

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
CIVIL ACTION
NO. 12H784CV000611

CHRISTOPHER Y. BERRY,

Plaintiff

VS.

BOSTON HOUSING AUTHORITY,

Defendant

MEMORANDUM OF DECISION
AND ORDER FOR JUDGMENT

Introduction

Plaintiff Christopher Berry ("Berry") filed a complaint seeking relief in the nature of certiorari pursuant to G.L. c. 249, § 4 challenging defendant Boston Housing Authority's ("BHA") decision to terminate Berry's participation in the federal Section 8 Housing Choice Voucher Program.¹ The hearing officer who heard Berry's informal administrative appeal upheld the BHA's decision to terminate based upon the BHA's determination that Berry engaged in drug-related criminal activity that constituted a serious or repeated violation of his Section 8 family obligations. In response to Berry's certiorari petition the BHA filed the informal hearing record together with a Motion for Judgment on the Pleadings. This matter is before the court on the merits of that motion and Berry's complaint.

¹ Berry commenced this action by filing an application for a temporary restraining order seeking to order the BHA to reinstate her Section 8 voucher. I will treat his request as one seeking relief in the nature of certiorari under G.L. c. 249, § 4.

Under certain circumstances a Section 8 participant whose federal benefit has been terminated may also assert a claim that the termination constituted a wrongful deprivation of a procedural or substantive right secured under federal law pursuant to 42 U.S.C. § 1983.

Discussion

The federal Section 8 Housing Choice Voucher Program ("Section 8 HCVP program") is succinctly described in *Wojcik v. Lynn Housing Authority*, 66 Mass. App. Ct. 103, n. 2 (2006):

"The Housing Choice Voucher Program, commonly referred to as 'section 8,' was established by Congress pursuant to § 201(a) of the Housing and Community Development Act of 1974, amending § 8 of the United States Housing Act of 1937. See 42 U.S.C. § 1437f(o) (2003); 24 C.F.R. § 982.1 *et seq.* (2005). It allows low-income families seeking assistance to apply to a local housing authority See 24 C.F.R. § 982.1. If approved, the local housing authority will issue a section 8 voucher to the family. See 24 C.F.R. § 982.302. With this voucher, the family may then locate to a suitable apartment in the private market and enter into a lease that is in accordance with the applicable housing authority guidelines. *Ibid.* Once the housing authority has approved the lease, the family may then pay thirty percent of its adjusted monthly income to the owner of the unit in satisfaction of its rent obligation. 42 U.S.C. § 1437f(o)(2)(A). Under its own agreement with the owner, the housing authority then pays the owner the difference between what the tenant has paid and the monthly rent charged. 42 U.S.C. § 1437f(c)(3)."

The United States Department of Housing and Urban Development ("HUD") administers the Section 8 HCVP program on the national level and has promulgated regulations to implement the program. See 24 C.F.R. § 982 *et seq.* On the local level, Defendant Boston Housing Authority ("BHA") is authorized to administer the Section 8 HCVP program for HUD. See, 42 U.S.C. § 1237a(b)(6); 24 C.F.R. § 982.4.

The BHA is a public body corporate and politic, established pursuant to G.L. c. 121B, §§ 3 and 5. The BHA administers the federal Section 8 Housing Choice Voucher Program (Section 8 program). 42 U.S.C. § 1437, *et seq.* The Department of Housing and Urban Development ("HUD") has promulgated regulations to implement the Section 8 program. See, 24 CFR § 982.551 (a) to (n). Section 982.551 (l) provides that "[t]he members of the household may not engage in drug-related criminal activity . . . or other criminal activity that threatens the health, safety, or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises." Section 24 CFR 982.552 (c) (1) (i) provides that the BHA may terminate participation in the Section

8 program if a family member “violates any family obligations under the program.” Family Obligation #11 provides that “members of the family may not engage in Drug-Related Criminal Activity.”

A Section 8 participant has the right to an informal hearing to appeal the BHA’s decision to terminate Section 8 assistance.²

The BHA is not a state agency subject to the administrative appeal provisions of G.L. c. 30A. Therefore, Berry has sought relief by bringing an action in the nature of certiorari pursuant to G.L. c. 249, § 4.³ Section 4 states in relevant part, “a civil action in the nature of certiorari to correct errors in proceedings . . . which proceedings are not otherwise reviewable by motion or by appeal, may be brought [in a court of competent jurisdiction].” The housing court department has jurisdiction concurrent with the superior court department with respect to housing matters. See, G.L. c. 185C, § 3. In considering a certiorari petition the court must determine whether the administrative decision was based upon legal error that adversely affected material rights of the plaintiff. Legal error includes terminating a tenant’s Section 8 subsidy based upon findings of fact that are not supported by a preponderance of the evidence presented at the informal hearing. See, *Board of Ret. v. Woodward*, 446 Mass. 698, 703 (2006); *Emerson College v. Boston*, 391 Mass. 415, 422 n. 14 (1984); *School Comm. Of Hatfield v. Board of Education*, 372 Mass. 513, 517 (1977); *First Church of Christ Scientist v. Alcoholic Beverages Control Commission*, 349 Mass. 273, 275 (1965); *Police Comm’r of Boston v. Robinson*, 47 Mass. App. Ct. 767, 770 (1999).⁴

² The hearing officer must make a factual determination relating to the individual circumstances of the participant based on a preponderance of the evidence presented at the hearing. See, *Carter v. Lynn Housing Authority*, 450 Mass. 626 (2008). The hearing officer may consider any mitigating circumstances and other relevant circumstances presented by the participant. These mitigating circumstances may include the seriousness of the violation, the extent of participation or culpability of individual family members, facts related to the disability of a family member, and the effects of the termination of assistance on other family members who were not involved in the conduct that constituted a lease violation.

³ Berry commenced this action within the sixty-day limitation period set forth in G.L. c. 249, § 4.

⁴ In *Woodward*, supra. at 703, the court states that “[t]he requisite elements for availability of certiorari are (1) a judicial or quasi judicial proceeding, (2) from which there is no other reasonably adequate remedy (3) to correct substantial error of law apparent in the record (4) that has resulted in manifest injustice to the plaintiff . . .”

Since I cannot substitute my judgment for that rendered by the BHA and the hearing officer, my consideration of Berry's certiorari petition must be based solely upon the evidence presented at the informal hearing. Therefore, my review of the hearing officer's decision will be limited to a consideration of whether the hearing officer's factual findings derived solely from the facts presented at the informal hearing as set forth in the administrative record and his legal conclusions based upon those factual findings constituted legal error that adversely affected Berry's material rights (whether the hearing officer applied the correct legal principles and whether his findings and conclusions were supported by the evidence in the record).

Berry resides as a tenant at 16 Everett Avenue, Apartment 2A, in the Dorchester section of Boston. His tenancy at is subsidized under the provisions of the Section 8 Housing Choice Voucher Program. The BHA administers Berry's Section 8 voucher. The BHA model lease shows that Berry has lived at the Everett Street apartment as a Section 8 subsidized tenant since August 2008. (Record, Exhibit 7). Berry signed the most recent Section 8 Family Obligations Form in May 2011. (Record, Exhibit 8). The Family Obligations form states in relevant part that as a Section 8 program participant Berry would not "... engage in Drug-Related Criminal Activity ...". On October 3, 2011, the BHA gave Berry a written notice entitled "Proposed Termination of Section 8 Rental Assistance" (Record, Exhibit 6). The reason the BHA gave for terminating Berry's Section 8 rental assistance was that on August 9, 2011, Berry engaged in drug-related criminal activity. Berry appealed that decision and requested that the BHA hold an informal hearing. The informal hearing was held before a BHA hearing officer on January 9, 2012. The evidence presented at the hearing included the BHA Section 8 program documents, termination and hearing notices (Record, Exhibits 1 – 8, 14, 15), a written police report dated August 9, 2011 (Record, Exhibit 9), a prior BHA hearing decision favorable to Berry dated July 27, 2010 (Record, Exhibit 10), an affidavit from Roy Harris dated January 6, 2012 (Record, Exhibits 13) and the informal hearing transcript. In a written decision issued on June 1, 2012, the hearing officer upheld the BHA's decision to terminate Berry's Section 8 rental assistance (Record, Exhibit 18).

The August 9, 2011 police report (Record, Exhibit 9) states that on August 9, 2011, officers from the drug control unit observed a black male (later identified as Roy

Harris) on a street corner talking on a cell phone. A few minutes later they observed Harris meet a white male and a black male. They began to walk up the street and turned the corner. They observed the white male take money out and start to count it. The three men continued to walk. One of the men entered a building a few times (it is unclear which male the report was referring to). The police followed Harris. They saw him make a few quick calls on his cell phone. Harris turned onto Everett Avenue. The police observed a car stopped in the middle of Everett Avenue. Berry was in the driver's seat and a female was in the passenger seat. Harris walked up to the car and got into the rear passenger side. The car then drove away. The police followed the car. The car turned on Stoughton Street and again onto Pleasant Street. The car pulled over on Pleasant Street opposite Thornley Street. Harris got out of the car and walked down the Thornley Street. The car began to drive away.

The police, suspecting that a drug transaction had occurred, conducted a threshold inquiry. They stopped Harris on the street. Harris told them that he had drugs in a cigarette pack in his pocket. The police found one plastic bag that contained what they believed to be heroin. According to the police report Harris told the police that he had obtained the drugs from the driver of the car he had just been in. Harris gave the police his cellphone and the cellphone number of the person he claimed was his seller.

The police then stopped Berry's car, placed Berry under arrest and confiscated his cellphone. He was charged with possession with intent to distribute a Class A narcotic. The police dialed the number Harris had given them. Berry's cellphone rang.

The police report does not include any information that the police 1) saw Berry (or anyone else) pass drugs to Harris, 2) saw Harris (or anyone else) pass money to Berry, 3) found drugs on Berry, on his passenger or in his car, 4) heard Berry say anything to Harris (or anyone else) pertaining to a drug transaction, or 5) heard Berry say anything to them about a drug transaction. What the police report does state is that Berry asked the police officers whether he was arrested "because of the guy who just got out of my car." When the police officers said yes, Berry told them "he just met him at the store and that he just asked for a ride."

At the BHA informal hearing, Berry testified that on the afternoon of August 9 he had gone to the Auto Zone to purchase a part for his car. The store receipt was introduced as an exhibit. He testified that on his way home that he saw Harris walking up the street. Harris gestured him to stop. Berry stopped his car in the street. Harris walked to the car and asked Berry for a ride. Harris got into the back seat of the car. Harris saw a police car and cursed. Berry asked him why he had cursed and Harris said "nothing man." Berry said he didn't want any problems. Harris said, "everything's good Chris." Berry drove Harris to Thornton Street (where Harris lived) and dropped him off at the top of the street. The police car drove by. Berry drove away, and a short time later he was stopped by the police.

Berry placed in evidence a notarized affidavit from Harris (Record, Exhibit 13) in which Harris denied that he had told the police that he got the drugs while he was in Berry's car. He stated that Berry did not give him the drugs and was not responsible for the drugs that were in Harris's possession. Berry testified at the hearing that he did not give or sell drugs to Harris and that he did not engage in any drug-related activity

The hearing officer found that Berry had engaged in drug-related activity on August 9, 2011. The sole source of the hearing officer's finding and conclusion that Berry engaged in drug related criminal activity on August 9, 2011 is the hearsay statements attributed to Harris in the 2011 police report. The hearing officer found that that the hearsay statement attributed to Berry was reliable, citing to *Costa v Fall River Housing Authority*, 453 Mass. 614 (2009). Based upon these findings, the hearing officer upheld the BHA's decision to terminate Berry's Section 8 assistance.

Berry argues that the hearing officer committed legal error in upholding the BHA's decision to terminate his Section 8 assistance based solely upon the information set forth in the August 9, 2011 police report.

In *Costa*, at p. 627, the court held that "... consistent with applicable due process requirements, hearsay evidence may form the basis of a PHA's decision to terminate Section 8 assistance so long as that evidence contains substantial indicia of reliability." However, the court cautioned "[a]s for the risk of error arising from reliance on hearsay, the risk will vary widely with the nature of the hearsay. Reliance on hearsay that is anonymous, uncorroborated, or contradicted by other evidence will

create particular risk of error.” With respect to the hearsay information contained in the police report at issue in *Costa*, the court ruled that it was reliable and could form the basis for termination of Section 8 assistance because “[t]he police report offered a detailed factual account based on the personal observations of the detective, and it is a crime for a police officer to file a false report.” See also *Commonwealth v. Durling*, 407 Mass. 108, 120-121 (1990).

The police report does not point to any statements Berry made to the police officers regarding his involvement in drug activity. The police officers did not report that they made any observations of Berry selling or buying drugs. Attempting to pigeonhole the hearsay statements attributed to Harris into the analytical framework set forth in *Costa*, the hearing officer found those statements to be reliable because “I find that his answer was given voluntarily.” Even if Harris made the statements attributed to him, there is no evidence in the record from which the hearing officer could reasonably conclude that the statements were truthful or accurate. There was no other evidence that would corroborate the truthfulness and accuracy of the statements attributed to Harris. In fact, the hearing officer simply ignored Harris’s statements set forth in his affidavit in which he stated that Berry did not sell him the heroin that the police found in Harris’s pocket. The hearing officer disregarded that part of *Costa* that cautions him against relying on hearsay that is “uncorroborated, or contradicted by other evidence.” At the hearing Berry denied repeatedly that he engaged in a drug transaction on August 9, 2011. The hearing officer did not present any legally sufficient reason to reject out of hand Berry’s testimony or the statements set forth in Harris’s affidavit.⁵ The hearing officer failed to apply the correct burden of proof applicable to Section 8 termination hearings. It is the BHA that had the burden of proof to present evidence sufficient to establish by a fair preponderance that Berry engaged in illegal drug activity.

In an effort to buttress his conclusion that the information contained in the August 9, 2011 police report was reliable (and in the absence of any corroboratory evidence), the

⁵ The hearing officer asked a question during the informal hearing that resonates with unintended irony. When Berry presented Harris’s affidavit, the hearing officer asked, “But why is he not here to testify?” Although the hearing officer was perfectly willing to accept as truthful and accurate the hearsay statements attributed to Harris as set forth in the police report that were adverse to Berry’s interests, he was not willing to give any consideration to the statements contained in Harris’s affidavit that was consistent with Berry’s testimony.

hearing officer suggested that Berry's conduct was similar to his conduct as was reported in a 2009 police report. The hearing officer stated this "similarity" was relevant in determining whether to credit the information in the 2011 police report. The BHA had tried to terminate Berry's Section 8 subsidy in 2010 based upon illegal drug activity that it alleged occurred in 2009. The BHA relied upon hearsay statements contained in that 2009 police report. A different hearing officer presided over the first informal hearing in 2010 and issued a written decision on July 27, 2010. The hearing officer who heard the 2010 appeal determined that the information contained in the 2009 police report was not sufficiently reliable "in light of the dearth of any other corroborating evidence." The hearing officer in the 2010 case *reversed* the BHA's decision to terminate Berry's Section 8 subsidy. The hearing officer in the current case ignored the legal finding and conclusions made by the hearing officer in the first case that the information contained in the 2009 police report was not reliable. Stated simply and without varnish, the hearing officer's reliance of the statements contained in the 2009 police report that the first hearing officer determined to be unreliable constitutes legal error.

Applying the standards of reliability set forth in *Costa*, I rule that the uncorroborated and disputed hearsay statements attributed to Harris contained in the August 9, 2011 police report are not sufficiently reliable to support a finding that Berry engaged in drug-related criminal activity on August 9, 2011. Therefore, I rule that the hearing officer committed legal error when he based his factual findings regarding Berry's purported 2011 drug-related activity solely on those hearsay statements attributed to Harris.

Conclusion

Without the benefit of the hearsay statements attributed to Harris there is no other reliable evidence in the record to support the hearing officer's conclusion that Berry had engaged in drug-related activity August 9, 2011. Accordingly, the hearing officer committed legal error by finding that Berry had violated Section 8 Family Obligation #11.

For these reasons, I rule on the merits of Berry's Complaint and on the BHA's Motion for Judgment on the Pleadings that the hearing officer committed legal errors that adversely affected Berry's material rights.

Accordingly, the hearing officer's May 21, 2012 decision upholding the BHA's proposed decision to terminate Berry's participation in the federal Section 8 Housing Choice Voucher Program shall be vacated and Berry's Section 8 subsidy shall be reinstated.

Order for Judgment

Based upon the evidence set forth in the informal hearing record in light of the governing law, it is **ORDERED** that:

1. Judgment shall enter in favor of Christopher Berry on his complaint in the nature of certiorari under G.L. c. 249, § 4.
2. The decision of the hearing officer in the case of In Re: Christopher Berry, dated June 1, 2012, is **VACATED** and the Boston Housing Authority's proposed decision to terminate Berry's participation in the federal Section 8 Housing Choice Voucher Program is **REVERSED**.
3. The Boston Housing Authority shall reinstate Berry's Section 8 subsidy retroactive to the date of proposed termination.

SO ORDERED.



JEFFREY M. WINIK
FIRST JUSTICE

November 9, 2012

cc: Foster Jay Cooperstein, Esq.
Bridgette K. Kelly, Esq.