COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
CIVIL ACTION
NO. 11H84CV000521

LUCILLE BURWELL,

Plaintiff

VS.

STEVEN CARVALHO, ACTING DIRECTOR, DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, AND CHRIS NORRIS, EXECUTIVE DIRECTOR, METROPOLITAN BOSTON HOUSING PARTNERSHIP, INC.,

Defendant

Memorandum of Decision on Defendants' Motion to Dismiss

Introduction

This case involves Plaintiff Lucille Burwell's ('Burwell") challenge to a determination made by the Department of Housing and Community Development ("DHCD") to affirm a decision rendered by Metropolitan Boston Housing Partnership, Inc. ('MBHP") to terminate Burwell's participation in the Section 8 Housing Choice Voucher Program ("Section 8 HCVP program"). That decision was based upon a finding that Burwell violated her Section 8 program obligations by failing to report on her annual Section 8 family certification forms income she earned from 1995 through 2009. Burwell raises two claims in this action. First, she claims that the decision was legally erroneous and not supported by substantial evidence. Second, she claims that DHCD committed legal error and deprived her of her due process rights when it refused to afford her an administrative hearing that satisfied the procedural requirements of G.L. c. 30A, §§ 10 and 11.[1]

[1] The plaintiff's claims seek relief under G.L. c. 249, § 4 (in the nature of certiorari), G.L. c. 231A (declaratory judgment) and 42 U.S.C. § 1983.

This matter came before the court on motions to dismiss filed by DHCD and MBHP.[2] DHCD argues that Burwell's claims must be dismissed (1) pursuant to Mass. R. Civ. P. 12 (b) (1) because the Housing Court lacks subject matter jurisdiction to consider claims in the nature of certiorari under G.L. c. 249, § 4, and (2) pursuant to Mass. R. Civ. P. 12 (b) (6) for failure to state a claim upon which relief can be granted under any theory. With respect to Burwell's claim that the ruling is contrary to federal law and not supported by substantial evidence, DHCD argues that Burwell is not entitled to judicial review under the state certiorari statute, the state declaratory judgment act or 42 U.S.C. § 1983. DHCD argues that under the Section 8 statutory scheme the plaintiff was entitled to only one informal hearing to challenge the decision to terminate her Section 8 benefits, and that MBHP provided that hearing conducted by a hearing officer. DHCD argues that Burwell is not entitled to a state law adjudicatory hearing pursuant to G.L. c. 30A. Burwell argues that the housing court has subject matter jurisdiction to consider the residential tenancy-related claims set forth in her complaint. Further, Burwell argues that because DHCD is a state agency and the decision to terminate Burwell's Section 8 benefits involves the deprivation of a vested property interest, as a matter of state law DHCD is obligated to afford Burwell an adjudicatory hearing that satisfies the procedural requirements of G.L. c. 30A, §§ 10 and 11. Finally, Burwell argues that even if she is not entitled to an adjudicatory hearing under the provisions of G.L. c. 30A, she nonetheless has a right under federal and state law to judicial review to correct substantial errors of law that formed the basis of the administrative decision rendered by the MBHP hearing officer and affirmed by DHCD.

After considering the thoughtful arguments presented by the parties, I conclude that 1) the housing court has subject matter jurisdiction over the claims set forth in Burwell's complaint, 2) Burwell's complaint states claims upon which relief can be granted with respect to the Section 8 termination decision under the state certiorari statute and 42 U.S.C. § 1983, and 3) Burwell's complaint states a claim upon which relief can be granted under the state declaratory judgment act because *as a matter of state law* DHCD, directly or through MBHP, is obligated to afford Burwell an adjudicatory hearing that satisfies the procedural requirements of G.L. c. 30A, §§ 10 and

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[2] Since the issues raised in each motion are substantially identical, for simplicity I shall refer only to DHCD's motion.

11 with respect to its decision to terminate Burwell from participation in the federal Section 8 program. Accordingly, DHCD's **Motion to Dismiss** is **DENIED**.

Facts

For purposes of ruling on DHCD's motion I shall accept as true the following facts. Burwell resides at 4 Gladeside Terrace, in the Mattapan section of Boston. She is elderly and receives social security benefits. She lives alone. For many years Burwell has been a participant in the Section 8 Housing Choice Voucher Program ("Section 8 HCVP program").[3]

The United States Department of Housing and Urban Development ("HUD") administers the Section 8 HCVP program on the national level. The Section 8 program is administered by State or local governmental entities called public housing agencies ("PHA"). DHCD is a PHA authorized to administer the Section 8 HCVP program in Massachusetts. DHCD administers the Section 8 HCVP program through eight regional non-profit corporations ("RNPs") with whom it subcontracts. Among those subcontractors is MBHP. At all times relevant to this action MBHP has administered Burwell's Section 8 voucher through its subcontract with DHCD.

In 2009 MBHP determined that between 1996 and 2009 Burwell had failed to report earned income (totaling **$56,958.00**) on her annual family certification forms.[4] On December 30, 2009, MBHP sent Burwell a written notice that she was being terminated from the Section 8 program for (1) failing to provide MBHP with accurate and truthful income information, (2) providing false statements to MBHP regarding her income, and (3) committing fraud. Burwell requested an informal hearing in accordance with the Section 8 regulations. On February 24, 2010, an MBHP hearing officer conducted an informal hearing. On July 9, 2010, the hearing officer issued a written decision upholding MBHP's decision to terminate Burwell's participation in the Section 8 program. Burwell filed an appeal to DHCD by which she requested that DHCD review the adverse decision rendered by MBHP. Burwell and MBHP submitted to

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[3] In 1998, Congress converted the Section 8 Existing (Certificate) Housing Program or the Section 8 Voucher Program into the Section 8 Voucher Program. Between 1999 and 2001, participating families were transferred to the Section 8 Housing Choice Voucher Program (HCVP).

[4] A consideration of whether or not Burwell failed to report income or whether MBHP erred in calculating the amount due or erred in refusing to enter into a repayment plan must await a judicial hearing on the merits on Burwell's claim for judicial review.

DHCD written documentation and supplemental evidence. However, DHCD did not conduct an informal or other administrative hearing on Burwell's appeal. On May 2, 2011, DHCD issued a written decision upholding MBHP's decision concluding that the decision was "supported by the record." On July 7, 2011, Burwell commenced this civil action against DHCD and MBHP. Her civil action was commenced more than 30 days but less than 60 days from the date of DHCD's decision.

Discussion

When considering the sufficiency of a complaint on a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6), the court must accept as true the factual allegations set forth in the complaint, as well as any inferences favorable to the plaintiff that can be drawn from those facts. *Eyal v. Helen Broadcasting Corp.*, 411 Mass. 426, 429 (1991). The factual allegations, stripped of "labels and conclusions," are assumed to be true "even if doubtful in fact." *Iannacchino v. Ford Motor Company*, 451 Mass. 623, 636 (2008) (quoting *Bell At. Corp. v. Twombly*, 550 U.S. 554, 127 S.Ct. 1955, 1966, 167 L.Ed.2d 929 (1977). A complaint is sufficient, however, only if those "factual allegations plausibly suggest [ ] (not merely consistent with) an entitlement to relief, in order to reflect [ ] the threshold requirement of [Mass.R.Civ.P. 8(a)(1)] that the 'plain statement' possess enough heft to sho[w] that the pleader is entitled to relief." *Id.* (internal quotations omitted); *see also Flomenbaum v. Commonwealth, 451 Mass. 740, 751, n. 12 (2008)* ("to survive a motion to dismiss, a complaint must contain factual allegations 'enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true' ").

Subject Matter Jurisdiction of the Housing Court Department

Burwell has challenged DHCD's decision to terminate Burwell's Section 8 subsidy under the state certiorari statute (G.L. c. G.L. c. 249, § 4) and 42 U.S.C. § 1983. Burwell has sought relief in the nature of a declaratory judgment under G.L. c. 231A with respect to whether DHCD is obligated to afford Burwell an adjudicatory hearing that satisfies the procedural requirements of G.L. c. 30A, §§ 10 and 11.

The housing court's jurisdictional statute, G.L. c. 185C, § 3, provides in relevant part that that the,

> "housing court department shall have common law and statutory jurisdiction concurrent with the divisions of the district court department

> and superior court department of all . . . civil actions . . . concerned directly or indirectly with the health, safety, or welfare, of any occupant of any place used . . . as a place of human habitation and the possession . . . or use of any particular housing accommodations . . . In all matters within their jurisdiction, the divisions of the housing court department shall have all the powers of the superior court department including the power to grant temporary restraining orders and preliminary injunctions as justice and equity may require."

The Housing Court Department has extensive experience and expertise in matters pertaining to the operation of federal and state subsidized housing programs, including the interpretation of the federal statutes and regulations as they impact the rights and responsibilities of Section 8 tenants. The termination of Burwell's participation in the Section 8 program will have a direct impact on her welfare and safety given that the loss of her rent subsidy will adversely impact her ability to pay her contract rent and thus will place at risk her ability to retain possession of her apartment. See, *Tedford v. Massachusetts Housing Finance Agency*, 390 Mass. 688, 693 fn.7 (1984). Therefore, a judicial appeal from a decision to terminate a Section 8 subsidy and a declaratory judgment claim addressing whether as a matter of state law a Section 8 tenant facing termination of her benefits is entitled to an adjudicatory hearing that meets the procedural requirements of G.L. c. 30A fall squarely within the parameters of the housing court's subject matter jurisdiction.

<u>Burwell's Declaratory Judgment Claim Regarding the Right to an Adjudicatory Hearing Pursuant to Chapter 30A</u>

Burwell alleges that DHCD is legally obligated *as a matter of state law* to afford her an adjudicatory hearing that satisfies the procedural requirements of G.L. c. 30A, §§ 10 and 11 with respect to its decision to terminate Burwell from participation in the federal Section 8 HCVP program. Burwell's complaint alleges that in deprivation of her rights secured *under state law* the appeal conducted by DHCD did not satisfy the procedural requirements of G.L. c. 30A, §§ 10 and 11 because she was not afforded an adjudicatory hearing. It is undisputed that MBHP conducted an informal evidentiary hearing and that DHCD conducted only a limited record review of the MBHP hearing decision. The issue I must decide in ruling on DHCD's motion to dismiss is whether as a matter of state law the decision to terminate Burwell's participation in the Section 8 HCVP program (either made by MBHP or DHCD) is an agency decision subject to the provisions of G.L. c. 30A. If the answer to that question is yes, then I must decide

whether 1) DHCD can delegate to MBHP the responsibility for conducting that adjudicatory hearing; and) whether the MBHP hearing was conducted in a manner that complied with the procedural requirements of G.L. c. 30A, §§ 10 and 11.

Because an actual controversy exists with respect to whether DHCD, directly or through MPHP, is legally obligated to afford Burwell an adjudicatory hearing that satisfies the procedural requirements of G.L. c. 30A, §§ 10 and 11, Burwell may seek a declaration of her rights pursuant to G.L. c. 231A, § 1.[5]

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 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.* The Section 8 program is generally administered by State or local governmental entities called public housing agencies ("PHA"). 24 C.F.R. § 982.1 (a) (1). On the local level, HUD has identified DHCD as a PHA authorized to administer the Section 8 HCVP program. See,

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[5] Further, Burwell may assert this claim as one in the nature of certiorari under G.L. c. 249, § 4. See discussion, infra. at p. 15-16.

42 U.S.C. § 1237 a (b) (6); *24 C.F.R. § 982.4.*[6] DHCD, a state agency, administers the Section 8 HCVP program by delegating certain administrative responsibilities to eight regional non-profit corporations ("RNPs") with whom it subcontracts. Among those subcontractors is MBHP. DHCD as well as the RNPs are referred to as PHAs. However, at all times these RNPs administer the Section 8 HCVP program subject to direction, control and administrative regulation by DHCD.

Section 24 CFR 982.552 (c) (1) (i) provides that the PHA may terminate participation in the Section 8 HCVP program if a family member "violates any family obligations under the program."

As a matter of federal law a Section 8 tenant has the right to an informal hearing to appeal the PHA's decision to terminate that tenant's participation in the Section 8 program.[7] See, 24 C.F.R. 982.555 (e).

In accordance with federal law, the PHA (here DHCD) must enact an Administrative Plan that sets forth the policies and procedures that it and its RNPs must follow in the administration of the Section 8 HCVP program. See, 24 C.F.R. § 982.54 (a). Acting in compliance with the HUD regulations, DHCD enacted its Section 8 HCV Administrative Plan that was most recently amended on October 1, 2009 ("Administrative Plan"). DHCD is the principal "PHA" within the meaning of the HUD regulation. As is set forth in the Administrative Plan, DHCD has delegated to each RNP the responsibility in its assigned region for administering the Section 8 vouchers and conducting Section 8 informal termination hearings. Creating some confusion, the DHCD Administrative Plan refers to the RNPs as "PHAs." Nonetheless, each RNP acts as a delegee subject to the direction and control of DHCD. The Administrative Plan (Chapter 16, Part III, pp. 16:12-24) sets forth the informal review and hearing

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[6] HUD has also authorized local public housing authorities (established pursuant to G.L. c. 121B, § 3 and 5) to administer the Section 8 HCVP program as PHAs. However, unlike DHCD, a public housing authority is not an "agency" within the meaning of G.L. c. 30A. See, *Costa v. Fall River Hous. Auth.*, 71 Mass. App. Ct. 269, 274 fn. 6 (2008), modified on other grounds, 453 Mass. 614 (2009).

[7] 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.

procedures to be used by a PHA. Those procedures follow the federal regulatory requirements set forth in 24 C.F.R. 982.555 (a - e).

The Administrative Plan (p. 16:23) explicitly incorporates the provisions of 24 C.F.R. 982.555 (f) that provides in relevant part that "[t]he PHA is not bound by a hearing decision . . . contrary to HUD regulations or requirements, or otherwise contrary to federal state or local law." In this same provision of the Administrative Plan, DHCD provides that a Section 8 participant may appeal to DHCD from an adverse decision regarding termination of assistance rendered by the RNP's hearing officer. Accordingly, the Section 8 participant has the right to appeal directly to the state agency, DHCD, from a hearing decision rendered by that agency's delegee, MBHP. This means that the informal hearing decision rendered by the RNP (MBHP) does not constitute a final decision until either the appeal period has expired or, if an appeal is taken, DHCD renders a decision. The Administrative Plan does not set forth with any clarity the procedural rights to which the participant is entitled when it files an appeal with DHCD. The Administrative Plan states only that "[t]he HUD requirement for an informal hearing is considered satisfied at the PHA level." I shall assume that the term "PHA" as used in this provision of the Administrative Plan refers to the RNP.

Burwell acknowledges that *as a matter of federal law* she is entitled only to an informal hearing before a PHA when she appeals from the proposed termination of her participation in the Section 8 HCVP program. The PHA in this context could be an RNP delegee such as MBHP. However Burwell argues that because DHCD is a state agency and because Burwell is faced with termination of her right to participate in the Section 8 program (a constitutionally protected vested property interest), *as a matter of state law* she is entitled 1) to an adjudicatory hearing before DHCD that meets the procedural requirements of G.L. c. 30A, §§ 10 and 11, and 2) to take a judicial appeal from a final agency decision rendered by DHCD pursuant to G.L. Chapter 30A § 14. She contends that even though MBHP conducted an informal hearing in response to her appeal from the decision to terminate her participation in the Section 8 program, she is entitled to a de novo adjudicatory hearing before DHCD. DHCD argues that the informal hearing conducted by MBHP complied with HUD's Section 8 HCVP program regulations; that it was not obligated to afford Burwell an adjudicatory hearing pursuant to G.L. c. 30A; and that the informal hearing before MBHP was conducted in a manner that all respects met

the procedural requirements of due process. DHCD argues further that it was not obligated to afford Burwell a second de novo adjudicatory hearing in response to Burwell's appeal from the MBHP hearing officer's decision; that in response to Burwell's appeal it was only obligated to conduct a limited record review of the MBHP hearing officer's decision.

In the exercise of its administration of the Section 8 HCVP program DHCD must comply with all applicable provisions of state law that may afford additional rights and protections to Section 8 HCVP program participants unless either Congress preempted such state laws or compliance with such state law requirements would impermissibly conflict with the federal program. Congress did not include in the Section 8 statute an explicit general preemption provision or one that preempted state law to the extent it provides Section 8 participants with procedural rights to contest termination decisions that are greater than those afforded under the federal statute. See, *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973); *City of Boston v. Harris*, 619 F. 2d 87 (1980). Nonetheless, preemption can be implied where Congress evidenced its intent to occupy the field of subsidized housing to the exclusion of any state regulation. See *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947); *Kargman v. Sullivan*, 552 F. 2d 2 (1977). There is nothing set for in the Section 8 statute or HUD regulations (or in the overall structure of the Section 8 HCVP program) from which a congressional intent to preempt state law can be implied. It is clear that many aspects of the Section 8 HCVP program involve cooperative administration at the federal and state level. Finally, state law must give way only to the extent it actually conflicts with federal law. An actual conflict exists where it is impossible to comply with both state and federal law, *Florida Lime & Avacado Growers, Inc. v. Paul,* 373 U.S. 132 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). Congress created the Section 8 HCVP program to provide access to affordable housing to low income individuals. 42 U.S.C. § 1437f. The fact that a state might afford a Section 8 participant with the right to an adjudicatory hearing (as opposed to an informal hearing) and judicial review where the PHA is a state agency does not make it impossible for DHCD to comply with any substantive provision of the Section 8 statute; nor does it interfere with an identifiable purpose or objective of Congress.

DHCD is a department of the state government that was created in relevant part to "be the principal agency of the government of the commonwealth to . . . fund and advance the programs of open and adequate housing for all citizens of the commonwealth . . ." G.L. c. 23B, § 3. As such DHCD is an "agency" within the meaning of G.L. c. 30A, § 1 (2).

Under the Section 8 statutory scheme enacted by Congress (and implemented through HUD regulations) it is DHCD that is the "PHA" authorized to administer the Section 8 HCVP program for HUD. See, *42 U.S.C. § 1237 a (b) (6)*; *24 C.F.R. § 982.4.* While DHCD may delegate to its RNPs (such as MBHP) responsibility for administering the Section 8 program, the RNPs are at all times acting as delegees of the state agency PHA. Therefore, to the extent that MBHP is authorized by DHCD to conduct a Section 8 termination hearing, it is acting at the direction and control of DHCD, a state agency administering the Section 8 HCVP program as the HUD designated PHA. If as a matter of state law DHCD is obligated to conduct a Section 8 termination hearing that meets the procedural requirements of G.L. c. 30A, and if DHCD has the authority to delegate that hearing responsibility to an RNP, then the RNP is likewise obligated to conduct such hearing in a manner that meets the procedural requirements of G.L. c. 30A.[8]

An "adjudicatory proceeding" is defined in G.L. c. 30A, § 1, as "a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing." "When a constitutionally protected property interest is at stake, the terms of G.L. c. 30A, § 1(1), require that a hearing before an agency, at which receipt or denial of a benefit is determined, be conducted in accordance with the dictates of G.L. c. 30A, §§ 10 and 11." *Madera v. Secretary of Executive Office of Communities and Development*, 418 Mass. 452, 462-463 (1994). See, *Forsyth School for Dental Hygienists v. Board of Registration in Dentistry*, 404 Mass. 211, 214 (1989); *Cambridge Elec. Light Co. v. Department of Pub. Utils.*, 363 Mass. 474, 501 (1973).

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[8] DHCD, acting as the PHA under the Section 8 regulatory scheme, has the authority to delegate its informal hearing responsibilities to its RNPs. For purposes of ruling on the motion to dismiss I shall assume that DHCD, acting as a state agency, has the authority to delegate (explicitly or implicitly) to its RNPs responsibility for conducting an agency adjudicatory hearing pursuant to G.L. c. 30A.

Burwell, as a participant in the Section 8 HCVP program, has a protected property interest in her continued rent subsidy. See, *Carter v Lynn Housing Authority*, 450 Mass. 626, 633 (2008), quoting *Wojcik v. Lynn Hous. Auth.*, 66 Mass. App. Ct. 103, 105 n.4 (2006) (*judicial review of a decision to terminate "has long been framed as a claim for deprivation of a vested property interest without due process of law"*). Accordingly, because DHCD, a state actor, is terminating Burwell's Section 8 subsidy, Burwell has a due process right secured under the fourteenth amendment to the U.S. Constitution to a fair hearing before such termination becomes final. See *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976). HUD relied upon the due process constitutional requirement set forth in *Goldberg* and *Mathews* when it promulgated its Section 8 HCVP program termination regulations that mandated that PHAs afford recipients with an informal hearing before termination. See 49 Fed Reg. 12,215, at 12,226-30 (March 29, 1984).

DHCD argues that the informal hearing provided by MBHP met the requirements of the HUD Section 8 regulations and afforded Burwell with procedural rights that complied in all respects with federal due process requirements; and that as a matter of federal law Burwell was not entitled to a de novo adjudicatory hearing before DHCD. Citing to *Wojcik v. Lynn Housing Auth.*, supra. at 114 and 24 C.F.R. § 982.555(f)(2), DHCD further argues that the HUD Section 8 regulations "confine [DHCD's review] to whether the decision of the hearing officer was '[c]ontrary to HUD regulations or requirements, or otherwise contrary to federal, state or local law."

Under the federal regulatory scheme set forth in the HUD Section 8 regulations a PHA can delegate the administration of the Section 8 HCVP program to an RNP; the RNP can conduct the informal hearing when a program recipient challenges a decision to terminate her Section 8 assistance; the Section 8 recipient can appeal to the PHA from an adverse hearing decision rendered by the RNP's hearing officer; and the PHA can review the adverse hearing decision on appeal for errors of law without conducting a de novo hearing. Therefore, DHCD is correct when it argues that as a matter of federal law Burwell is entitled only to one informal hearing before a PHA, and that MBHP can be designated as the PHA for that purpose. As DHCD states in its brief, "Burwell has no constitutional due process right to a second evidentiary hearing after receiving a full evidentiary hearing before MBHP."

However, DHCD's arguments do not account for the fact that with respect to the administrative hearing and appeal provisions of the Section 8 HCVP program, DHCD's procedural obligations and Burwell's procedural rights under state law are more extensive than the procedural rights set forth as a matter of federal law. Simply stated, because DHCD is a state agency administering a program that provides Burwell with a constitutionally protected vested property interest in the form of her Section 8 subsidy, *as a matter of state law*, DHCD must afford Burwell with an adjudicatory hearing that complies with the procedural requirements of G.L. c. 30A, §§ 10 and 11. *Madera v. Secretary of Executive Office of Communities and Development*, supra.

Under Chapter 30A Burwell is entitled to only one de novo adjudicatory hearing to contest the agency decision to terminate her Section 8 subsidy. DHCD has a choice. It may choose to conduct the adjudicatory hearing itself, or it may delegate that responsibility to an RNP acting as its delegee. This is true even though the RNP (here MBHP) is not a state agency. See *Space Bldg. Corp. v. Comm'r of Revenue*, 413 Mass. 445, 449-451 (1992); *Yebba v. Contributory Retirement Appeal Bd.*, 406 Mass. 830, 837-838 (1990). If DCHD explicitly or implicitly delegated that responsibility to MBHP, then an adjudicatory hearing before an MBHP hearing officer (that otherwise met the requirements of the HUD Section 8 regulations and the DHCD Administrative Plan) would be sufficient as a matter of state law if it complied with the procedural requirements of G.L. c. 30A, §§ 10 and 11 and complied with the " . . . general principles affecting administrative decisions and judicial review of them." *Space Bldg.*, supra. at 451, quoting *New Braintree v. Pioneer Valley Academy, Inc.*, 355 Mass. 610, 612 n.1 (1969).[9]

The Section 8 statutory scheme provides that the Section 8 participant may file an "appeal" to the PHA (DHCD) from an adverse decision rendered by the RNP's hearing officer. However, this appeal provision does not does necessarily trigger a right to a full adjudicatory "agency hearing" before DHCD within the meaning of G.L. c. 30A, § 10, ¶ 2, provided that DHCD had authorized MBHP to act as its delegee for the purpose of conducting a de novo agency hearing in accordance with the procedural requirements of G.L. c. 30A, §§ 10 and 11. Under those circumstances, an appeal from

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[9] If DHCD did not explicitly or implicitly authorize MBHP to conduct a Chapter 30A compliant adjudicatory hearing, if would appear that Burwell's appeal would have to be remanded DHCD to conduct a Chapter 30A compliant adjudicatory hearing.

the MBHP decision to DHCD is an appeal from an "agency hearing" within the meaning of G.L. c. 30, § 10, ¶ 3, and such appeals are "limited to the record made at the hearing." While such further appeal to DHCD from the hearing decision may be limited to the record made at the hearing, DHCD must comply with G.L. c. 30A, § 11, ¶s 7 and 8, including providing notice of the right to appeal to the courts.

If MBHP, acting as DHCD's delegee, afforded the Section 8 participant a Chapter 30A compliant adjudicatory hearing and the Section 8 participant did not file an appeal to DHCD from that decision then, once that appeal period had expired, it would be the MBHP hearing officer's decision that would constitute the "final decision of the agency" within the meaning of G.L. c. 30A, § 14. However, if the Section 8 participant filed an appeal to DHCD, it would be the decision rendered by DHCD that would constitute the "final decision of any agency" within the meaning of G.L. c. 30A, § 14. Further, to meet the requirements of state law MBHP and DCHD would have to comply with the notice provisions set forth in G.L. c. 30A, § 11, ¶8 regarding Burwell's "rights to review or appeal the decision within the agency or before the courts, as the case may be; and of the time limits on their rights to review or appeal."

Accordingly, Burwell would have thirty days "after receipt of notice of the agency decision" (that included notice of her rights to review or appeal) from MBHP (if no appeal was taken) or from DHCD (if an appeal was taken) to commence an action seeking judicial review of the final decision pursuant to G.L. c. 30A, § 14.

It remains to be decided whether DHCD implicitly delegated to MBHP the responsibility to conduct a Chapter 30A complaint adjudicatory hearing, and if the answer is yes, whether the MBHP hearing complied with the procedural requirements of G.L. c. 30A, §§ 10 and 11. I cannot answer these questions without reviewing the MBHP hearing record upon summary judgment or at trial. Further, it remains to be decided whether MBHP and DHCD properly notified Burwell of her right to appeal a final agency decision to the courts, including the time limit on her right to file such appeal. Since neither MBHP nor DHCD considered the MBHP Section 8 hearing decision or the DHCD review decision to be subject to G.L. c. 30A, it is unlikely that

Burwell was notified of any of her review or appeal rights in accordance with G.L. c. 30A, § 11, ¶8.[10]

For these reasons, I conclude that Burwell's complaint states a cause of action with respect to the declaration of her rights to a G.L. c. 30A adjudicatory hearing.

Burwell's 42 U.S.C. § 1983 Claim

The provisions of the Section 8 HCVP program are set forth in 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). For many years it had been settled law that a Section 8 tenant may assert a claim under 42 U.S.C. § 1983 against state agencies and public housing authorities for improper termination of her Section 8 subsidy where the termination is alleged to be in violation of or in conflict with rights secured under the federal housing laws. See *Clark v. Alexander*, 85 F.3d 146 (4th Cir. 1996); *Holly v. Housing Authority of New Orleans*, 684 F. Supp. 1363 (E.D. La. 1988). In *Wright v. Roanoke Redevelopment and Housing Authority,* 479 U.S. 418 (1987), the court ruled that a private cause of action was available under § 1983 to enforce the Brooke Amendment to the National Housing Act. The court ruled that a private cause of action was available where Congress had not specifically foreclosed such enforcement of the statute and where the statute created enforceable rights, privileges and immunities within the meaning of § 1983. I continue to believe this to be correct. However, more recent Supreme Court decisions have created uncertainty as to whether the analytical framework that formed the basis of those earlier decisions has been modified. It appears that the question that may now need to be answered to determine whether Burwell's complaint states a cause of action under 42 U.S.C. § 1983 is whether Congress intended to create a federal remedy under § 1983 for violations of the Section 8 statute and regulations. See, *Alexander v. Sandoval*, 532 U.S. 275 (2001) and *Gonzaga University v. Doe*, 536 U.S. 273 (2002); contrast *Clark v. Alexander*, 85 F.3d 146 (4th Cir. 1996) with *Caswell v. City of Detroit Hous. Com'n*, 418 F.3d 615 (6th Cir. 2005). The Section 8

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[10] It is undisputed that Burwell's complaint was filed more than thirty days after DHCD issued its appeal decision. If the MBHP decision otherwise complied with the procedural requirements of G.L. c. 30A, §§ 10 and 11, but neither MBHP nor DHCD complied with the right to judicial review notice provisions set forth in § 11, ¶8, I would have to decide whether the remedy would be to vacate the decision and remand the case to DHCD for a new hearing, or to determine that the Chapter 30A appeal period had been tolled and that Burwell's Chapter 30A appeal was timely filed.

statute does not include an explicit provision stating that a Section 8 beneficiary has a right to take a judicial appeal from a decision terminating her Section 8 benefits. However, it is inconceivable to me that Congress did not intend to afford Section 8 recipients facing termination of their rent subsidy with a judicial remedy to redress legal errors committed at the administrative appeal level to the extent those errors if uncorrected would result in the deprivation of a vested property right secured under federal law. See, *Carter v Lynn Hous. Auth.*, 450 Mass. 626, 633 (2008).[11]

Burwell has alleged that DHCD in violation of federal law failed to properly calculate her earned income disregard and failed to offer her a repayment plan in accordance with HUD directives. I agree with DHCD that a provision of a HUD PIH Notice does not create enforceable statutory rights, and therefore is beyond the scope of § 1983. *Alexander v. Sandoval*, supra. However, with respect to the earned income disregard claim that is based upon an alleged failure to apply correct statutory provisions, and accepting the factual allegations pertaining to that claim as true, I conclude that Burwell's complaint states a cause of action under § 1983 with respect to whether the hearing officer and DHCD applied the correct legal standard and whether the decision was supported by the evidence presented at an informal hearing that was conducted in compliance with the Section 8 regulations.

Burwell's Claim in the Nature of Certiorari under G.L. c. 249, § 4

Burwell claims that MBHP and DHCD committed substantial errors of law that adversely affected her rights in its decision to terminate her participation in the Section 8 HCVP program. Burwell claims that MBHP and DHCD erred 1) by failing to include Burwell's earned income disregard under 24 C.F.R. § 5.617 in determining the amount of income, if any, Burwell actually earned and was obligated to report in a given year, and 2) by failing to offer Burwell a repayment plan in accordance with terms mandated by HUD in PIH Notice 2010-19. For purposes of ruling on the motions to dismiss I must accept as true the factual allegations that form the basis of these legal claims.

The state certiorari statute, G.L. c. 249, § 4, provides that where a state administrative or agency decision is "not otherwise reviewable by motion or by appeal,"

[11] It is clear that a Section 8 tenant may also assert a claim under § 1983 where a public housing agency has terminated her Section 8 subsidy based upon evidence obtained at a constitutionally flawed pre-termination hearing. See, *Goldberg v. Kelly*, 397 U.S. 254 (1970).

a petitioner may bring a civil action in the nature of certiorari to correct substantial errors of law evidenced in the record of the proceedings and that adversely affected material rights of the petitioner. To the extent that MBHP's decision to terminate Burwell's Section 8 subsidy is "not otherwise reviewable by motion or by appeal" Burwell may seek to correct "errors in proceedings" by bringing an action in the nature of certiorari.

The provisions of the Section 8 HCVP program are set forth in the Housing and Community Development Act of 1974, amending § 8 of the United States Housing Act of 1937. See. Unless a Section 8 beneficiary has a remedy under 42 U.S.C. § 1983 to enforce her rights under the Housing and Community Development Act of 1974 (42 (U.S.C. § 1437f (o)) or a right to judicial review under G.L. c. 30A, § 14, there are no other federal or state statutes that afford a Section 8 beneficiary with a right of appeal from a state administrative decision terminating her Section 8 benefits. Whether Burwell has a cause of action under either statute are issues at the core of this civil action.

DHCD argues that Burwell may not assert a claim under either § 1983 or Chapter 30. As is more fully set forth above, I have ruled otherwise. However, it is possible that an appellate court may agree with DHCD, leaving Burwell with no other path to seek judicial review of the decision to terminate her participation in the Section 8 HCVP program. Given these unsettled legal issues, even though I have determined that Burwell has stated a claim under the § 1983 and that the Section 8 termination decision is subject to the provisions of Chapter 30A, as a matter of judicial economy, it is appropriate to allow Burwell to proceed in the alternative with her claim under G.L. c. 249, § 4.

Accordingly, I rule that Burwell's complaint states a cause of action pursuant to G.L. c. 249, § 4. Further, Burwell's complaint states a cause of action for certiorari review under G.L. c. 249, § 4 based upon her claim that DHCD committed legal error in failing to afford Burwell with an agency hearing (either before MBHP or DHCD) that meets the procedural requirements of G.L. c. 30A, §§ 10 and 11 with respect to the decision to terminate Burwell from participation in the federal Section 8 program.

The statute provides that a certiorari claim shall be brought in the Superior Court. With respect to a certiorari claim involving a residential tenancy matter (such as

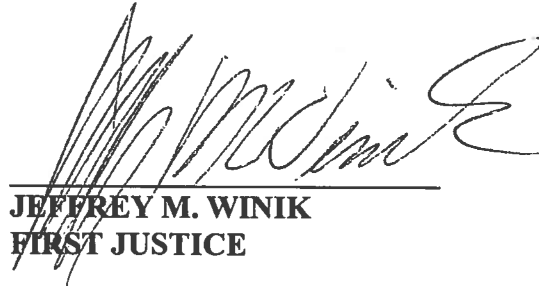
termination of a Section 8 rent subsidy) the Housing Court has subject matter jurisdiction concurrent with the Superior Court. See G.L. c. 185C, § 3.

Conclusion

For these reasons, the DHCD's and MBHP's **Motions to Dismiss** are **DENIED**.

The clerk shall schedule a **status conference** to discuss the scheduling of a hearing on the merits of Burwell's complaint **Friday, January 18, 2013 at 12 noon**.

SO ORDERED.



JEFFREY M. WINIK
FIRST JUSTICE

December 19, 2012

cc: James M. McCreight, Esquire
Iraida J. Alvarez, Esquire
Anthony J. Cichello, Esquire
Guillermo Garza, Assistant Clerk Magistrate