

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
CIVIL ACTION
NO. 10H784CV000373

MARLINE PIERRE FRANCIOS,

Plaintiff

VS.

BOSTON HOUSING AUTHORITY,

Defendant

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT

Introduction

Plaintiff Marline Pierre François (“François”) 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 François’s participation in the federal Section 8 Housing Choice Voucher Program. The hearing officer who heard François’s informal administrative appeal upheld the BHA’s decision to terminate based upon the BHA’s determination that François engaged in violent criminal activity resulting from an altercation with another person on or near the premises.¹ In response to François’s certiorari petition the BHA filed the informal hearing record together with a

¹ The BHA had also asserted as ground for termination that François engaged in drug-related criminal activity and criminal activity which may threaten the health, safety or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity. The hearing officer declined to address (and thus rejected) the drug-related criminal activity allegation “because Leased Housing was willing to dismiss that allegation.” The hearing officer rejected the second criminal activity allegation – that François was in possession of a knife – because he found that the BHA did not present any evidence “to show that the activity happened on the premises or close to the premises.” (Record Exhibit 2, Hearing Officer Decision, p. 3). Neither party has challenged those findings and rulings in this certiorari action.

Motion for Judgment on the Pleadings. This matter is before the court on the merits of that motion and Weekes’s complaint.

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 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 BHA has a Housing Choice Voucher Program Administrative Plan (“HCVP Plan”) that sets forth the rules that

govern the BHA's administration of the Section 8 program.² Section 13.5.2 of the HCVP Plan includes a list of Section 8 participant "Family Obligations." See, 24 CFR § 982.551 (a) to (n). The family obligation of relevance here provides that "a participant may be terminated from the rental assistance program if the participant has violated any family obligation under the program. The family obligations are as follows . . . 19. The family members must not engage in drug-related or violent criminal activity." (Record, p. 10).³ A Section 8 participant has the right to an informal hearing to appeal the BHA's decision to terminate Section 8 assistance.⁴

The BHA is not a state agency subject to the administrative appeal provisions of G.L. c. 30A. Therefore, Weekes has sought relief by bringing an action in the nature of certiorari pursuant to G.L. c. 249, § 4.⁵ 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

² The HCVP administrative plan was not included as part of the informal hearing record or otherwise introduced as evidence. Nonetheless, I shall make reference to certain provisions of the plan that are not in dispute. I shall assume that the HCVP plan is consistent with the applicable HUD regulations that govern the Section 8 program, 24 CFR, § 982, et seq.

³ A local housing authority's ability to terminate a "participant's" Section 8 assistance is governed by HUD regulations at 24 C.F.R. §§ 982.551 – 553. The Section 8 regulations pertaining to termination of assistance generally, 24 C.F.R. § 982.552(c)(1)(i), provides that the PHA may terminate program assistance for a participant "[i]f the family violates any family obligations under the program (see § 982.551). See § 982.553 concerning denial or termination of assistance for criminal activity by family member." The HUD regulations pertaining to termination of Section 8 assistance for criminal activity, 24 C.F.R. § 982.553(b)(1), provides that "[t]he PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that . . . (iv) . . . any household member has violated the family obligation under §982.551 not to engage in violent criminal activity."

⁴ See, Section 13.7.1 of the HCVP Plan. Under Section 12.7.5(i) of the HCVP plan, "the hearing officer shall 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). Section 13.6.1 and 13.7.5 of the HCVP Plan provides that the hearing officer may consider any mitigating circumstances and other relevant circumstances presented by the participant including "the seriousness of the violation, the extent of participation or culpability of individual family members, mitigating circumstances 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 violation(s)."

⁵ Francois commenced this action within the sixty-day limitation period set forth in G.L. c. 249, § 4.

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).⁶

Since I cannot substitute my judgment for that rendered by the BHA and the hearing officer, my consideration of Francois's certiorari petition shall be based solely upon the evidence presented at the informal hearing. I shall limit my review of the Hearing Officer's decision to a determination as to whether the Hearing Officer's factual findings and legal conclusions were based upon legal error (whether the findings and conclusions were supported by a preponderance of the evidence).

The following facts were presented by testimony and through documents submitted at the informal hearing.

At all times relevant to this action Francois resided as a tenant at 12 Gayland Street, in the Dorchester section of Boston. Her tenancy was subsidized under the provisions of the Section 8 voucher choice program. Francois and her four children are listed on her lease as the authorized occupants. The BHA administered Francois's Section 8 voucher. Francois has participated in the Section 8 program for ten years.

On July 29, 2009, the BHA gave Francois a written notice entitled "Proposed Termination of Section 8 Rental Assistance" (BHA Record Exhibit 2: 1-2). The reason the BHA gave for terminating Francois's Section 8 rental assistance (Violation 3 at issue in this appeal)⁷ was that on November 12, 2008, Francois engaged in violent criminal activity. The BHA alleged that Francois stabbed a "victim" with a broken bottle during an altercation. Francois, in her testimony, identified the "victim" as "Latasha."

⁶ 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 . . ."

⁷ See fn. 1, supra. at pg. 1.

Francois appealed that decision and requested that the BHA provide her with an informal hearing. The informal hearing was conducted before a BHA Hearing Officer on November 11, 2009. The evidence presented at the hearing on this incident included only a written police report and Francois's testimony. The other party involved in the altercation, Latasha, did not appear or testify at the hearing.

In a written decision issued on March 30, 2010, the BHA Hearing Officer upheld the BHA's decision to terminate Francois's Section 8 rental assistance (Record Exhibit 2). The hearing officer's decision was based upon his factual findings that (1) Francois and Latasha had had "encounters" in the past; (2) on November 12, 2008, Francois went to Latasha's apartment twice looking for her child's father; (3) at some point that same day Francois approached Latasha in the street to talk to her; (4) Latasha was scared when Francois approached; (5) Francois punched Latasha; (6) Latasha used a sharp object to slash Francois's face; (7) Francois grabbed a broken bottle and used it as a weapon to stab Latasha. The hearing officer rejected Francois's claim that she had grabbed the bottle and used it in self-defense to fend off Latasha. The hearing officer determined that Francois was not acting in justifiable self-defense because "she had an opportunity to retreat after [Latasha] had slashed her face, but she chose to grab a bottle from a passerby, broke the bottom and forced it against the victim's forehead." (Hearing Officer's Decision, p. 3). He ruled that Francois's engaged in violent criminal activity in violation of her Section 8 obligations. The hearing officer then determined that the mitigating circumstances presented by Francois were not compelling and that she was not entitled to continue to participate in the Section 8 program as a reasonable accommodation of her disability.

The hearing officer's factual findings regarding the November 12, 2008 incident were based entirely upon the statements set forth in a police incident report dated November 12, 2008 (Record Exhibit 2:7) and Francois's testimony.

The report states that at approximately 6 p.m., Boston police officers responded to a call and went to Latasha's apartment. The police officers observed that Latasha was bleeding from a 2-inch gouge on her forehead. Latasha told the police officers that Francois and a second female attacked her while she was waiting for her children at a street corner. Latasha said that Francois and the other female had been to her apartment

looking for the father of Francois's child. She says that the man was in her apartment, but that she did not open the door. Instead, Latasha says she called the police. She says Francois left before the police arrived. Latasha told the police officers that Francois and the female returned to her apartment, banged on the door and threatened her. Latasha called the police again. Latasha said she then left her apartment to meet her children at the bus stop. She said that Francois and the second female approached and attacked her. She said that Francois punched her in the face and then bit her on the left cheek. Latasha admitted that she pulled out a "knife thing" (a box cutter type weapon) and slashed out at Francois "in an attempt to protect herself." She said that Francois grabbed a bottle from a passerby, broke the bottom off the bottle and stabbed her. She said that Francois then fled to her apartment.

Francois was the only person with direct knowledge of the altercation who testified at the hearing. Francois said that she and Latasha had had run-ins before. Francois testified that on November 12, 2008, she went to Latasha's apartment looking for her children's father. She was told he wasn't there so Francois left. As she was walking away Francois saw the man leave the apartment. Francois dropped him off at his work and returned to Latasha's apartment building intending to speak with her. Francois said that when she approached Latasha (who was outside the building) "she totally just got scared whatever, and she ended up slashing my face." Francois testified that she was the victim. Francois said that she did not take a bottle from another person. She said that after Latasha slashed her face with a knife, and while they "were in the middle of a fight," Francois picked up a bottle from the floor "and I defended myself."

In *Costa v Fall River Housing Authority*, 453 Mass. 614, 627 (2009), 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." *Id.* at 626. 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.” *Id.* at 627. The Supreme Judicial Court has held that second-level hearsay contained in a police report (here the statement of Latasha given to the police officer) may be used if it meets the test of reliability. See, *Commonwealth v. Nunez*, 446 Mass. 54 (2006).

If Francois did not initiate the physical altercation and if she used the bottle in self-defense to ward off Latasha’s assault, then her conduct would be justified, and she would not be in breach of her Section 8 obligations not to engage in a violent criminal activity. If she did not engage in a violent criminal activity then the BHA has no legal basis to terminate her participation in the Section 8 program. The burden rests with the BHA to prove by a preponderance of the evidence that Francois engaged in violent criminal conduct. Once Francois presented evidence that she had acted in an effort to defend herself from further injury, the burden shifted to the BHA to prove by a preponderance of the evidence that her actions did not constitute self-defense.

The evidence in the record is sufficient to support the hearing officer’s finding that Francois went to Latasha’s apartment and that Latasha was scared when Francois approached her the second time. The evidence in the record is also sufficient to establish that Francois and Latasha engaged in a violent altercation outside Latasha’s apartment building on November 2, 2008.

However, the evidence in the record is not sufficient to support what appears to be the hearing officer’s finding that Francois was the aggressor and initiated the altercation by punching Latasha. The statement attributed to Latasha in the police report is that Francois and the other female attacked her. However, other than this uncorroborated and unreliable hearsay statement from Latasha, there is no other evidence in the record from which the hearing officer could reasonably conclude that Francois was the aggressor who threw the first punch or otherwise started the fight. In assessing the reliability of Latasha’s uncorroborated hearsay statement, the hearing officer appears to have ignored one important and established fact – immediately prior to the altercation it was only Latasha who possessed a weapon (a box cutter type knife). There is nothing in the record to suggest that Francois had a knife or any other weapon when she approached Latasha.

It is clear from the record that Latasha used her knife to slash Francois in the face and that this occurred before Francois stabbed Latasha with the broken bottle. Francois testified that Latasha initiated the physical altercation by slashing Francois with a knife. As to the differing versions of the altercation that are in the record, I point to the obvious - Francois testified at the hearing; Latasha did not appear or testify. Given that Latasha admitted to the police officers that she slashed Francois with a knife, it is not surprising that she would paint Francois as the aggressor in an effort to justify her own violent criminal conduct as an act of self-defense. Even if the hearing officer was unwilling to credit Francois's testimony, the hearing officer's disbelief alone is insufficient to establish that the opposite is true. The hearing officer is required to look elsewhere in the record to find credible and reliable evidentiary support for the proposition that Francois was the aggressor. The hearing officer's reliance on Latasha's uncorroborated and self-serving hearsay statement as the source of his factual findings is insufficient to meet the preponderance of evidence standard applicable to a Section 8 termination hearing. There is no other evidence in the record that would not allow the hearing officer to conclude that Latasha's statement "contains substantial indicia of reliability." *Costa*, supra at 627.

Accordingly, to the extent that the hearing officer found that Francois was the aggressor and struck the first blow in the altercation, that finding is not supported by a preponderance of the evidence in the record and constitutes legal error.

Further, after reviewing all of the evidence contained in the hearing record, I rule that the hearing officer's finding that Francois did not act in self-defense because "she had an opportunity to retreat after [Latasha] slashed her face" is not supported by a preponderance of the evidence in that record. He found that instead of fleeing Francois "chose to grab a bottle from a passerby." Without evidence to support these findings, the hearing officer's rejection of Francois's claim of self-defense constituted legal error.

The hearing officer found that after being slashed Francois took a bottle from another person who was present at the scene of the altercation. Apparently, he reasoned that if in the midst of the altercation Francois had time to interact with another person then she should have had time to retreat. Other than the uncorroborated hearsay statement from Latasha, there is no reliable evidence that Francois took a bottle from another person. There is no evidence in the record that identifies who that person was,

whether that person was holding a bottle, or how (and why) that person gave a bottle to Francois. Francois's uncontested testimony was that she picked up the bottle from the ground in an effort to defend herself against Latasha's ongoing assault with a knife. The hearing officer had no credible basis for accepting Latasha's hearsay statement over the testimony presented by Francois. Again, even if the hearing officer was not willing to credit Francois's testimony, his reliance on Latasha's statement constituted legal error. He had no reasonable basis to conclude that the information in Latasha's hearsay statement was reliable.

Finally, Francois testified that she grabbed the bottle from the ground to defend herself because she believed that Latasha, armed with a knife, posed an immediate and realistic threat to her physical safety. The hearing officer concluded that Francois had an opportunity to retreat. This is the reason the hearing officer rejected Francois's claim of self-defense. His apparent disbelief of Francois's testimony does not constitute evidence of the opposite. The BHA has the burden of proving that Francois did not act in self-defense. The hearing officer does not identify any facts in the record that support his conclusion that Francois could have retreated immediately after she was slashed without risking further injury at the hands of Latasha. The hearing officer's arbitrary and unsupported finding is not supported by a preponderance of the evidence, and constitutes legal error.

For these reasons, I rule that the hearing officer's legal conclusion that Francois engaged in violent criminal activity in violation of her obligations as a Section 8 program participant is legally erroneous.⁸

Conclusion

For these reasons, I rule on the merits of **Francois's Complaint** and on the BHA's **Motion for Judgment on the Pleadings** that the hearing officer's March 30, 2010 decision upholding the BHA's proposed decision to terminate Francois's participation in the federal Section 8 Housing Choice Voucher Program must be **VACATED and REVERSED**.


⁸ In light of this ruling, I do not need to consider whether the hearing officer committed legal error when he rejected Francois's request for a reasonable accommodation.

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 the plaintiff, Marline Pierre Francois, on her 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: Marline Pierre-Francois, dated March 30, 2010, is vacated and reversed; and
3. The defendant, Boston Housing Authority, shall reinstate the plaintiff's Section 8 Housing Choice Voucher Program retroactive to March 30, 2010.

SO ORDERED.



JEFFREY M. WINIK
FIRST JUSTICE

August 26, 2010

cc: Wilbur E. Commodore, Esquire
Paul E. Clancy, Jr., Esquire