Union County*, Memorandum and Order, Case No. CV-94-1638 (M.D. Pa. 1994) (App. 2-A at 9-11) ("The factual scenario in the instant case is nearly identical to that in *Edgecomb*. . . . This was not sufficient to satisfy plaintiff's due process rights under *Goldberg, supra,* and *Edgecomb, supra*.") *Litsey v. Housing Authority of Bardstown*, Memorandum Opinion, Case No. 3:99CV-114 (W.D. Ky. 1999) (App. 2-B at 6-7) (Only documentary evidence was presented by the PHA. "If . . . the hearing officer was trying to infer from the [document's] content that [the putative unauthorized resident] live with Plaintiff, the Plaintiff had the right to question the [author of the document]. . . . In these circumstances, this omission amounts to a denial of due process.") *Williams v. Housing Authority of City of Raleigh*, Order, Case No. 5:05-CV-219 (E.D.N.C. 2005) (App. 2-E at 2-3, 8) (The only evidence presented by the PHA at the hearing was a letter written by the accuser and PHA's recounting of a phone call from the accuser. Hearing officer's reliance on this evidence improperly denied voucher holder's right of cross-examination.)

Neither the *Basco* trial court below, nor the district court in *Tomlinson v. Machin*, Order,

set aside the hearing decision under § 982.555(f)(2) upon being notified that the decision was contrary to HUD regulations and federal law; but he expressly declined to do so. RE-2, Ex. 8, 9. In fact, Appellant Machin testified at his deposition that he prefers hearsay evidence over live testimony. D-53 at 46-47.

Lastly, Appellees persuaded the District Court below that HUD's annual approval of the County Administrative Plan's for a number of consecutive years constituted an endorsement by HUD for Appellants being allowed to shift the burden of proof to the voucher entitlement holder as to whether the voucher holder is harboring an unauthorized resident in the voucher holder's dwelling. RE-4 at 14-15. The portion of the Administrative Plan relied upon by Appellees is as follows:

> Use of the unit address as the visitor's current residence for ***any*** purpose that is not explicitly temporary shall be construed as permanent residence.
>
> ***The burden of proof that the individual is a visitor rests on the family. In the absence of such proof the individual will be considered an unauthorized member of the household and the PHA will terminate assistance since prior approval was not requested for the addition.***

RE-6. Emphasis added.

Case No. 8:05-cv-1880 (M.D. Fla. 2007), were persuaded by the holdings' *ratio decidendi* of any of the above cases. The *Basco* district court expressly rejected these holdings without discussing these cases. RE-5 at 1.

However, neither the adoption of the Administrative Plan nor HUD's action in endorsing it are entitled to any deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel Inc.* 467 U.S. 837 (1984). Assuming *arguendo* that HUD's approval of Appellants' Administrative Plan was a conscious attempt to derogate voucher holder's rights under § 982.555, such a decision would not be a permissible construction of the regulation, given the strong language in the *Goldberg* opinion. *See, Chevron,* 467 U.S. at 842.

The bottom line is that Appellants cannot legally escape from *Goldberg's* principles by obtaining HUD approval of the "Visitors" provision of the County Administrative plan. If the *Goldberg* principles of the right of confrontation and cross-examination and burden of proof are to have any teeth whatsoever, then the Administrative Plan's intentional shifting of the burden of proof as to "visitors" must be struck down.

CONCLUSION

Appellants respectfully submit that the Court of Appeals should reverse the District Court's entry of summary final judgment in favor of Appellees and remand with directions to enter final judgment in favor of Appellants and, accordingly, reinstate Plaintiffs-Appellants' entitlement housing voucher subsidy effective the date of termination of February 1, 2006.

Respectfully submitted,

C. MARTIN LAWYER, III, Esquire

LINDA S. MANN, Esquire
BAY AREA LEGAL SERVICES, INC.
829 West M. L. King Blvd., Suite 200
Tampa, FL 33603-3336
(813) 232-1222, Ext. 109
FAX: 232-1403
ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that we have furnished a copy of the foregoing by U.S. Mail this 2 May 2007 to:

Louise B. Fields, Esquire
Sr. Assistant County Attorney
Florida Bar # 520380
P.O. Box 1110
Tampa, FL 33601-1110
(813) 272-5670
FAX: 272-5758
Attorney for Appellees

C. MARTIN LAWYER, III

LINDA S. MANN

APPENDICES

APPENDIX 1

APPENDIX 2 - A

APPENDIX 2 - B

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