

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
CIVIL ACTION
NO. 13H84CV000738

ANGEL MCLEAN,

Plaintiff

VS.

BOSTON HOUSING AUTHORITY,

Defendant

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT

Introduction

Plaintiff Angel McLean (“McLean”) 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 McLean’s participation in the federal Section 8 Housing Choice Voucher Program.¹ The hearing officer who heard McLean’s informal administrative appeal upheld the BHA’s decision to terminate based upon the BHA’s determination that McLean’s son (who was not a member of her Section 8 family household at the time of the incident) used her apartment to engage in drug-related criminal activity and keep an illegal firearm that constituted a serious or repeated violation of her lease. In response to McLean’s certiorari petition the BHA filed the informal hearing record together with a Motion for Judgment on the Pleadings. This matter is before the court on the merits of that motion and McLean’s complaint.

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

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 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 (e) provides that “[t]he family may not commit any serious or repeated violation of the lease.” Section 24 CFR 982.552 (c) (1) (i) provides that the BHA may terminate participation in the Section 8 program if a family member “violates any family obligations under the program.” Family Obligation #4 provides that “[t]he family may not commit any serious or repeated violation of the lease.”

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

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

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

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

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

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

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 her findings and conclusions were supported by the evidence).

McLean has resided as a tenant at 67 Centre Street, Apartment #1, in the Dorchester section of Boston, continuously since December 1994. From the inception of her tenancy McClean's rent has been subsidized under the provisions of the Section 8 Housing Choice Voucher Program. The BHA has administered McLean's Section 8 voucher. McLean currently lives with two of her four children – daughters who are 14 and 18 years old. At the inception of her Section 8 tenancy in 1994 McLean lived with her two older children – a daughter (now 30 years old) and Hubman Hunter (now 20 years old). The oldest daughter moved from the family apartment and is not a member of McLean's Section 8 household. Sometime in April 2011 McLean's son, Hubman Hunter ("Hunter"), moved out of McLean's home and was taken off her lease.

Section 10 (a) of McLean's Section 8 lease provides that McLean must "not engage in or allow family members or guests to engage in any criminal activity in the rented premises . . ."

On July 19, 2012, the BHA gave McLean a written notice entitled "Proposed Termination of Section 8 Rental Assistance" (Record, Exhibit D). The reason the BHA gave for terminating McLean's Section 8 rental assistance was that McLean committed serious and repeated violations of her lease. The BHA alleged that on October 18, 2012, McLean allowed Hunter to use her apartment to engage in criminal and drug-related criminal activity. Specifically, the BHA alleged that the police seized from McLean's apartment a loaded firearm, ammunition and plastic bags containing crack cocaine. McLean appealed that decision and requested that the BHA hold an informal hearing. The informal hearing was held before a BHA hearing officer on May 6, 2013. The evidence presented at the hearing included a written police report dated October 18, 2012 (Record, Exhibit F), BHA program Section 8 documents, termination and hearing notices (Record, Exhibits A – D, G), 1994 Section 8 lease (Record, Exhibit E), 209A abuse prevention order dated April 11, 2011 and Section 8 hearing transcript. In a written decision issued on July 25, 2013, the hearing officer upheld the BHA's decision to terminate McLean's Section 8 rental assistance (Record, Exhibit I).

The following facts can be distilled from the testimony and evidence in the record: On October 18, 2012, Boston police officers obtained a search warrant to search McLean's apartment for evidence that Hunter was engaged in illegal drug related activity. The police officers observed Hunter in a motor vehicle operated by McLean. The police followed the car to various locations in Boston. The police stopped the car and informed Hunter that he was not under arrest, but that he would be transported back to 67 Centre Street for the purpose of executing the search warrant. McLean, who was the driver when the car was stopped, told the police that she had keys to her apartment and would allow the police officers to enter and search her apartment. The police officers entered McLean's apartment and with Hunter's assistance recovered 1) a loaded .38 caliber revolver secreted under a mattress in one of children's bedrooms, 2) 24 rounds of ammunition under the same mattress, and 3) 25 bags of crack cocaine found in a dresser located in that bedroom. The police arrested Hunter and charged him with illegal possession with intent to sell a Class B narcotic and unlawful possession of a firearm and ammunition. He admitted that the revolver, ammunition and drugs belonged to him. Hunter pleaded guilty to the charges and is currently serving his sentence in a Massachusetts correctional facility.

McClellan testified that Hunter has had a long history of mental health problems. During his adolescence Hunter had been in repeated trouble with school authorities and had frequent encounters with law enforcement and the criminal justice system. Hunter has not been a member of McLean's Section 8 household since 2011. He was not a member of her Section 8 household on October 18, 2012.

McLean testified that at the time of the October 18, 2012 incident Hunter was not living with her. She said that at times he was living with his father and at other times he was homeless. In April 2011 McLean obtained a 209A abuse prevention order against Hunter. In her affidavit she stated that she was scared of her son, fearful for her safety and the safety of her daughters, and was scared of losing her housing because of her son's actions. The judge ordered Hunter to stay away from McLean's apartment. McLean testified that she had been attempting to obtain Social Security/SSI disability benefits for Hunter and that she intended to act as his representative payee. McLean testified that she had the court vacate the 209A order because she was told by a Social Security

Administration representative that she could not act as Hunter's representative payee so long as the restraining order remained in effect. McLean testified that since April 2011 she had never allowed Hunter to live in or enter her apartment. She testified that she was unaware that Hunter had ever entered her apartment or that he had left illegal drugs, an illegal firearm or ammunition in her apartment at any time after April 2011. She stated that she did not know how Hunter got into her apartment after April 2011. She stated it was possible that Hunter entered her apartment without her knowledge by climbing through a window or that her 14 year old daughter may have allowed Hunter to enter her apartment on occasion without telling McClean. It appears that the hearing officer believed McClean when she testified that she was unaware that Hunter had left the drugs, firearm and ammunition in her apartment.

McLean testified that for 14 years she has been treated by medical professionals for severe depression and anxiety. She was prescribed the drug Prozac in sixty milligram doses. She said the drug diminished her ability to comprehend things going on around her. She tried to explain what she meant by stating that because of the Prozac she was taking, "I was not there." A fair reading of the record suggests that McLean meant to use the phrase "I was not there" to express her belief that because of the effect that her anti-depression medication had on her mental alertness or acuity, she suffered from a significantly diminished ability to comprehend or process what may have occurred in her apartment – including the fact that Hunter had hidden drugs, a weapon and ammunition in her apartment without her knowledge or consent. In other words, she was trying to tell the hearing officer that there was a causal link (a nexus) between her mental health disability and the conduct (a lease violation) that resulted in the BHA's decision to terminate her participation in the Section 8 program.

The hearing officer found the factual statements set forth in the police report reliable because those facts were based upon their direct observations. The hearing officer found that on October 18, 2012, the police found illegal drugs, an illegal firearm and ammunition hidden in a bedroom in McLean's apartment. The hearing officer found that it was Hunter, and not McLean, who had brought the items into McLean's apartment and engaged in the illegal activity. Nonetheless she found that McLean committed a serious violation of her lease because McLean was responsible for Hunter's actions even

though she did not have actual knowledge that Hunter had placed the drugs, firearm and ammunition in her apartment. She reached this conclusion by ruling that because McLean was the head of her household “. . . she is responsible for the actions of family members and guests which occur in her unit.”

The hearing officer did not credit McLean’s testimony with respect to how Hunter was able to enter McLean’s apartment. Although the hearing officer did not make any specific findings regarding the manner in which Hunter gained access to the apartment it appears that she inferred that his entry was permissive making McLean responsible for his actions.

With respect to mitigation, the hearing officer ruled that the mitigating circumstances presented by McLean (that she had been a Section 8 tenant for approximately 25 years without incident, that her two school-age children would be adversely impacted if she lost her Section 8 subsidy, that she suffers from depression and anxiety) were insufficient to overcome the seriousness of the criminal activity that occurred in her apartment.

The hearing officer did not make any findings or rulings as to whether McLean had requested a reasonable accommodation based upon her mental health disability, whether the BHA had considered Mclean’s request or whether on the merits McLean was entitled to a reasonable accommodation.

Based upon these findings and rulings, the hearing officer upheld the BHA’s decision to terminate McLean’s Section 8 assistance.

McLean does not challenge the underlying factual findings made by the hearing officer pertaining to the fact that a firearm, ammunition and drugs were found in McLean’s apartment. See, *Costa v Fall River Housing Authority*, 453 Mass. 614, 627 (2009) (“ . . . 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”). Further, McLean does not challenge the hearing officer’s ruling that the presence of those illegal items in her apartment would constitute a serious violation of her lease and her Section 8 family obligations.

A Section 8 tenant is legally responsible for the criminal acts of her household occupants, guests and those under her control. This is so even if the tenant is not aware

that her apartment was being used for criminal activity. The underlying rationale is that the tenant is presumed to have the knowledge and ability to control the conduct of the wrongdoer. See, *HUD v. Rucker*, 535 U.S. 125 (2002). However, the law recognizes that under certain circumstances, owing to a physical or mental disability, a person who otherwise has violated the terms of her tenancy (or Section 8 program rules) may be able to meet her obligations if she is provided with a reasonable accommodation.

Because the BHA is a public housing provider, is an administrator of the Section 8 program, and because it receives federal funding, it is subject to the provisions of the Fair Housing Amendments Act (“FHAA”) (42 U.S.C. § 3601-3619), Section 504 of the Rehabilitation Act (29 U.S.C. § 794) and the state anti-discrimination statute (G.L. c. 151B). Pursuant to 42 U.S.C. 3603, federally assisted public housing authorities such as the BHA are subject to the anti-discrimination provisions of 42 U.S.C. 306(f) that provides in relevant part:

“[D]iscrimination includes ... a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped person] equal opportunity to use and enjoy a dwelling.”

Stated in summary fashion the FHAA requires the BHA to afford an otherwise qualified disabled tenant with a reasonable accommodation in the form of a modification of rules, policies and practices to the extent the accommodation is reasonable and necessary to allow the tenant to meet her tenancy obligations (here her obligation to prevent anyone from keeping illegal firearms, ammunition and drugs in her apartment). “[A] reasonable accommodation is required where there is a causal link between the disability for which the accommodation is requested and the misconduct that is the subject of the eviction or other challenged action.” *BHA v. Bridgewaters*, 452 Mass. 833, 860 (2009).

Ultimately, to establish that she is entitled to a reasonable accommodation McLean must establish that there is a causal link between her disability and her actions (or failure to act) that resulted in the termination of her Section 8 subsidy.

McLean argues the hearing officer committed legal error by failing to recognize at the informal hearing that McLean had articulated a request for a reasonable accommodation based upon her serious mental health disability and then failing to

remand the case to the BHA so that it could consider McLean's request for reasonable accommodation in accordance with federal and state law, and in accordance with the BHA's reasonable accommodation policies. I agree.

First, I rule that the hearing officer was aware that McLean had a mental health condition (depression and anxiety) that might constitute a handicap or disability under the provisions of state and federal law. See Record, Exhibit I, Hearing Officer's Decision, p. 7, footnote 2.

Second, the hearing officer considered McLean's mental health conditions only in the context of balancing McLean's mitigating circumstances against the serious of the lease and program violation in accordance with the provisions of the Section 8 regulations. The standards applicable to mitigation as an element of a Section 8 termination proceeding and the standards applicable to reasonable accommodation under the provisions of federal and state anti-discrimination statutes are significantly different. In contrast to the mitigation provisions of the Section 8 regulations, the laws pertaining to handicap and disability affords tenants much greater protection and imposes upon the BHA a much greater obligation to evaluate and consider a request for a reasonable accommodation.

The hearing officer found that McLean's statements made during the informal hearing did not constitute a request for a reasonable accommodation because "she did not argue that her disability caused her to violate her lease and Section 8 rules." The hearing officer found that McLean ". . . only argued that her disability prevented her to give clear statements during the hearing." The hearing officer is incorrect as a matter of fact and law.

I find that the hearing officer should have recognized during the informal hearing conducted on May 6, 2013 that McLean had communicated, albeit imperfectly, a request that she be afforded a reasonable accommodation. From a reading of the transcript McLean appeared to be agitated and confused; and at times she was not particularly clear or articulate when she tried to communicate that there was a connection between her mental health disability and the alleged lease violation. She used fractured grammar and awkward phrasing. It is not surprising to me that the hearing officer misconstrued what McLean had been trying to say. I conclude, however, that McLean's words, fairly

considered as a whole, did constitute a legally sufficient oral request for a reasonable accommodation. See, *Bridgewater*, 452 Mass. at 846. The hearing officer committed legal error in failing to acknowledge that McLean had requested a reasonable accommodation.

Third, there was sufficient evidence presented at the informal hearing to put the hearing officer on notice that McLean had articulated a reasonable basis to support a claim that there existed a causal link (a nexus) between her mental health disability (McLean's contention that her medication diminished her ability to comprehend what may have been taking place in her apartment) and the breach of her lease (the presence of illegal firearms, ammunition and drugs and firearm that had been hidden in her apartment by her non-occupant son when she was not present). See, *Bridgewater*, 452 Mass. at 844-848. At the informal hearing McLean was not obligated to prove by a preponderance of the evidence that a causal link existed. It is enough that she presented through her testimony facts sufficient to support a good faith argument that such a causal link existed. Whether or not a legally sufficient causal link exists to support McLean's request for a reasonable accommodation can only be determined through a full and fair consideration of the facts by the BHA in accordance with the requirements of federal and state antidiscrimination law (and in accordance with the BHA's reasonable accommodation administrative policies).

I rule that the hearing officer committed legal error when she failed to remand the case to the BHA for consideration of McLean's reasonable accommodation request. The BHA must give McLean a fair opportunity to present medical and other evidence to support her contention that she has a mental health disability and that there was a causal link between her mental health disability and her failure to comply with her lease as alleged in the Section 8 termination notice.

Interim Order

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

1. The BHA hearing officer's July 25, 2013 decision upholding the BHA's proposed decision to terminate McLean's participation in the federal Section 8 Housing Choice Voucher Program is **VACATED**;

2. This case is remanded to the BHA to consider the merits of McLean's May 6, 2013 request for a reasonable accommodation;
3. The BHA shall afford McLean all notice and administrative appeal rights should the reasonable accommodation request be denied;
4. The BHA shall continue to make Section 8 subsidy payments on McLean's behalf pending further order of this Court;
5. The court shall retain jurisdiction of this action;
6. The parties shall appear in Court, Courtroom 15, for a status conference on March 26, 2014 at 2 p.m.

SO ORDERED.



JEFFREY M. WINIK
FIRST JUSTICE

January 31, 2014

cc: Angel McLean
Michael Decker, S.J.C. Rule 3:03 Counsel
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