

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
CIVIL ACTION
NO. 12H84CV000147

OSWALDO ORTIZ,
Plaintiff

v

BOSTON HOUSING AUTHORITY,
Defendant

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT

Introduction

Plaintiff Oswaldo Ortiz (“Ortiz”) filed a complaint seeking relief in the nature of certiorari pursuant to G.L. c. 249, § 4 and injunctive relief under 42 U.S.C. § 1983 challenging defendant Boston Housing Authority’s (“BHA”) decision to terminate Ortiz’s participation in the federal Section 8 Housing Choice Voucher Program. The hearing officer who heard Ortiz’s informal administrative appeal upheld the BHA’s decision to terminate Ortiz’s Section 8 assistance based upon the BHA’s determination that Ortiz had failed to comply with the Section 8 program obligation to notify the BHA promptly of his absence from his apartment from December 22, 2010 to March 16, 2011.

In response to Ortiz’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 Ortiz’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. 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 Department of Housing and Urban Development (“HUD”) has promulgated regulations to implement the Section 8 program. See, 24 CFR § 982.551 (a) to (n). In accordance with Section 982.551(i), a Section 8 tenant is obligated to comply with the following occupancy requirement:

- (1) Absence from unit. The family must supply any information or certification requested by the PHA to verify that the family is living in the unit, or relating to family absence from the unit, including any PHA-requested information or certification on the purposes of family absences. The family must cooperate with the PHA for this purpose. The family must promptly notify the PHA of absence from the unit.

In accordance with Section 982.552 (c) (1) (i) the BHA may terminate a tenant’s Section 8 assistance “[i]f the family violates any family obligations under the program (see § 982.551).”

A Section 8 participant has the right to an informal hearing to appeal the BHA’s decision to terminate Section 8 assistance. 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. 24 C.F.R. § 982.552 (c) (2) (i).

The BHA is not a state agency subject to the administrative appeal provisions of G.L. c. 30A. Therefore, Ortiz has sought relief by bringing an action in the nature of certiorari pursuant to G.L. c. 249, § 4.¹ 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).²

Under certiorari review I cannot substitute my judgment for that rendered by the BHA and the hearing officer; therefore my consideration of Ortiz’s certiorari petition must be based solely upon the evidence presented at the informal hearing. My review of the hearing officer’s decision is limited to a consideration of whether the hearing officer’s factual findings and legal conclusions were based upon legal error that adversely affected

¹ Ortiz commenced this action within the sixty-day limitation period set forth in G.L. c. 249, § 4.

² 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 . . .”

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).

On May 23, 2011, the BHA gave Ortiz a written notice entitled "Proposed Termination of Section 8 Rental Assistance." (Record, Exhibit D). The reason the BHA gave for terminating Ortiz's Section 8 rental assistance was that Ortiz failed "promptly" to notify the BHA of his absence from his subsidized apartment from December 2010 to March 16, 2011. The termination notice states that Ortiz's conduct is contrary to 24 CFR §§ 982.551 (i) and 982.552 (c) (1) (i).

Ortiz appealed the proposed termination and requested that the BHA hold an informal hearing. The informal hearing was held before a BHA hearing officer on July 25, 2011. The evidence presented at the hearing included the proposed termination and hearing notices (Record, Exhibits A, B, C, D), a letter from Ortiz's probation officer (Record, Exhibit E, 13), criminal docket sheets from the Dorchester Division of the Boston Municipal Court (Record, Exhibit F), a Section 8 Family Obligations Form signed by Ortiz (Record, Exhibit G), and a Boston Medical Center letter from Ortiz's medical case manager (Record, Exhibit H). Ortiz was the only witness who testified at the hearing. A copy of the hearing transcript was included as part of the administrative record before the Court.

In a written decision issued on January 30, 2012, the hearing officer upheld the BHA's decision to terminate Ortiz's Section 8 rental assistance (Record, Exhibit 10).

From the evidence presented at the informal hearing, as is set forth in the administrative record, the facts are not reasonably in dispute pertaining to the reason Ortiz was absent from his apartment, the time period he was absent and the reasons he did not (or could not) notify the BHA of his absence.

Ortiz resides as a residential tenant at 415 River Street, Suite #103, in Mattapan. His tenancy is subsidized under the provisions of the Section 8 voucher choice program. The BHA administers Ortiz's Section 8 voucher. Each year, when Ortiz completes his annual re-certification with the BHA, he signs a document entitled "Family Obligations as Listed in the Section 8 Certificate and Voucher Programs." The Family Obligations form states that a participant can be terminated from the rental assistance program "if the participant has violated any family obligation under the program." The list of family

obligations includes, "16. *The family must promptly notify the Housing Authority of any absence from the unit.*" Ortiz signed this Family Obligations form on April 22, 2010. (Record, Exhibit G). The "prompt notification" requirement set forth in the HUD regulations and the Family Obligations form do not state that a Section 8 tenant will be deemed to be absent from his subsidized apartment when is absent for more than a specified period (such as, for example, "more than thirty days"). The term "absence" is not defined in either the HUD regulations or the Family Obligations form.

In its brief, the BHA states that the Boston Housing Authority Administrative Plan For Section 8, §§§ 11.6.2, 13.5.2 and 16 ("BHA Administrative Plan"), provides that any Section 8 participant who will be absent from the subsidized unit for more than thirty days must notify and obtain written approval from the BHA. The BHA Administrative Plan is not part of the record in this case. The notice of proposed termination does not cite to Ortiz's failure to comply with this provision of the BHA Administrative Plan as a grounds for termination.

On December 22, 2010, Ortiz was arrested and detained while awaiting disposition of a five count criminal complaint. Bail was initially set by a district court judge at \$7,500.00. Because of his limited income Ortiz was unable to post bail.³ He was remanded to the Nashua Street jail where he was detained from December 22, 2010 to March 16, 2012.⁴ On March 16, 2012, a district court judge dismissed all five counts of the criminal complaint and Ortiz was released from custody.⁵ Ortiz returned to live at his apartment upon his release from the Nashua Street jail.

Ortiz did not notify the BHA that he was absent from his apartment at anytime between December 22, 2010 and March 16, 2011.⁶ Ortiz testified at the hearing that he was not aware that he was supposed to contact the BHA to inform him that he was absent from his apartment. Although he acknowledged that he had signed the Family Obligations form he said that he had not read it. However, he testified that even if he had

³ Ortiz's sole source of income is Social Security and SSI benefits.

⁴ On January 20, 2011, upon review, a superior court judge reduced Ortiz's bail to \$5,000.00. Ortiz was unable to post this reduced bail amount and remained in custody.

⁵ The docket entry for each charge states "DWOP." This means dismissed for want of prosecution.

⁶ It is unclear from the record when or how the BHA learned that Ortiz was held in custody during this period.

known that he was obligated to notify the BHA when he was absent from his apartment, he would have been unable to do so while he was detained at the Nashua Street jail.

Ortiz testified that he had no money available for his use at the jail and was unable to access any of his funds from outside the jail while he was detained. For this reason he was unable to make any telephone calls or post any letters to anyone, including his leasing officer at the BHA. Further, he testified that he had no family in Boston and that no one came to visit him while he was detained. For this reason he was unable to ask a family member or friend to contact the BHA on his behalf. The hearing officer did not make any findings that Ortiz's testimony was untruthful, inaccurate or unreliable. Therefore, based upon the undisputed evidence in the administrative record, I accept as factually true that while he was detained at the Nashua Street jail, Ortiz did not have access to money, he could not afford to make telephone calls or post letters, he did not have any visitors and he could not contact anyone outside the Nashua Street jail.

In his decision the hearing officer states that the BHA Administrative Plan, § 11.6.2, provides that "an absence of greater than thirty days must be approved by the BHA for reasons of health, rehabilitation, convalescence, incarceration or the personal needs of the family . . ." and that "[f]ailure to request and receive approval to be absent from the Unit for more than thirty (30) days may result in termination of assistance." Relying on this provision the hearing officer ruled that Ortiz was obligated to notify the BHA and request approval when he had been absent from his apartment "for more than thirty days." He found that Ortiz failed to notify and request BHA approval after he had been absent from his apartment for more than thirty days. Based upon this finding, the hearing officer concluded that Ortiz had violated his family obligation set forth in 24 CFR § 982.55 (i) and Section 16 of the Family Obligations form. The hearing officer ruled that Ortiz's failure to notify the BHA of his absence from his apartment and request approval under these circumstances constituted "sufficient grounds to propose termination of his Section 8 assistance."

The hearing officer is correct in ruling that Ortiz is presumed to have known of his Section 8 family obligations, including his obligation to notify the BHA promptly if he is absent from the unit. Ortiz signed the Section 8 Family Obligation form each year when he completed his annual re-certification.

However, in ruling that Ortiz's Section 8 assistance can be terminated because of his failure to notify the BHA of his absence once it lasted more than thirty days, the hearing officer made a number of factual and legal errors that adversely affected material rights of Ortiz with respect to his participation in the Section 8 subsidy program.

The hearing officer underlying legal reasoning is based in substantial part on the fact that the BHA Administrative Plan, §§ 11.6.2, and 16, provides that any Section 8 participant who will be absent from the subsidized unit for more than thirty days must notify the BHA and obtain its written approval. The hearing officer assumed that "more than thirty days" as used in the BHA Administrative Plan is the definition of what constitutes an "absence" as that word is used in the HUD Section 8 regulations pertaining to family obligations as set forth in 24 C.F.R. 982.551 (i). Working from that assumption the hearing officer recast the HUD family obligations regulation to mean that as a matter of federal law *a Section 8 tenant must give the BHA "prompt" notice of his absence after he had been absent from his apartment for more than thirty days.* Relying on his interpretation of what constituted an "absence" the hearing officer ruled that Ortiz had violated his Section 8 family obligation when he failed to notify the BHA after he had been absent from his apartment for more than thirty days.

The problem with the hearing officer's legal analysis is that the BHA Family Obligation form that Ortiz signed states only that the tenant must give the BHA "prompt" notice of his absence from his apartment. (Record, Exhibit G). This is consistent with the requirement set forth in the HUD regulation, 24 CFR § 982.551 (i). The HUD regulations do not set forth any specific time-period after which a tenant is deemed to be absent from his unit. Specifically, the HUD regulations do not state that a tenant will be deemed to be absent from his apartment after thirty days. There is no evidence in the record that Ortiz (or for that matter any other Section 8 tenant) was ever made aware that he was obligated to notify the BHA whenever he was absent from his apartment for more than thirty days (as opposed to, for example, fifteen days, sixty days or ninety days). There is no evidence that the BHA ever provided Ortiz with a copy of the BHA Administrative Plan. The Notice of Proposed Termination (Record, Exhibit D) does not cite as a ground for termination Ortiz's failure to comply with the "after thirty day" notice provision of the BHA Administrative Plan.

Accordingly, it was legal error for the hearing officer to find that Ortiz had violated his Section 8 family obligation solely based upon Ortiz's failure to give the BHA notice after he was absent from his apartment for more than thirty days.

There remains the question of whether the hearing officer committed legal error in ruling that Ortiz had failed to give the BHA "prompt" notice of his absence as that term is used in the "prompt" notice provision of the HUD Section 8 regulation, 24 CFR § 982.551 (i). While the HUD regulations do not define the word "absence" I believe that reasonably interpreted "absence" must be measured in months, not weeks.⁷ Perhaps a period of "more than thirty days" as is set forth in the BHA Administrative Plan would be a reasonable measure of what constitutes "absence" under the HUD regulations. However, concepts of fundamental fairness would dictate that Section 8 tenants be notified of this time-specific notice requirement before they are faced with a proposed termination of their Section 8 subsidy for failing to comply with it.

Even if I were to assume that "more than thirty days" was the period of "absence" that would be sufficient to trigger Ortiz's obligation to provide the BHA with "prompt" notice in accordance with the HUD Section 8 regulation, 24 CFR § 982.551 (i), the hearing officer was still required to determine whether Ortiz's failure to provide such "prompt" notice to the BHA given the specific circumstances of his detention constituted a violation of his Section 8 Family Obligations.

In determining whether Ortiz violated his Section 8 family obligations by failing to notify the BHA "promptly" of his absence from his apartment, the individual circumstances pertaining to whether he had the actual ability to comply with the "prompt" notice obligation is a critical part of the legal analysis.⁸ See, *Carter v. Lyons Housing Authority*, supra. The HUD regulations require the hearing officer to consider the individual and mitigating circumstances that may have impacted the participant's ability to comply with his family obligations. 24 C.F.R. C.F.R. § 982.552(c) (2) (i).

⁷ The hearing officer erroneously found that Ortiz failed to notify the BHA of his absence from his apartment while he was incarcerated "during a period of almost 4 months." In fact the period of time that Ortiz was absent from his apartment due to his detention was less than three months.

⁸ That this is an important consideration should be self-evident. I assume that a hypothetical BHA tenant who is absent from his apartment for more than thirty days while comatose in a hospital would not have his Section 8 benefits terminated based upon his failure to give the BHA "prompt" notice of his absence.

The hearing officer found that during the period that Ortiz was detained, “. . . he did not try to call or send a letter to his Leasing Officer to notify of his situation.” While it is true that Ortiz did not call or write to his leasing officer, there is no evidence in the record to support the hearing officer’s finding that Ortiz “did not try.” This finding can be correct as a matter of law only if it was based upon a subsidiary finding that Ortiz had the actual ability to contact the BHA during his detention and for whatever reason did not make the effort. Even if the hearing officer had made that subsidiary finding, it would be legally erroneous because there is no evidence in the record to support it.

The hearing officer states in the last paragraph of his decision that “[t]he tenant’s failure to notify his Leasing Officer of his situation permits the inference that he chose willingly not to inform his Leasing Officer about his then criminal activity.” An inference must be the reasonable or logical result of known fact. The hearing officer’s inference of willfulness on the part of Ortiz is unreasonable as a matter of law. It is based upon speculation and conjecture. The hearing officer has attributed a motive to explain Ortiz’s purportedly intentional inaction that is unwarranted from a fair reading of the evidence in this record.

Ortiz presented unchallenged testimony that it was impossible for him to contact anyone at any time during his detention at the Nashua Street jail.⁹ Ortiz testified that he did not have access to any funds while he was detained. Without access to money, he could not afford to make an outgoing telephone call from the Nashua Street jail or to pay for postage to send a letter to the BHA. For this same reason, he had no way to contact his family members or his friends. He did not have any relatives or friends come to visit him at the Nashua Street jail. Therefore, Ortiz was unable to ask a relative or friend to notify the BHA on his behalf. The hearing officer, without justification, ignored Ortiz’s testimony and did not afford it any weight. This was legal error. The only legally supportable finding that the hearing officer could have made from the undisputed evidence presented at the informal hearing was that Ortiz did not promptly notify the

⁹ The BHA suggests that Ortiz must have communicated with his court-appointed attorney during the period he was detained at the Nashua Street jail, and that he could have had his attorney contact the BHA. There is no evidence in the administrative record regarding whether and when Ortiz may have spoken with his attorney after he had been detained for more than thirty days.

BHA of his absence from his apartment because during his detention at the Nashua Street jail he had no reasonable and lawful way to contact the BHA.

It would be unfair and legally indefensible for the BHA to terminate a tenant's Section 8 subsidy (a federally protected property interest) where for reasons beyond that tenant's control the facts demonstrate that it would have been impossible for the tenant to comply with his Family Obligation to notify the BHA of his absence from his apartment. Ortiz's defense to the BHA's effort to terminate his Section 8 subsidy is that his failure to comply with his family obligation to promptly notify the BHA of his absence from his apartment resulted from his inability to communicate with anyone outside of the Nashua Street jail. He was unable to communicate for reasons beyond his control. In other words it was impossible for him to comply with his family obligations. To the extent that hearing officer's legal conclusion is based upon his finding that Ortiz "did not try to call or to send a letter to his Leasing Officer to notify him of his situation," his finding is erroneous and his resulting conclusion that the BHA had sufficient grounds to propose termination of Ortiz's Section assistance is arbitrary, capricious and legally erroneous.¹⁰

I rule that the factual and legal errors that formed the basis of the hearing officer's decision adversely affected the material rights of Ortiz. The hearing officer committed legal error when ignored the facts that while Ortiz was detained at the Nashua Street jail he had no financial ability to make a telephone call, had no financial ability to mail a letter, and had no family or friends come to visit him. The hearing officer committed legal error when, despite the undisputed evidence establishing that it was impossible for Ortiz to communicate with anyone outside the Nashua Street jail for reasons beyond his

¹⁰ Further, the hearing officer committed legal error when he ruled, "the Tenant's mitigating circumstances cannot offset the seriousness of the violation." Ortiz raised his lack of money while detained as a "relevant circumstance" why he did not notify the BHA. He asked that the hearing officer consider that fact in accordance with 24 C.F.R. § 982.552(c) (2). The hearing officer's evaluation of that "relevant circumstance" was inadequate as a matter of law. The hearing officer ignored Ortiz's testimony that he had no money while he was detained and could not afford to use the telephone or post a letter. As is referenced earlier in this decision the hearing officer states that because Ortiz "did not try to send him [the BHA leasing officer] a letter or note about his situation . . ." the hearing officer can draw an "inference that he chose willingly not to inform his Leasing Officer about his then criminal activity." His factual finding upon which he bases his inference is erroneous. Ortiz did not have the financial ability to contact the leasing officer. The conclusion that Ortiz acted willfully is unwarranted and insufficient to provide a legal basis for the hearing officer's conclusion that the mitigating circumstances (in this case Ortiz's inability to give the BHA notice because of his detention) against the seriousness of the violation (seriousness being identified as the fact the BHA paid Ortiz's rent subsidy during the period he was detained).

control, he ruled that Ortiz's failure to notify the BHA of his absence from his apartment during the period that he was detained at the Nashua Street jail constituted a violation of his Family Obligations set forth in 24 CFR § 982.551 (i).¹¹

Conclusion

For these reasons, I rule on the merits of **Ortiz's Complaint** and on the BHA's **Motion for Judgment on the Pleadings** that the hearing officer's January 30, 2012 decision upholding the BHA's proposed decision to terminate Ortiz's participation in the federal Section 8 Housing Choice Voucher Program must be **VACATED and REVERSED**.

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, Oswaldo Ortiz, on his claim in the nature of certiorari under G.L. c. 249, § 4;
2. The decision of the hearing officer in the case of In Re: Oswaldo Ortiz, dated January 30, 2012, is vacated and reversed;
3. The defendant, Boston Housing Authority, shall reinstate the plaintiff's Section 8 Housing Choice Voucher Program retroactive to May 23, 2011; and
4. Judgment shall enter dismissing the plaintiff's 42 U.S.C. § 1983 claim.

SO ORDERED.



JEFFREY M. WINIK
FIRST JUSTICE

April 2, 2012

cc: Oswaldo Ortiz
Angela Marcolina, Esquire

¹¹ In light of the court's ruling reversing the BHA's decision upon state certiorari review, I shall dismiss Ortiz's federal 42 U.S.C. §1983 claim.