

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK SS.

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
CIVIL ACTION
DOCKET NO. 11H84CV000121

BOSTON HOUSING AUTHORITY

Plaintiffs

v

BRENDALIS HERNANDEZ

Defendant

**MEMORANDUM OF DECISION AND
ORDER FOR ENTRY OF PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

The plaintiff, Boston Housing Authority (“BHA”), commenced a summary process action against the defendant, Brendalis Hernandez (“Hernandez”), seeking to recover possession of her public housing apartment for non-payment of rent. By agreement of the parties the case was transferred to the civil docket to give them additional time to attempt to resolve a dispute regarding the calculation of the Hernandez’s rent. It is that calculation that appears to be the source of the rent arrearage.

This matter is before the Court on Hernandez’s motion for partial summary judgment. The parties agree that for purposes of calculating her new rent at the time she began her new job in August 2008, Hernandez was eligible for the self-sufficiency earned-income disregard (“EID”) based upon the income from her new job. 42 U.S.C. §1437a(d) and 24 C.F.R. §960.255.

Hernandez claims that for purposes of calculating her adjusted rent after she began her new job in August 2008, her baseline "annual income" (before applying the EID) was her actual income immediately prior to her return to work. Her actual income at that time was zero. Hernandez argues that in accordance with the EID regulations the BHA was required to set her adjusted rent effective August 2008 (and the for the next twelve months) at \$0.00. The BHA argues that under the EID regulations "annual income" means actual income received and that Hernandez's baseline "annual income" for purposes of adjusting her rent (after disregarding her new employment income) could not be \$0.00. Instead her "annual income" was the income she had previously received in the form of state family assistance payments up until a few months before she began her new job.

For the reasons set forth herein, I conclude that Hernandez's position is correct.

Discussion

The standard for review on summary judgment "is whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). See Mass. R. Civ. P. 56 (c).

The facts necessary to resolve the legal issue before the court on summary judgment are not in dispute.

The BHA is a public housing authority organized under federal law, U.S.C. § 1437d and state law, G.L. c. 121B, § 3 et seq. The BHA owns and manages the Alice H. Taylor public housing development located in the Roxbury section of Boston. The multi-family apartment building at 50B Annunciation Road is part of that development.

Statutory and Regulatory Scheme. As a matter of federal law the BHA must review a family's household composition and income annually in order to set the income-based rent for the next year. 42 U.S.C. § 1437a (a) (1). In situations for a family's composition or income changes after the annual re-certification was completed, the BHA is authorized to establish their own policies pertaining to whether and when a tenant must report such changes, and whether and how it will conduct interim re-certifications to account for those changes. The BHA's interim re-certification polices must be in accordance with the BHA's written plan or policy. 24 C.F.R. § 960.257(c). Even if the BHA's written plan or policy does not require the public housing tenant to report interim changes in household

composition or income, the tenant nonetheless may request that the BHA conduct an interim re-examination of such changes and to adjust the family's rent accordingly. 24 C.F.R. § 960.257(b).

With one exception involving tenants paying "minimum rent", the BHA does not require that a public housing tenant report any increases in its household income on an interim basis. In accordance with federal law, the BHA must set a "minimum rent" that a tenant must pay even if the household has no countable income. The "minimum rent" may be set anywhere between \$0.00 and \$50.00. See, 42 U.S.C. § 1437a(a)(3); 24 C.F.R. § 5.630. The BHA's policies and procedures regarding "minimum rent" and "interim re-certification" of household income is set forth in its Admissions and Continued Occupancy Policy ("ACOP"). Since 2000, as a matter of BHA policy, the "minimum rent" that a BHA tenant may be charged has been set at zero. Accordingly, a BHA tenant may qualify for "zero rent" where the tenant's household has no countable income from any source. However, Section 9.2 of the ACOP provides that the BHA must re-certify a tenant household with "zero income" every 90 days. To maintain their "zero rent" status the tenant must certify to the BHA that her household continues to have no income when contacted by the BHA.¹

In 1998, Congress amended the public housing statute and adopted the current form of the provision known as the Self-Sufficiency Earned Income Disregard ("EID"). See 42 U.S.C. §1437a(d) and 24 C.F.R. §960.255. The EID applies where 1) a public housing family, 2) whose income increases as a result of the new employment of a household member who was previously unemployed for one or more years, or 3) who is or was, within six months, assisted under a state temporary assistance program such as the

¹ The provisions relevant to this case are set forth in the July 2008 ACOP. The "zero rent" provisions of the July 2008 ACOP provided that management was authorized to conduct an interim re-certification every 90 days and that the tenant would have to cooperate and provide all necessary information requested by the BHA. In 2009 the BHA revised the ACOP to make it mandatory that a tenant with zero income re-certify his income every 90 days and that all tenants must report increases in gross income greater than \$200.00 (from the amount reported at the most recent annual re-certification) by the seventh day of the month following the month in which the tenant received the increase. These ACOP revisions do not apply to this case because ACOP also required that the BHA have the tenant execute a revised lease to implement these changes. The BHA has not as yet revised its 2000 lease.

Temporary Aid for Families with Dependant Children program (“TAFDC”)² and whose earned income increases as a result of new employment, 4) shall not be subject to a rent increase as a result of the increased income due to such employment during the 12-month period beginning on the employment commencement date. The purpose of the EID provision is described in the Department of Housing and Urban Development’s (“HUD”) 2003 Public Housing Occupancy Guidebook, Section 10.9. The EID provision “encourages resident self-sufficiency by rewarding certain residents who go to work or have increased earnings.”

Hernandez Rent History. Hernandez became a BHA tenant in March 2001. On January 26, 2007, Hernandez signed a BHA standard form lease for her current apartment in the Alice Taylor Development at 50B Annunciation Road, Apartment #5002. In accordance with the terms of her lease and public housing regulations Hernandez must complete an annual re-certification of her household composition and income by March 1 of each year. Hernandez’s monthly rent is based upon a percentage of her gross annual household income, less certain deductions allowed under the BHA’s program rules and regulations.

Prior to September 2007, Hernandez’s employment income was the sole source of her household income and was used by the BHA to calculate her monthly rent. Hernandez lost her job in September 2007 at which time she began receiving unemployment benefits. The BHA adjusted her rent based upon her reported unemployment income. Hernandez stopped receiving unemployment benefits in March 2008. In April 2008 Hernandez began to receive TAFDC benefits in the amount of \$4,536.00 per year. Hernandez reported this change in the source and amount of her family income to the BHA. Based upon that information the BHA adjusted her rent to \$77.00 per month retroactive to April 2008.

In June 2008 Hernandez reported to the BHA that her TAFDC benefits had terminated and that she had no household income. Since Hernandez qualified for “minimum rent” status the BHA adjusted Hernandez’s rent to \$0.00 per month retroactive to June 2008.³

² The TAFDC Program provides temporary assistance for families with dependent children under Part A of Title IV of the Social Security Act.

³ In 2008, the BHA commenced a summary process action against Hernandez alleging habitual late payment of rent. Hernandez filed an answer that included conditions-based counterclaims. In November 2008 the

In August 2008 Hernandez began to work at a new job and reported her new employment to the BHA. At the time just prior to date on which she began her new job Hernandez's actual household income was \$0.00.

The BHA acknowledged that because Hernandez received TAFDC benefits within six months of obtaining new employment, she was "qualified" to have her public housing rent set with the benefit of the EID. In calculating her adjusted rent the BHA disregarded 100% of Hernandez's new employment income. However, rather than use her actual zero income the BHA used Hernandez's prior TAFDC income of \$4,536.00 per year as her baseline "annual income" at the time she returned to work. Therefore, for purposes of adjusting her rent the BHA disregarded Hernandez's new employment income only to the extent that it exceeded her prior TAFDC income. Using the TAFDC income as the measure of Hernandez's household "annual income" the BHA set Hernandez's rent at \$77.00 per month effective September 1, 2008 (and for the next twelve months through August 31, 2009). This amounted to a total of \$924.00 in rent due for that twelve-month period. Had the BHA used her actual zero income as the measure of her August 2008 household "annual income" it would have set Hernandez's rent at \$0.00 for this twelve-month period.

In August 2009 Hernandez notified the BHA that her employment had ended and that she had begun receiving unemployment benefits as the sole source of her household income. Effective September 2009 the BHA adjusted Hernandez's rent to \$273.00 per month based on her unemployment income.⁴ Her rent was further adjusted to \$299.00 per month in March 2010 based on a small increase in her unemployment benefits.

parties settled that action and executed an agreement for judgment in favor of the BHA for possession. Under the terms of the agreement, Hernandez was allowed to continue to live in her apartment provided she paid her rent each month when due for a period of one year. The BHA waived its claim for unpaid rent and costs and in exchange Hernandez waived her counterclaims. Hernandez complied with her obligations under the agreement and her tenancy was reinstated effective December 2009. The 2008 eviction action is not relevant to the issues raised in this action.

⁴ Had Hernandez continued to work at her job after August 2009 without any change in her income, the BHA would have set Hernandez's rent at \$372.00 per month, effective September 1, 2009. Under the EID provision, during her second year of employment Hernandez would have been eligible for a 50% disregard of the incremental increase in her income (but the BHA would have continued to use her prior TAFDC income of \$4,536.00 per year as the baseline annual income). However, when Hernandez stopped working she was not longer "qualified" have her rent set with the benefit of the EID.

In January 2010, the BHA served Hernandez with a fourteen-day notice to quit for nonpayment of rent.

In August 2010, Ms. Hernandez notified the BHA that she was no longer receiving unemployment benefits and that she had begun to receive TAFDC as her sole source of household income. She also notified the BHA that a child had been added to her household. Effective September 1, 2010, the BHA adjusted Ms. Hernandez's rent to \$95.00 per month based upon her household composition and TAFDC income.

In August 2010, the BHA commenced a second summary process action against Hernandez based upon the January 2010 notice to quit. The BHA claimed that Hernandez owed \$739.00 in unpaid rent through September 2010.⁵ In February 2011, the case was transferred to the civil docket.

Legal Issue. The legal issue the parties have asked the court to resolve upon summary judgment is whether in accordance with the EID provision of federal law, 42 U.S.C. § 1437a(d) and 24 C.F.R. § 960.255, the baseline "annual income" that the BHA was required to use in calculating Hernandez's adjusted September 2008 rent was 1) Hernandez's actual zero household income just prior to her return to employment in August 2008, or 2) the TAFDC income (\$4,536.00 per year) that she had received through May 2008 (but which she was not receiving when she became employed).

The HUD EID regulations, 24 C.F.R. §960.255, state in relevant part that in setting the rent of a "qualified" public housing tenant who has started new employment, a public housing authority "must exclude from annual income (as defined in §5.609 of this title) of a qualified family any increase in income of the family member as a result of employment over prior income of that family member." The definition of "annual income" set forth in 24 C.F.R. §5.609 provides that "annual income" includes "all amounts, monetary or not, which (1) [g]o to, or on behalf of, the family head . . . [and] (2) [a]re anticipated to be received from a source outside the family during the 12-month period following admission or annual reexamination effective date."

The parties agree that Hernandez was "qualified" under the provisions of the EID regulations because, within six months of her commencement to new employment, she

⁵ In accordance with the agreement entered in the first summary process action, the BHA cannot in this second eviction action claim unpaid rent for a period prior to December 2008.

received assistance under the TAFDC program and her earned income increased as a result of her new employment. The parties disagree as to what constitutes "annual income" at the time Hernandez began her new job in August 2008.

The BHA recognizes that an otherwise "qualified" tenant who is without income at the time she starts a new job is entitled to have her rent adjusted with the benefit of the EID. However it argues that if the tenant's household income is zero at the time she begins working at her new job, the EID regulations should be read to provide that the baseline "annual income" is the last income the tenant actually received from unemployment compensation, state/federal assistance or some other source. To do otherwise, suggests the BHA, would discourage tenants from returning to work and would open the door to abuse.⁶ With respect to Hernandez, the BHA argues that under the EID regulations the baseline "annual income" that it must use to adjust Hernandez's rent is the annual amount of TAFDC benefits she had actually received up until June 2008. This is so argues the BHA because the term "annual income" as used in 24 C.F.R. § 5.609 "is a positive expression of a dollar amount, an asset or a benefit that is 'received from' some source or 'goes to' the tenant or household member . . ." The BHA contends that Hernandez's TAFDC benefit was the only "actual income" that she received in the year before she returned to fulltime employment. The BHA argues that although in June 2008 it set Hernandez's rent at zero in accordance with its minimum rent policy (based upon the fact that she was not receiving TAFDC benefits and had no other income), the standard for calculating "annual income" in accordance with the EID regulations for the purpose of adjusting the tenant's rent is different.

Hernandez argues that the term "annual income" as used in the EID regulations means her actual household income just prior to her start of new employment. She contends that her position is consistent with HUD's interpretation of its EID regulations. In

⁶ I do not understand the reasoning underlying the BHA's suggestion that the adoption of Hernandez's definition of "annual income" would discourage public housing tenants from pursuing new employment. As for its concern about abuse, according to the BHA if "zero income" were to be considered a measure of "actual income" under the EID regulations, a clever hypothetical tenant, in an effort to maximize the benefit she would derive from the EID, could simply find a new job and then proceed to terminate her unemployment or family assistance a short time before she started that new job. Her actual income would drop to zero; and as a result of her calculated action, she would be entitled to the benefit of a lower rent than would have been set had she kept her federal/state assistance until she started her new job. The BHA suggests that this would give that clever hypothetical tenant a "windfall" that should be discouraged as a matter of public policy..

its introduction of the final EID regulations issued in March 2000, Federal Register, 65 Fed. Reg. 166692, 16695-96, March 29, 2000, HUD states, “. . . [t]he final rule clarifies that the amount of the incremental increase in income is calculated by comparing *the amount of the family member's income before the beginning of qualifying employment* to the amount of such income after beginning the employment” (emphasis added). She states that the uncontested facts in the summary judgment record establish that after her TAFDC benefits ended she had no family income from June to August 2008. The BHA had acknowledged that her household income was zero when it completed her interim re-certification for June 2008. Thus, Hernandez argues, her baseline “annual income” for purposes of adjusting her rent after she began her new job in August 2008 should have been calculated to be \$0.00, and under the provisions of the EID regulations, after disregarding her new employment income, Hernandez’s rent should have been set at \$0.00 per month for the twelve-month period from September 2008 to August 2009. Hernandez contends that were the BHA to properly re-calculate her rent for that period she would be entitled to a \$924.00 rent credit (\$77.00 x 12). This in turn would reduce or eliminate the \$739.00 arrearage that is the basis of the BHA’s August 2010 summary process complaint.

Hernandez makes the more persuasive argument. The EID provisions of the federal statute and HUD regulations provide that a public housing tenant who obtains new employment will be categorically eligible for the EID where 1) she has been unemployed previously for one or more years, or 2) she received state or federal family assistance (such as a TAFDC grant) within six months prior to her return to work. The language of the EID regulations is clear that the EID provisions apply even when that tenant has no household income at the time she obtains new employment.⁷ The term “annual income” as used in the EID provisions has a temporal component. Specifically, I interpret the term “annual income” as used in 24 C.F.R. § 5.609 to mean the family’s actual income (annualized) just prior to the date on which the tenant (or household member) starts her new employment. Although it does not have the force of law, the HUD’s PHA Guidebook, Part 3, Chapter 10,

⁷ For any of a number of reasons (unrelated to misconduct, abuse or illegality) a tenant might not be eligible to receive unemployment compensation (or the period of eligibility may end) or the tenant’s state/federal family assistance may end. Nonetheless, during the period she has not income that tenant would be entitled to “zero rent” status under the BHA’s ACOP. For purposes of completing her interim re-certification the BHA would calculate her annual income to be zero; and as a matter of fact the tenant’s actual household income up until the time she begins her new employment would be zero.

Section 10.9, supports the position advanced by Hernandez. HUD's Guidebook states that in determining the baseline "annual income" from which new income is to be disregarded in accordance with the EID regulations, the baseline "annual income" shall be the last "certified income" of the individual. HUD explains in the Handbook that "[f]ormer income is the amount of the family member's income *just prior* to the earned income disallowance being triggered, e.g. the last certified income. It is this former income that establishes the baseline to be used in determining the amount to be excluded" (emphasis added). Hernandez's last BHA "certified income" in effect just prior to the date on which she began her new job in August 2008 was zero.

The policy issues identified by the BHA are not insubstantial; however, the BHA's concerns must be raised in a legislative forum where the language of the EID regulations is clear. It is for Congress to address policy issues concerning the EID and to amend the statutory scheme to address issues it may not have contemplated or foreseen at the time it enacted the statute.⁸

Based upon to the plain language of the EID regulations, I rule that the definition of "annual income" for purposes of adjusting a "qualified" tenant's rent when she starts a new job is simply what HUD says it is: "the amount of the family member's income before the beginning of qualifying employment." 65 Fed. Reg. 16695-96, March 29, 2000. Under the definition provided in 24 C.F.R. §5.609, "annual income" need not be a positive monetary amount. Thus, in accordance with the EID regulations a public housing tenant may have an "annual income" of zero immediately before she begins new employment.

CONCLUSION

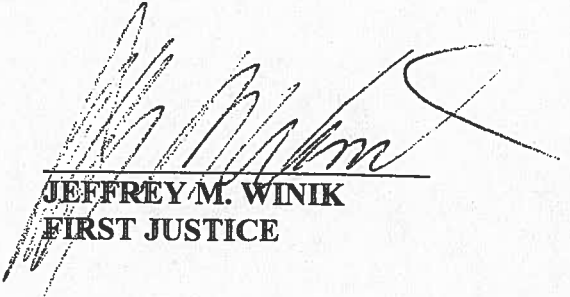
For the foregoing reasons, Hernandez's **Motion for Partial Summary Judgment** is **ALLOWED**.

The undisputed facts in this case establish that in August 2008, just prior to the date on which she began her new job, Hernandez's household income was zero. Had the BHA used \$0.00 as Hernandez's baseline "annual income" before applying the EID, her BHA rent for the twelve-month period from September 2008 through August 2009 would be

⁸ The BHA does not point to any evidence (such as legislative history in the Federal Register) to show that Congress was concerned about these policy issues or otherwise considered them when the EID provision was enacted or when HUD promulgated the EID regulations.

have been set at zero. Instead the BHA set Hernandez's rent at \$77.00 per month for that twelve-month period. Accordingly, I rule that Hernandez is entitled to a \$924.00 rent credit equal ($\$77.00 \times 12$).

SO ORDERED.



JEFFREY M. WINIK
FIRST JUSTICE

March 15, 2012

cc: Helene C. Maichle, Esquire
James M. McCreight, Esquire