COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
CIVIL ACTION
NO. **12H84CV000392**

KIMBERLY HARRISON,

Plaintiff

VS.

BOSTON HOUSING AUTHORITY,

Defendant

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT

Introduction

Plaintiff Kimberly Harrison ("Harrison") filed a complaint seeking relief in the nature of certiorari pursuant to G.L. c. 249, § 4 and for deprivation of rights under federal law pursuant to 42 U.S.C. § 1983. Harrison challenges defendant Boston Housing Authority's ("BHA") decision to terminate Harrison's participation in the federal Section 8 Housing Choice Voucher Program. The hearing officer who heard Harrison's informal administrative appeal upheld the BHA's decision to terminate based upon the BHA's determination that Harrison's son, Ira Harrison, (a member of Harrison's household) engaged in criminal activity (possession of a loaded firearm) and that his criminal activity "threatens the health, safety, or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises because not only the firearm was recovered from Ira Harrison at 0.6 mile from the Tenant's premises . . . *but also the firearm may have been used in the armed robbery that occurred the day before*" (emphasis added). In response to Harrison's complaint the BHA filed the informal hearing record together with a motion for judgment on the pleadings. Harrison filed a cross-motion for judgment on the pleadings. This matter is before the court on the merits of the cross-motions.

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 Family Unification 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 (i) (l) provides that a tenant's participation in the Section 8 program may be terminated if she or a member of her household "engage in drug-related criminal activity or violent criminal activity *or other criminal activity that threatens the health, safety, or right to peaceful enjoyment of other residents and persons in the immediate vicinity of the*

premises" (emphasis added). A Section 8 participant has the right to an informal hearing to appeal the BHA's decision to terminate Section 8 assistance.[1]

The BHA is not a state agency subject to the administrative appeal provisions of G.L. c. 30A. Therefore, Harrison has sought relief by bringing an action in the nature of certiorari pursuant to G.L. c. 249, § 4.[2] 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).[3]

Since I cannot substitute my judgment for that rendered by the BHA and the hearing officer, my consideration of Harrison'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

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[1] 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 shall consider any mitigating circumstances and other relevant circumstances presented by the participant. See 24 C.F.R. §982.552(c)(2). 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.

[2] Harrison commenced this action within the sixty-day limitation period set forth in G.L. c. 249, § 4.

[3] 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 . . ."

factual findings and legal conclusions were based upon legal error that adversely affected the plaintiff's material rights (whether the hearing officer applied the correct legal principles and whether his findings and conclusions were supported by the evidence).[4]

At all times relevant to this action Harrison resided as a tenant at 51 Marcella Street, Apartment 1, in the Roxbury section of Boston. At the time of the June 2011 incident Harrison was living with her 19 year old son (Ira Harrison), her 13 year old daughter and 9 year old son. Harrison's tenancy was subsidized under the provisions of the Section 8 voucher choice program. At the time of the June 2011 incident Harrison together with her three children were listed on her lease as the authorized occupants.[5] The BHA administers Harrison's Section 8 voucher. The "Family Obligations" provision applicable to this case provides that "11. Crime by family member. The members of the family may not engage in Drug-Related Criminal Activity or Violent Criminal Activity *or other criminal activity that threatens the health, safety or right to peaceful enjoyment of other participants or persons residing in the immediate vicinity of the premises*" (emphasis added).[6] Harrison signed the "Family Obligations" form on January 29, 2011, in which she acknowledged that her Section 8 assistance could be terminated if she or a member of her household violated any of the Family Obligations. (Record, Exhibit 2).

On August 3, 2011, the BHA gave Harrison a written notice entitled "Proposed Termination of Section 8 Rental Assistance" (Record, Exhibit 3). The reason the BHA gave for terminating Harrison's Section 8 rental assistance was that "[a] member of her family, specifically Ira Harrison, is engaged in 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." The BHA did not allege as grounds for termination that Ira Harrison had engaged in "drug-related criminal activity" or "violent criminal activity." The BHA alleged that he had engaged in "other criminal activity."

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[4] In light of the decision I have reached (which addresses the legal argument regarding the proper interpretation of 24 C.F.R. § 982.551 (i) (l)), I do not address Harrison's federal claim.

[5] Shortly after the June 2011 incident Ira Harrison vacated the premises and on November 18, 2011 Harrison asked the BHA to remove him from her Section 8 lease and household. (Record, Supplemental Exhibit B).

[6] This provision incorporates the language of HUD regulation, 24 C.F.R. § 982.551 (i) (l). The language of this same provision is incorporated as part of the BHA Administrative Plan for Section 8 Programs, dated November 1, 2009, Section 13.5.2 (k). (Record, Exhibit1).

The BHA's decision to terminate Harrison's Section 8 subsidy for having engaged in "other criminal activity" is based on the uncontested fact that on June 29, 2011, Ira Harrison was arrested and charged with unlawful possession of a firearm, carrying a loaded firearm, unlawful possession of ammunition and carrying a large capacity firearm less than a mile from Harrison's apartment. There is no dispute that Ira Harrison was in possession of a loaded 9 mm Glock pistol when he was detained and arrested by Boston police officers on June 29, 2011. He was arrested approximately 0.6 miles from Harrison's apartment.

Harrison appealed the BHA's decision to terminate her Section 8 subsidy and requested that the BHA hold an informal hearing. The informal hearing was held before a BHA hearing officer on September 19, 2011. The evidence presented at the hearing included a written police report dated June 30, 2011 (Record, Exhibit 5), a Google map (Record, Exhibit 6), a Boston Municipal Court criminal complaint against Ira Harrison dated July 1, 2011 (Record, Exhibit 7), the BHA family obligations form signed by Harrison (Record, Exhibit 2), the BHA program termination and hearing notices (Record, Exhibits 3, 4, 8) and a transcript of the informal hearing. The court allowed Harrison to supplement the administrative record with the following documents: BHA Administrative Plan (Exhibit A), BHA documentation regarding removal of Ira Harrison from Harrison's household (Exhibit B), letters pertaining to Harrison's request for reconsideration of the hearing decision (Exhibits C and D).

In a written decision issued on March 15, 2012, the hearing officer upheld the BHA's decision to terminate Harrison's Section 8 rental assistance (Record, Exhibit 8).

The only evidence in the administrative record pertaining to Ira Harrison's arrest consists of the police officer's statements contained in the July 1, 2011 police report (Record, Exhibit 5). The police report identifies Ira Harrison as "suspect #3." The police report states that during the early evening hours of June 29, 2011 police officers had been investigating an armed robbery that occurred on June 28, 2011. They observed three black males in Washington Park, one of whom had been "positively identified as a suspect in the armed robbery they were investigating." The police stopped the three males and spoke with suspect #1. Suspect #2 and suspect #3 (Ira Harrison) walked away. As the police moved towards suspects #2 and #3 to conduct a threshold inquiry, and the

two suspects ran away. The police apprehended and detained them. The police removed a black 9 mm Glock pistol from suspect #3's (Ira Harrison's) left waist line. The firearm had one live round in the chamber and sixteen live rounds in the magazine.

The police arrested Ira Harrison and charged him with unlawful possession of a firearm, carrying a loaded firearm, unlawful possession of ammunition and carrying a large capacity firearm.

The police brought the armed robbery victim to Washington Park to view suspect #2 and Ira Harrison (suspect #3). The victim was unable to identify either suspect as a person who had taken part in the June 28, 2011 armed robbery. Ira Harrison was not arrested or charged in connection with that armed robbery. There is no evidence in the administrative record that connects Ira Harrison to that armed robbery.

There is no evidence in the administrative record that Ira Harrison used the firearm in the commission of a crime or that he otherwise engaged in "violent criminal activity."

On the issue of mitigation, at the hearing Harrison presented evidence of other relevant circumstances regarding her family (including the fact that Ira Harrison has not lived with her since July 1, 2011, that he is incarcerated, that she would be willing to remove him from her lease, and that a loss of her Section 8 subsidy would cause her and her minor children substantial hardship).[7]

In his written decision (Record, Exhibit 8) the hearing officer found that 1) at the time of his arrest on June 29, 2011, Ira Harrison was in possession of a 9 mm firearm that contained more than 16 live rounds of ammunition, 2) the firearm was recovered approximately 0.6 miles from Harrison's apartment and 3) the firearm "may have been used in the armed robber that occurred the previous day." Based on these three factual findings the hearing officer reached the legal conclusion that Harrison had violated Section 8 Family Obligation #11 because Ira Harrison's "criminal activity here threatens the health, safety, or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises." The hearing officer then consideration the mitigation issue. He balanced Harrison's "relevant circumstances" against other factors. He noted that Harrison had admitted that Ira Harrison "had been in trouble before" and

[7] See Footnote 1, supra.

that Ira Harrison had been previously *charged* with illegal possession of a firearm.[8] He also stated that Harrison had admitted that "she cannot control Ira Harrison's actions."[9] He found that after "weighing the seriousness *and the severity of the criminal activity* that took place at the proximity of the Tenant's premises and all relevant circumstances" (emphasis added) that "termination of her Section 8 assistance is the only alternative punishment and the proper remedy that the violation of her programs' rules requires."

For these reasons the hearing officer upheld the BHA's decision to terminate Harrison's participation in the Section 8 program.

Harrison argues the hearing officer committed legal error in upholding the BHA's decision to terminate her Section 8 subsidy based upon "other criminal activity that threatens the health, safety or right to peaceful enjoyment of other participants or persons residing in the immediate vicinity of the premises." She argues that Ira Harrison's criminal activity (possession of a firearm) did not take place "in the immediate vicinity" of Harrison's apartment, and that Ira's possession of a firearm did not threaten "the health, safety or right to peaceful enjoyment" of persons residing in the immediate vicinity of Harrison's apartment. With respect to the hearing officer's obligation to consider an alternative to termination of her Section 8 subsidy, Harrison argues that the hearing officer had relied on facts not established at the hearing, and had not properly evaluated her mitigating "relevant circumstances," including that she had agreed and offered to remove Ira Harrison from her lease and not allow him to reside at or enter her Section 8 premises.

For purposes of ruling on the merits of this appeal I accept as true the statements set forth in the June 30, 2011 police report to the extent they were based upon the police officers' direct observations (Record, Exhibit 5). The hearing officer found that the hearsay statements set forth in the police reports made by the police officers contained substantial indicia of reliability, and therefore could be used as testimonial evidence at

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[8] The hearing officer was referring to a statement that appears in the last sentence of the June 30, 2011 police report. There is no evidence in the administrative record that Ira Harrison had ever been found guilty of a prior fire arm charge.

[9] This is not exactly what Harrison stated. She said when Ira was living with her she did not always know what he was doing outside the home and that she could not control his comings and goings (Transcript, p. 5, 7 and 9). As for her ability to control those residing in her home now, Harrison stated that Ira Harrison is no longer living with her and that he is incarcerated. She stated that she would remove him from her lease and agree that she would not allow him to return to live with her when he is released.

the informal hearing consistent with *Costa*. The hearing officer is correct.[10]

Accordingly, there is sufficient evidence in the record to establish that Ira Harrison was in unlawful possession of a loaded 9 mm Glock pistol when he was detained and arrested by Boston police officers on June 29, 2011.

With respect to the issue of "proximity" as it relates to the location of the criminal act, it is undisputed that Ira Harrison was arrested approximately 0.6 miles from Harrison's apartment.

The HUD Section 8 termination regulation, 24 CFR § 982.552(c)(2), states that a tenant's participation in the Section 8 program may be terminated if she or a member of her household "engage in drug-related criminal activity or violent criminal activity *or other criminal activity that threatens the health, safety, or right to peaceful enjoyment of other residents and persons in the immediate vicinity of the premises*" (emphasis added). The term "premises" is defined as "the building or complex in which the dwelling unit is located, including common areas and grounds." See 24 C.F.R. § 982.4(b).[11]

Under the Section 8 regulations a drug-related criminal act or a violent criminal act constitutes a violation of a Section 8 tenant's family obligations (with respect to Harrision, obligation #11) without regard to whether the act occurred on, adjacent, near or off the Section 8 premises. Such conduct is presumed to be activity that threatens the safety and right to peaceful enjoyment of all lawful residents. See 24 C.F.R. § 982.552(b). In order for "other criminal activity" to constitute a violation of the Section 8 family obligations, the "other criminal activity" must be shown to be of a kind " . . . that threatens the health, safety, or right to peaceful enjoyment of other residents and person in the immediate vicinity of the premises." Notwithstanding Harrison's argument

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[10] 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." 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."

[11] An identical definition of "premises" is found in the Glossary to the BHA Section 8 Administrative Plan (Chapter 18, Revised Plan dated December 6, 2011, p. 241). (Record, Supplemental Exhibit 1).

to the contrary, neither the federal Section 8 program statute nor the implementing regulations establish a specific or general proximity limitation with respect to the distance from the Section 8 premises where "other criminal activity' could not constitute a Section 8 program violation sufficient to support termination of the Section 8 subsidy. When faced with a notice of Section 8 termination based upon off-premises "other criminal activity," the legal issue is whether the specific criminal activity is of a kind as to pose a threat to the safety and peaceful enjoyment of residents who live in the immediate vicinity of the Section 8 tenant's premises, or inspire a significant level of fear on their part.

The Section 8 termination provisions have evolved over time. Congress amended the Section 8 statute in 1992. The amendment revised the termination provisions to address circumstances where the criminal activity of a Section 8 household member had an adverse impact on neighboring residents. The statutory amendment authorized evictions for criminal activity that had an adverse health or safety impact on those residing "in the immediate vicinity of" the premises. See 42 U.S.C. § 1437f(d)(1)(B)(iii); Pub. Law 102-550, § 145 (Oct. 28, 1992). The House Committee that considered the amendment stated in its report that "[i]t is the intent of the Committee that the term 'immediate vicinity of the premises' be interpreted as the substantial equivalent of 'on or near the premises.'" House Report No. 102-760, at 93, quoted in 1992 U.S.C.C.A.N. 3373.[12] However, these comments do not provide particularly helpful guidance because the term "on or near" when it appears in federal housing statutes is used to identify the locus of the criminal act that can constitute the basis to terminate a subsidized tenancy. The term "immediate vicinity" as it appears in the 1992 Section 8 statute is used in conjunction with the locus of those residents who might be placed in fear or whose safety and peaceful enjoyment might be threatened by the criminal conduct.

In 1995 HUD revised its Section 8 regulations. Among other things HUD incorporated the 1992 statutory changes relating to "other criminal activity." See 24, C.F.R. § 982.310(c) (1-2), as added by 60 Fed. Reg. 34695 (July 3, 1995). Harrison points out in her memorandum that in its written comments HUD did not address what

[12] The term "on or near" is a term that pertained to evictions for drug-related or criminal activity. See 42 U.S.C. § 1437f(d)(1)(B)(i-ii).

constituted the "immediate vicinity" but it did comment on what constituted "on or near" as it related to illegal drug activity. HUD stated that,

> " . . . In this rule, HUD tracks the statutory standard, and does not attempt to further define when a crime location is considered "near" the assisted project or building. In general, this standard would cover drug crime in a street or other right of way that adjoins the project or building where a Section 8 unit is located. A landlord-tenant court can apply the standard to the circumstances of a particular case."

60 Fed. Reg. at 34673-34674. Again this regulatory comment is not helpful to Harrison's case because the use of the phrase "on or near" focused on the locus of the criminal act whereas the phrase "immediate vicinity" refers to the location of the Section 8 premises.[13]

The Section 8 Voucher Choice Program in its current form was enacted by Congress in 1998 as part of the Quality Housing and Work Responsibility Act of 1998. Congress maintained the pre-existing termination provision for "other criminal activity having a health or safety impact on other residents or on those residing in the immediate vicinity." 42 U.S.C. § 1437f(o)(7)(D). When HUD adopted the QHWRA implementing regulations pertaining to termination of Section 8 assistance, it included as one of the "family obligations" that a Section 8 participant not engage in "other criminal activity having a health or safety impact on other residents or on those residing in the immediate vicinity." 24 C.F.R. § 982.551(i); 66 Fed. Reg. 28776 (May 24, 2001). The focus remained on the location of those persons who might be impacted by the criminal act, not on the locus of the criminal act.

Therefore, I conclude that for purposes of determining whether a Section 8 participant has violated the "other criminal activity" provision of the HUD Section 8

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[13] In her memorandum Harrison cited to my trial court decision in the case of *Boston Housing Authority v. Geneva Perez* (Docket No. 05H84SP001780, August 5, 2005). In that decision the public housing lease provided that the tenancy could be terminated where a tenant or household member engages in certain criminal activity. The state public housing statute provided that the tenant was not entitled to a grievance hearing if the alleged criminal act occurred "on or adjacent" to public housing property. I ruled that the criminal act that occurred 0.3 miles from the public housing development did not meet the statutory "on or adjacent" requirement, and that the tenant was entitled to a grievance hearing. For that reason I dismissed the summary process complaint. The public housing statute, unlike the Section 8 statute and regulation at issue in the Harrison case, imposed a proximity limitation on the criminal act. The proximity language in Section 8 regulation at issue in Harrison's case, "immediate vicinity" identifies the class of people who the Section 8 administrator must show will be threatened or placed in fear because of a criminal act committed by a Section 8 household member. There is no proximity limitation relating to where that criminal act may occur.

regulations (as that provision appears in the family obligations form and Section 8 family obligation provision of the BHA Section 8 Administrative Plan) where the allegation involves non-drug related and non-violent criminal activity, the determining consideration is not whether the alleged "other criminal activity" occurred within a specified distance from the Section 8 premises. The proper inquiry in a Section 8 termination hearing is whether, after taking into account all relevant considerations, the "other criminal activity" wherever it may have occurred is sufficiently associated with violence that it would pose a threat to the health, safety or peaceful enjoyment of those persons living in the "immediate vicinity" of the Section 8 recipient's premises, or inspire a significant level of fear on their part. The distance between the locus where the "other criminal activity" occurred and the location of the Section 8 premises is a factor (along with other relevant factors) that may be considered in making this determination. This formulation is consistent with the reasoning in the Supreme Judicial Court case of *Lowell Housing Authority v Melendez*, 449 Mass. 34, 39 (2007).

The *Melendez* case involved the termination of a public housing tenancy where the tenant "armed with an eight-inch kitchen knife, assaulted and attempted to rob a patron of a convenience store located approximately one mile from the Lowell Housing Authority (LHA) where he was a tenant." The public housing lease required the tenant "[t]o refrain from criminal activity that threatens the health, safety, or right to quiet enjoyment of any LHA housing development" tenant. The trial judge ruled in favor of the housing authority on its claim for possession. The judge found that the violent criminal act committed by the defendant in the same city (about one mile from the housing development) "is near enough to the other public housing residents to threaten their health, safety, and quiet enjoyment." Id. at 38. The SJC affirmed the judge's ruling and reasoned that

> "[w]hile the locus of the criminal activity is not the determining factor in this case, we do not go so far as to hold that all criminal activity, of whatever nature, is cause for termination of a public housing tenancy. Whether the criminal activity is cause for termination will depend largely on the facts of each case. It is enough to say here that certain criminal activity, such as assault by means of a dangerous weapon and armed robbery, is so physically violent, or associated with violence, that one who engages in it normally would pose a

> threat to, or reasonably inspire a significant level of fear on the part of, tenants forced to live in close proximity to the offending tenant."

The "other criminal activity" provision of the Section 8 statute and regulation is substantially similar to the "criminal activity" provision of the Lowell Housing Authority lease.[14]

With respect to the Harrison case, I conclude as a matter of law that a non-violent criminal act committed by a Section 8 household member that occurred approximately 0.6 miles from the Section 8-subsidized apartment could constitute a violation of the Harrison's Section 8 family obligation pertaining to "other criminal activity" where there is evidence that 1) the criminal act was associated with violence, or of a kind that 2) such conduct would pose a threat to the health, safety or right to peaceful enjoyment of those persons who live in the immediate vicinity of the Section 8 premises, or reasonably inspire a significant level of fear on their part.

Harrison's hearing officer did not make any findings that Ira Harrison's possession of an illegal firearm some distance from Harrison's apartment, considered without reference to the June 28, 2011 armed robbery, was sufficiently associated with violence that such conduct would threaten the health, safety or right to peaceful enjoyment of those persons who live in the immediate vicinity of Harrison's apartment, or reasonably inspire a significant level of fear on their part. Instead, the hearing officer based his decision that Harrison had violated her Section 8 family obligation in substantial part on his belief that Ira Harrison had committed a violent criminal act separate and distinct from his possession of an illegal firearm. The hearing officer found that "the firearm may have been used in the armed robbery that occurred the previous day." The hearing officer's suspicion or speculation that Ira Harrison may have participated in a violent criminal act is not a substitute for evidence sufficient to support a finding that Ira Harrison did in fact participate in the violent criminal act. The uncontested evidence in the administrative record establishes that the victim of the June

[14] In *Melendez* the defendant had engaged in a violent criminal act. Under the Section 8 regulations this criminal conduct - wherever it occurred - would be a violation sufficient to justify termination of the Section 8 subsidy because it would be conclusively presumed to pose a threat to all lawful residents. However, the court's analysis of what types of criminal conduct it would consider as sufficiently dangerous as to pose a threat to residents or inspire a significant level of fear provides helpful and persuasive guidance in interpreting the Section 8 "other criminal activity" provision.

28, 2011 armed robbery did not identify Ira Harrison as a participant in the robbery. There is no evidence in the administrative record that would support an inference that Ira Harrison had used the illegal firearm to commit an armed robbery or any other criminal act on June 28, 2011, or on any other day.

Accordingly, I rule that the hearing officer's legal conclusion that "the criminal activity here threatens the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises" constitutes legal error because it relies impermissibly on unsupported suspicion or speculation that Ira Harrison participated in an armed robbery.

With respect to the hearing officer's consideration of the mitigating factors, I conclude that the hearing officer's determination that the seriousness of Ira Harrison's criminal act outweighed Harrison's relevant circumstances showing hardship was based to some significant extent and thus was tainted by his suspicion that Ira Harrison had participated in an armed robbery. Accordingly, the hearing officer's rejection of a lesser sanction to mitigate the harsh consequences that would flow from termination of her Section 8 subsidy constitutes legal error.

It remains to be determined whether Ira Harrison's unlawful possession of an firearm on June 29, 2011, considered without reference to any "suspicions" regarding his involvement in the alleged armed robbery, constitutes "other criminal activity" within the meaning of 24 C.F.R. § 982.551(l). This should be considered and decided by a new hearing officer after conducting a de novo informal hearing applying the legal principles set forth in this decision. At the new hearing, the hearing officer must also consider (*only in the event the hearing officer concludes that Ira Harrison's conduct did constitute a violation of Family Obligation #11*) whether a lesser sanction would be the appropriate resolution of this matter after considering evidence Harrison may present regarding her individual mitigating circumstances, together with all the other circumstances presented at the hearing, in accordance with 24 C.F.R. § 982.552(c)(2). See, *Carter v. Lynn Housing Authority*, supra.

Conclusion

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

Accordingly, I rule that the hearing officer's March 15, 2012 decision upholding the BHA's proposed decision to terminate Harrison's participation in the federal Section 8 Housing Choice Voucher Program must be **VACATED**.

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 plaintiff Kimberly Harrison 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: Kimberly Harrison, dated March 15, 2012, is **VACATED**, and the case is remanded to Defendant Boston Housing Authority for a new informal hearing consistent with this decision;
3. The court shall retain jurisdiction of this action. The parties shall notify the court and request a status conference within thirty (30) days from the date the hearing officer renders a new decision; and
4. Defendant Boston Housing Authority shall continue to make Section 8 subsidy payments to the plaintiff's landlord pending further order of this court.

SO ORDERED.

JEFFREY M. WINIK
FIRST JUSTICE

April 9, 2013

cc: James M. McCreight, Esq.
Bridgette K. Kelly, Esq.