SEP 2 3 2009

STATE OF MINNESOTA FILED DISTRICT COURT

COUNTY OF HENNEPIN 2009 SEP 21 PM 2:16 FOURTH JUDICIAL DISTRICT

BY DEPUTY
HENN CO. DISTRICT
COURT ADMINISTRATOR

Minneapolis Public Housing Authority,

Plaintiff,

vs.

AMENDED ORDER ON RECONSIDERATION

FILE # 27-CV-HC-08-10954

Jack L. Vann,

Defendant.

Defendant Jack Vann sought review of the referee's order of January 12, 2009, which directed a judgment for plaintiff for recovery of premises. My order of May 4, 2009, reluctantly denied relief and affirmed. Defendant requested and was granted leave to seek reconsideration, and counsel submitted additional memoranda. (It should be noted that counsel for both parties have very thoroughly and effectively briefed and argued the issues, which are uncommonly difficult and complex, involving as they do the interplay of various state and federal laws, some of which contain confusing and arguably conflicting provisions.)

Defendant is represented by Lawrence McDonough, Esq.

Plaintiff is represented by Elizabeth Kragness, Esq.

This order supersedes and replaces the earlier order.

Mr. Vann was evicted because he possessed a small amount of marijuana, not on the premises, but about a mile away. He contends the referee erred in three respects: 1) by not considering and applying an applicable statute, 2) by allowing amendment of the

complaint, and 3) by adopting the plaintiff's proposed order verbatim. Defendant was pro se at the original hearing, but has since been represented by counsel.

Mr. Vann's first and most troublesome argument is that possession of a small amount of marijuana is not a "crime" in Minnesota, but a petty misdemeanor, (under Minn. Stat. § 609.03(4)(a)), which, he contends, could not therefore satisfy the provision of the federal statute, (42 U.S.C. §1437(d)(l)(6)), which forbids "criminal activity" that "threatens the health, safety, or right of peaceful enjoyment" of tenants, or any "drug-related criminal activity on or off such premises."

The evidence established both Mr. Vann's possession of a petty misdemeanor quantity of marijuana off the premises, and the plaintiff's "zero tolerance" policy toward drug use, and the reasons for this. (Transcript, 31 December 2008, passim.)

Plaintiff responds that the federal law defines "drug-related criminal activity" as inter alia "possession of a controlled substance," and includes marijuana as such a substance, and that therefore the technical Minnesota definition of "crime" does not control. Even if it did, plaintiff adds, the conduct was a serious breach of a material term of its lease. It notes that Minnesota law permits eviction for allowing unlawful controlled substances on or near the premises. (Minn. Stat. §504B.171, subd. 1(1)(i)).

The referee found (adopting the proposed findings) that the evidence satisfied the plaintiff's burden, concluding in effect that the "zero tolerance" approach was necessary, or at least reasonable, to prevent a serious threat to the health, safety and peaceful enjoyment of the premises.

This reasoning relies not entirely or even primarily on Mr. Vann's own infraction, but upon claims that the policy has improved the quality of life in the housing, implying

apparently that a person who possesses drugs elsewhere, anywhere, is likely either A) to bring drugs to the premises, B) to use or sell drugs on the premises, C) to be intoxicated on the premises, or D) to be in general an undesirable presence.

In the previous order I found this theory strained, and the inferences leading from Mr. Vann's conduct to the effect on the quality of life on the premises fanciful and far-fetched, but I concluded these findings were supported by the evidence presented – consisting as it did principally of the plaintiff's witness's interested and uncontradicted views.

Mr. Vann was not convicted of a "crime" but a petty misdemeanor, which raises the question of whether, in these circumstances, the definition of that term in Minnesota law, which excludes Mr. Vann's offense, overrides what is arguably the federal policy of including possession of all non-prescribed controlled substances in its ban. I concluded that it does not. Although the intention of the Minnesota Legislature in "decriminalizing" possession of small amounts of marijuana was, in part, to reduce the sometimes overly harsh consequences of a relatively minor and very common form of misconduct, and although eviction is indeed a harsh and often (including, in my judgment, in this case) unfair and disproportionate penalty, I concluded the federal legislation appeared to make no such distinction, nor to have been intended to adopt a state's definition of the term "criminal." Federal law refers to possession of "illegal" substances in its definition of "drug-related criminal activity." I reasoned that while possession of a small amount of marijuana is not a crime in Minnesota, neither is the substance or its possession legal. Unlike "crime" and "criminal", terms requiring in Minnesota the possibility of

punishment by incarceration, I concluded that "illegal" means more broadly "against or not authorized by law," and in this sense both marijuana and its possession were illegal.

I added that I would have preferred to reach the opposite result, for it troubled me greatly that a person in need of housing assistance can be effectively made homeless by so trivial a misdeed as having a single marijuana cigarette at a place far removed from the regulated premises. That a "zero tolerance" policy works, I observed, does not mean that it is right, and that it may be "legal" to evict Mr. Vann does not mean that it is right to do so. Virtually by definition, "zero tolerance" policies are insensitive to individual needs; they represent the belief that ends justify means; they are the common instruments of totalitarian regimes. But, I said, neither fairness, nor compassion, nor even simple good sense is the criterion by which cases such as this are to be judged.

Draconian policies are often justified by the claim that they treat all persons alike. But this rationalization ignores the less familiar truth that there is no greater inequality than the equal treatment of unequals. *See* Frankfurter, J., in *Dennis v. U.S.*, 339 U.S. 162, 184 (1950).

I have, on reconsideration, and in light of the further arguments and authorities presented by counsel, re-examined these views, and this has led me to the following revisions of the reasoning and decision in the previous order.

By using the words "criminal" and "illegal" in the same context the drafters have created confusion and a dilemma – a quite unnecessary one, I might add, because this problem could have been easily eliminated by using some consistency and precision of language, or by adding additional clarification. (Legislators should be encouraged to write clearly – hence the "void for vagueness" due process doctrine, most often

applicable in the criminal context. *See e.g. U.S. v. Santos*, 128 S.Ct. 2020 (2008). Clarity relieves courts of the need to guess at legislative intentions.)

In the original order, I concluded that "illegal" was for purposes of this case the equivalent of "criminal," at least in the negative sense that neither of them refers to legal conduct. But I relied principally on a general lexicographic definition of "illegal," and for reasons discussed below I now conclude that was an erroneous and insufficient basis for my determination. It also had the effect of undervaluing the role and authority of the state in a situation such as this; that is, my reasoning gave too little deference to Minnesota's quite explicit and deliberate determination that Mr. Vann's conduct was not "criminal." And the expansive use of "illegal" causes one provision in a statute effectively to nullify another, where there is no indication that this was the legislative intent, and arguably in violation of the principles that A) provisions should be construed where possible to avoid conflict, *see State v. Cottew*, 746 N.W.2d 632, 639 (Minn. 2008); B) that where provisions cannot be reconciled the more specific should prevail, *see State v. Richmond*, 730 N.W2d 62 (Minn. Ct. App. 2007); and C) the doctrines of ejusdem generis and D) noscitur a socis, and E) inclusio unius est exclusio alterius.

Although these principles (which I shall not further discuss) do not individually or in combination compel me to read the words "criminal" and "illegal" synonymously in this case, they lend some weight to Defendant's argument that the "non-criminal" nature of his conduct is entitled to more serious consideration than I gave it in the earlier order. In short, I too readily concluded that the legislative use of "illegal" controlled or modified the term "criminal."

The most serious shortcoming in my previous decision, however, considered in conjunction with the principles mentioned above, is this: The legislative history shows that the intention quite reasonably and commendably was that "each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court," S. Rep. 101-316, S. Rep. No. 316, 101st Cong., 2d Sess. 1990, 1990 U.S.C.C. A.N. 5763, 5941, 1990 WL 272745, cited by Defendant.

Although my prior order, I hope, at least implicitly recognized this, I did not satisfactorily consider its implications vis à vis, the so-called "zero tolerance" policy involved here. The obvious problem is this: a "zero-tolerance" policy is altogether inconsistent with the important principle of individual judgment of each case, and nullifies it, and removes the ability to take a "humane" approach to any litigant. My previous reading, and that promoted by Plaintiff, would substitute for that more salutary approach a standard of strict liability, which neither the language of the laws nor the legislative history expresses or implies. This is beyond the power of the Plaintiff to implement or of this court to enforce, in these circumstances.

Together with the state's clear decision to remove many of the harsh consequences of "petty" offenses by explicitly denominating these non-criminal, this leads me to conclude, contrary to my earlier order, that although the findings remain essentially the same, both the Referee and I were in error in ruling in favor of Plaintiff.

Therefore:

1) The order dated May 4, 2009, is vacated.

2) Considering Mr. Vann's situation individually, in light of the specific facts in this record, I conclude that the single instance of non-criminal possession of marijuana

occurring away from the premises in question is neither a material breach of the lease nor an event that in any rational way threatened the health, safety, or right of peaceful enjoyment of the premises, and the eviction as a result of application of the "zero-tolerance" policy in the specific circumstances of this case was not justified.

The Referee's decision and my prior order affirming it are reversed, and judgment shall be entered for Defendant.

IT IS SO ORDERED.

BY THE COURT:

Dated: September 21, 2009

Jack S. Nordby
Judge of District Court