

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Marilyn Piretti et al.

v.

Carl Hyman et al.

Civil Action
79-622-K

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JUL 20 1979

NATIONAL CLEARINGHOUSE
FOR RENTAL SERVICES

July 23, 1979

The matter before the court is Plaintiff Marilyn Piretti's motion for preliminary injunction. A hearing on this motion was held on July 16, 1979. After consideration of the evidence offered at the hearing and the arguments and authorities presented in written submissions and in open court, the court finds and concludes as follows:

Findings of Fact

1. Plaintiff Marilyn Piretti is 35 years old and resides at 59 Dolphin Avenue, third floor, Revere, Massachusetts. She has lived at this address since August, 1977.

2. Defendant Carl Hyman is a resident of the City of Revere and is the Executive Director of the Revere Housing Authority.

3. Defendants Edward V. Clucas, Alfred C. Liston, Janice E. Felt, Richard D. Jordan, and Louis S. Insalaco are residents of the City of Revere and are Commissioners of the Revere Housing Authority. Defendant Clucas is also the Chairman of the Revere Housing Authority.

4. Defendant Revere Housing Authority is a public body politic and corporate, created pursuant to Mass. Gen. Laws c. 121B, § 3, for the purpose of providing housing for families or elderly persons of low income. It is a public housing agency as that term is defined in 42 U.S.C. § 1437a(6).

5. John Pace and Michael DeSesa (the landlords) are the owners of the apartment at 59 Dolphin Avenue, Revere, Massachusetts rented to Plaintiff.

7. Ida Cafarelli is the Assistant Executive Director of the Revere Housing Authority.

8. Defendant Patricia R. Harris is Secretary of the U.S. Department of Housing and Urban Development. Marvin Siflinger is Manager, Boston Area Office, U.S. Department of Housing and Urban Development.

9. Since April 1976 Plaintiff's rent has been subsidized by the Revere Housing Authority pursuant to the HUD Section 8 Housing Assistance Payments Program.

10. On or before July 28, 1977, Plaintiff had qualified for eligibility under the Section 8 Program and was granted a Certificate of Family Participation by the Revere Housing Authority.

11. In June or July of 1977, Plaintiff responded to an advertisement in the Revere Journal placed by John Pace and Michael DeSesa regarding a three-room apartment, the third floor at 59 Dolphin Avenue, Revere, Massachusetts. The advertisement stated that the rent for the apartment was \$225.

12. Plaintiff indicated to the landlords that she was a subsidized tenant under the Section 8 Program with the Revere Housing Authority.

13. Plaintiff and the landlords separately appeared at the Section 8 offices of the Revere Housing Authority located at One Orr Square, Revere and entered into and signed a self-renewing rental agreement and lease, to run from August 1, 1977 until July 31, 1978, calling for a total monthly rent of \$199. Plaintiff and the landlords represented, in a provision of the lease, that the total monthly rent for the apartment was \$199. This representation was false. In fact, they had agreed that the total monthly rent would be \$225.

14. Plaintiff admits that from August 1977 through December 1978 she paid \$26.00 a month to the landlords

desperate and the apartment in question was her last resort. The landlords would not have let the apartment for \$199 monthly.

15. At least by November 1978, Plaintiff had informed the Revere Housing Authority Section 8 office that she was paying to the landlord \$26 per month in excess of the written lease agreement rental amount of \$199 per month.

16. Plaintiff received a letter dated March 8, 1979 from the Revere Housing Authority stating that a determination had been made to terminate her from further rental assistance as of April 1, 1979. The letter stated that "According to the HUD Section 8 Certificate of Family Participation and your past record with us on relocations, you are in violation of the provisions of Rental Assistance."

17. On March 15, 1979 Plaintiff's lawyer sent a letter to the Revere Housing Authority asking them to maintain Plaintiff's benefits until and unless she was provided with notice, hearing, and other due process protections. The letter also requested a response from the Housing Authority by March 20, 1979.

18. On March 27, 1979, the Revere Defendants received notice of this lawsuit and ensuing application for temporary injunctive relief.

19. On March 29, 1979, the Revere Housing Authority agreed to provide Plaintiff a hearing on the issue of termination of benefits. The Housing Authority agreed not to terminate Plaintiff's Section 8 benefits pending that hearing.

20. On March 30, 1979, Roger Witkin, attorney for Revere Housing Authority, sent a letter to the landlords with copies to Plaintiff, her attorney, and the Revere Housing Authority scheduling the termination hearing for April 4, 1979 at 2:00 p.m. at the Revere Housing

letter was "whether or not [Plaintiff] will be terminated as a subsidized tenant, and whether or not [the landlords] will be terminated as a subsidized landlord under the provisions of the Section 8 Program, on the grounds that the tenant has been making and the landlord has been receiving under the table payments during the course of the lease arrangement."

21. On April 4, 1979, a hearing was held at the Revere Housing Authority, 70 Coolidge Street, Revere, Massachusetts.

22. The hearing officer was Edward V. Clucas. Mr. Clucas is and was at that time a defendant in this action and is and was represented herein by Roger Witkin, the same attorney who represents the other Revere Defendants.

23. During the course of the hearing, Mr. Clucas consulted with and was advised by attorney Witkin, who was also representing the Revere Housing Authority at the hearing.

24. In attendance at the hearing were Plaintiff; Karen L. Kruskal, Richard C. Allen, and Steven Glassroth, attorneys for Plaintiff; Roger Witkin, attorney for the Revere Defendants; Michael DeSesa and John Pace; Jean Kerrins; Ida Cafarelli; Carl Hyman; and Allan Nortonen, a certified shorthand reporter.

25. Witnesses were sworn and a stenographic transcript of the proceedings was kept.

26. The transcript of the hearing has been filed in this action.

27. The Revere Housing Authority mailed notice of its decision from the hearing on June 14, 1979. The decision, dated June 7, 1979, ordered "the immediate termination of the Section 8 subsidy" to the landlords and to Plaintiff. The practical effect of the decision was to terminate Plaintiff's Section 8 benefits as of

fraud in plaintiff's misrepresenting that the total monthly rental was \$199 when in fact it was \$225.

29. Plaintiff has been looking for housing and has been unable to find suitable housing for less than \$200 per month.

30. Plaintiff is disabled as a result of a brain tumor. The tumor has been partially surgically removed and treated by radiation. Plaintiff is currently under the care of a neurologist. She takes anti-convulsant medication because she is prone to seizure. When she is tense or under pressure, she suffers from severe headaches and dizziness.

31. Plaintiff's disability is permanent. She will never be able to work and has no prospect of any income other than disability benefits.

32. On June 25 and June 26, 1979, hearings were held on Plaintiff's motion for temporary injunctive relief. The Revere Housing Authority agreed not to terminate Plaintiff's Section 8 subsidy pending the hearing on Plaintiff's motion for preliminary injunctive relief.

33. The Revere Defendants have stipulated that Plaintiff will suffer irreparable harm if her motion for preliminary relief is not granted.

Conclusions of Law

1. The court has jurisdiction of this matter under 28 U.S.C. §§ 1343(3) and 1331(a).

2. The testimony of John Pace at the hearing of April 4, 1979, offered in this hearing by defendant Housing Authority over plaintiff's objection, is admissible under Rule 804(b) because of his unavailability as a witness following his assertion of the privilege not to incriminate himself. However, all findings of fact by the court are independently supported by other evidence offered by the parties.

protected property interest of hers. The April 4, 1979 hearing was fatally flawed. Neither in HUD regulations nor in Revere Housing Authority regulations is there a definition or explanation of the roles of key participants in a hearing such as that conducted at the Revere Housing Authority on April 4, 1979. Especially significant are the roles of the hearing officer and the attorney for the Housing Authority.

4. Due process requires a fair hearing before termination of benefits. *Goldberg v. Kelly*, 397 U.S. 254, 261-266 (1970). If fact issues are at stake, an evidentiary hearing is required. *Id.* If only contested applications of rules or policies to uncontested facts are at stake, a fair hearing is nevertheless required - *cf. id.* at 268 - even though an evidentiary hearing may not be required. "[A]n impartial decision maker is essential." *Id.* at 271.

5. If the hearing officer and others did not understand that his role required impartiality, there was no impartial decision maker. If he and others did understand that he was to be an impartial decision maker, then the hearing was fatally flawed because a single attorney was cast in the conflicting roles of zealous advocate for one of the two principal contenders and, at the same time, active adviser to the impartial decision maker.

6. Although the fact of false representation is incontestable and no genuine issue to the contrary can be raised, plaintiff was and is entitled to a fair and impartial hearing with respect to what legal sanction against such misrepresentation is appropriate. Flaws in the hearing, identified in paragraph 5 of these conclusions, deprived the plaintiff of this right.

7. Irreparable injury to Plaintiff is threatened if relief is not granted.

9. The public interest will be served by granting preliminary relief to Plaintiff.

10. The most appropriate relief to protect against the threatened irreparable harm to Plaintiff is that the Revere Housing Authority and its officers, agents, servants, and employees be directed as follows:

(1) To refrain from enforcing or giving any effect to the decision and order dated June 7, 1979.

(2) To issue to Plaintiff Marilyn Piretti a Section 8 Certificate of Family Participation and to process promptly any requests of hers for lease approval made pursuant to the Certificate.

(3) Pending trial of this case on the merits, to refrain from terminating Plaintiff Marilyn Piretti's Section 8 benefits on the basis of rental overpayments made by her to her landlords during the period August 1977 to December 1978, or on the basis of misrepresentations regarding such payments.

It will be so ordered.



United States District Judge



UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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Sp.

MARILYN FIRETTI, individually and
on behalf of all others similarly
situated, et al.,

Plaintiffs

v.

CARL HYMAN, individually and in
his official capacity as Executive
Director of the Revere Housing
Authority, et al.,

Defendants

Civil Action
No. 79-622-K

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NATIONAL GUARDIANHOUSE
FOR LEGAL SERVICES

July 23 1979

Memorandum

The matter before the court is Plaintiff Arlene Provencher's motion for preliminary injunction. After hearings on June 29, 1979 and July 5, 1979, and consideration of memoranda filed by the parties, the court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff Arlene Provencher is an adult citizen of the United States. She now resides in Pittsfield with her husband Richard and their three children. On the basis of Arlene Provencher's date of application (December 18, 1975), priority (financial hardship), and low-income status, she was given a Certificate of Family Participation on February 1, 1978 under the Section 8 Existing Housing Assistance Payments Program administered by the Pittsfield Housing Authority, a copy of which is attached hereto as "Exhibit A" and incorporated by reference.

2. The Pittsfield Housing Authority is a public body politic and corporate, created pursuant to the authority of the precursor of M.G.L. Chapter 121B, Section 3. It is a public housing agency as referred to at 42 U.S.C. Section 1437a(6).

3. Arthur C. McGill is Executive Director of the

William E. Flynn is the Assistant Director of the Pittsfield Housing Authority. He is responsible for assisting the Executive Director to administer and operate the Pittsfield Housing Authority and is Director of the Section 8 Housing Assistance Payments Program which it administers.

5. Nicholas Speranzo, Frank Pupo, Alfred Bradley, Ronald Stratton and Leon Phelps are officers and members of the Pittsfield Housing Authority, appointed pursuant to M.G.L. Chapter 121B.

6. After certifying eligibility of a housing unit at 177 Burbank Street, Pittsfield, Massachusetts, for participation under the Section 8 program, the Pittsfield Housing Authority began making housing assistance payments on Arlene Provencher's behalf to her landlord, John Ramos.

7. Arlene Provencher and her landlord, John Ramos, entered into a Section 8 Rental Agreement for a rental unit within the prescribed fair market rent limits; see attached Exhibit "B". John Ramos entered into a Housing Assistance Payments Contract with the Defendant Pittsfield Housing Authority. A copy of the Contract is attached as "Exhibit C," and incorporated herein by reference.

8. Under the Rental Agreement, "Exhibit B," Arlene Provencher was to occupy the unit until February 28, 1979 at a rental of \$150.00 per month (\$145.00 of which was to be paid by the Pittsfield Housing Authority directly to the landlord), utilities not included.

9. The Certificate of Family Participation, the Rental Agreement, and the Housing Assistance Payments Contract, entitled Plaintiff, Arlene Provencher, to substantial benefits. Plaintiff, Arlene Provencher,

remainder of the rent to the landlord on plaintiff's behalf.

10. Arlene Provencher began receiving rental assistance benefits under the Section 8 Existing Housing Assistance Payments Program on March 1, 1978.

11. Subsequently, at a time in October or November, 1978 (the evidence not clearly fixing the date and the exact date being immaterial to issues now before the court) plaintiff Arlene Provencher and her family moved out of the unit at 177 Burbank Street, Pittsfield, Massachusetts and moved into a unit in Pittsfield which was not certified under the Section 8 Program.

12. Plaintiff's current rent is \$150.00 per month (utilities not included) at 102 Howard Street, Pittsfield, Massachusetts.

13. On and after December 1, 1978, as a result of Arlene Provencher's moving out of the subsidized housing unit at 177 Burbank Street, Pittsfield, Massachusetts, no further Section 8 benefits were paid to her or for her benefit.

14. Pittsfield Housing Authority did not serve any notice upon Arlene Provencher before discontinuance of payment of Section 8 benefits to her or for her benefit effective at the end of November 30, 1978, and did not offer her a hearing before making a determination that the benefits would no longer be paid.

15. Because Arlene Provencher and her husband have not paid the rent on their current apartment Arlene Provencher's current landlord proposes to initiate eviction proceedings against her. He has already given her an eviction notice, a copy of which is attached hereto as "Exhibit D" and incorporated herein by reference, and the deadline in it has expired. The landlord has commenced court proceedings following the eviction notice.

16. Process in the proceeding for eviction of Arlene Provencher and her family by her present landlord was served on her on June 30, 1979 and requires appearance within 20 days after service. Irreparable harm to Arlene Provencher is threatened by the prospect of imminent eviction and the nonrecognition by the defendant Pittsfield Housing Authority of Arlene Provencher's claim to entitlement to a certificate.

17. Service of process and notice of the hearings in this matter were effective upon Pittsfield Housing Authority before these hearings.

Conclusions of Law

1. In administering the Section 8 benefits that are the subject of this action, the defendants Arthur C. McGill, William E. Flynn, Nicholas Speranzo, Frank Pupo, Alfred Bradley, Ronald Stratton, Leon Phelps, and the Pittsfield Housing Authority, were acting pursuant to the powers granted by Mass. Gen. Laws c. 121B, §§ 3, 11(b), and 26(m). The court has subject matter jurisdiction over claims against these defendants under 28 U.S.C. § 1342(3). Cf. *Caulder v. Durham Housing Authority*, 433 F.2d 998, 1001 (4th Cir. 1970), cert. denied 401 U.S. 1003 (1971). The court has subject matter jurisdiction over claims against the defendants Patricia R. Harris and Marvin Siflinger under 28 U.S.C. § 1331(a).

2. There is a strong likelihood that Arlene Provencher will prevail on the merits of her claim that termination of her benefits violated a federally protected property interest of hers.

3. Irreparable injury to Arlene Provencher is threatened, as found in paragraph 16, if relief is not granted.

4. The threatened harm to defendants from temporary

5. The public interest will be served by granting relief to Arlene Provencher.

6. The most appropriate relief to protect against the threatened irreparable harm to Arlene Provencher, as found in paragraph 16 of the findings of fact, is that Pittsfield Housing Authority and its officers, agents, servants, and employees be directed as follows:

1. To place Plaintiff Arlene Provencher in the status of a participant in good standing in the Section 8 program administered by the Pittsfield Housing Authority.
2. To issue to Plaintiff Arlene Provencher a Section 8 Certificate of Family Participation, to assist her to find a qualifying unit, and to process her requests for lease approval made pursuant to the certificate.
3. To pay housing assistance payments to or on behalf of Arlene Provencher, in an amount determined pursuant to 24 CFR Parts 882 and 889, from this date until payments are initiated pursuant to paragraph 2 of this order.

It will be so ordered.

Robert E. Keaton

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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MARILYN PIRETTI, individually and
on behalf of all others similarly
situated, et al.,

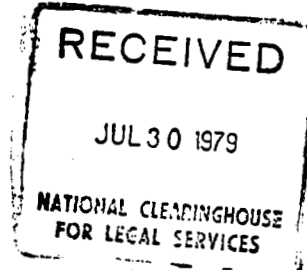
Plaintiffs

v.

CARL HYMAN, individually and in
his official capacity as Executive
Director of the Revere Housing
Authority, et al.,

Defendants

Civil Action
No. 79-622-K



July 23, 1979

Order

In accordance with findings of fact and conclusions
of law filed this day, it is ordered that Pittsfield
Housing Authority and its officers, agents, and employees
be directed as follows:

- (1) To place Plaintiff Arlene Provencher in the
status of a participant in good standing in the Section 8
program administered by the Pittsfield Housing Authority.
- (2) To issue to Plaintiff Arlene Provencher a Section 8
Certificate of Family Participation, to assist her to
find a qualifying unit, and to process her requests for
lease approval made pursuant to this certificate.
- (3) To pay housing assistance payments to or on
behalf of Arlene Provencher, in an amount determined
pursuant to 24 CFR Parts 882 and 889, from this date
until payments are initiated pursuant to paragraph 2
of this order.

Robert E. Keenan

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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Marilyn Piretti et al.

v.

Carl Hyman et al.

Civil Action
79-622-K

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JUL 30 1979

July 23, 1979

Opinion on Motion for Preliminary Injunction

MASSACHUSETTS
DISTRICT COURT

The matter before the court is Plaintiff Marilyn Piretti's motion for preliminary injunction.

I. The Factual and Procedural Framework

Plaintiff, a 35-year-old resident of the City of Revere, is permanently disabled as a result of a brain tumor partially surgically removed and treated by radiation. Before the events at issue, she had qualified for eligibility under a HUD Section 8 Housing Assistance Payments Program administered by the defendant, Revere Housing Authority. The Housing Authority is a public body created under Mass. Gen. Laws c. 121B, § 3 and is a public housing agency as defined in 42 U.S.C. § 1437a(6).

Plaintiff and her landlords appeared separately at the Housing Authority Section 8 offices and executed a rental agreement one provision of which represented that the total monthly rent was \$199. This representation was false. In fact, they had agreed upon a monthly rent of \$225, and from August 1977 through December 1978 plaintiff paid the additional \$26 monthly to her landlords. Initially this was done without knowledge of the Housing Authority and its agents. Not later than November 1978, agents of the Housing Authority became aware of the additional payments. Without prior notice and hearing, plaintiff received a letter dated March 8, 1979, from the Housing Authority stating that

benefits have been continued pending disposition of the present motion. Meanwhile, on March 30, 1979, the attorney for the Housing Authority sent a letter to plaintiff's landlords, with copies to plaintiff, her attorney, and the Housing Authority, scheduling a hearing on April 4, 1979 on the question "whether or not [plaintiff] will be terminated as a subsidized tenant, and whether or not [the landlords] will be terminated as a subsidized landlord under the provisions of the Section 8 Program, on the grounds that the tenant has been making and the landlord has been receiving under the table payments during the course of the lease arrangement."

At the hearing of April 4, 1979, the hearing officer was the Chairman of the five commissioners of the Revere Housing Authority. During the hearing, he consulted with and was advised by the attorney who had sent out the March 30 notice of the hearing. The attorney also served as zealous advocate for the position taken by executive officers and agents of the Housing Authority, examining and cross-examining witnesses and presenting oral argument to the hearing officer. On June 14, 1979, the decision of the hearing officer, dated June 7, 1979, was mailed from the office of the attorney.

The decision of the hearing officer ordered "the immediate termination of the Section 8 subsidy" to the landlords and the plaintiff. If an agreement for stay had not been reached, the practical effect of the order would have been to terminate benefits effective July 1, 1979.

The lease between plaintiff and her landlords runs out at the end of July, 1979. Thus, the stay agreed upon renders moot any controversy over benefits related to the present lease. If the termination order is allowed to stand, however, the Housing Authority defendants take the position that plaintiff must apply now for

"under-the-table" payments, plaintiff will enter a waiting list behind others and probably will receive no Section 8 benefits for a period of months, at least. In contrast, had the determination not been made against her, when the present lease runs out she would have been entitled to seek another qualifying rental unit and, if successful in finding one that the Housing Authority determined to be acceptable, to receive Section 8 benefits after July, 1979.

In the main action plaintiff seeks both (1) protection of her Section 8 benefits against termination by reason of the additional monthly payments beyond those stated in the lease and (2) protection against future deprivation of her right to Section 8 benefits without due process of law. Plaintiff joins the Secretary of Housing and Urban Development as a defendant and, on due process grounds, challenges HUD regulations as well as Revere Housing Authority practices and procedures. The question immediately before the court is plaintiff's motion for preliminary injunction to protect her Section 8 benefits pending determination of the more complex issues of the main action.

II. Did Plaintiff Receive a Fair Hearing?

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court determined that due process required an evidentiary hearing before termination of state financial aid under a federally-assisted program of Aid to Families with Dependent Children. Interpreting the meaning of the fundamental requirements of "opportunity to be heard" at a "meaningful time and in a meaningful manner," the Court stated:

In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own

Id. at 267-68.

In footnote 15, appended to the foregoing passage, the Court added:

This case presents no question requiring our determination whether due process requires only an opportunity for written submission, or an opportunity both for written submission and oral argument, where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues. See FCC v. WJR, 337 U.S. 265, 275-277, 69 S.Ct. 1097, 1103-1104, 93 L.Ed. 1353 (1949).

Id. at 268, n. 15.

More recently, in Mathews v. Eldridge, 424 U.S. 319 (1976) the Court held that the Due Process Clause of the Fifth Amendment does not require that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing. Pointing out that only in Goldberg "has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation," the Court distinguished Social Security disability benefits from the welfare benefits at issue in Goldberg because the disability benefits are not based on the financial need of persons "on the very margin of subsistence." Id. at 340. The Section 8 housing benefits at issue in the present case are closely analogous to those in Goldberg.

May an evidentiary hearing not be required, however, because of other differences between Goldberg and the present case? Here, the fact of false representation is incontestable. No genuine issue can be raised with respect to whether plaintiff and her landlords falsely represented that the total monthly rent was \$199. Just as summary judgment procedures may be used in judicial proceedings, in lieu of evidentiary hearings, to determine facts as to which no genuine dispute exists, the determination of the incontestable fact of false representations might have been made on written documentation without an oral evidentiary hearing in which witnesses were examined

were fatally deficient in failing to give notice that misrepresentation of facts material to an application for Section 8 benefits is forbidden. Regulations so prolix that they stated all points as fundamental and obvious as this would defeat the very purpose of clear communication. Needed information would be inaccessible in the encyclopedic recitation of the obvious.

A fair hearing, and perhaps even an evidentiary hearing, was nevertheless essential in this case. In the first place, the court has not been advised in this hearing of any HUD or Housing Authority regulation that expresses "rules or policies" to determine what legal sanction is appropriate for a particular misrepresentation in a particular context. The regulations are not, for that reason, fatally deficient. Again, to treat them so would be to demand obfuscating prolixity. Their incompleteness in this respect, however, does have the consequence that in a particular case the decision maker must apply some standards or rules or policies beyond the well understood generalization that material misrepresentation is forbidden. In doing so, the decision maker must choose among alternatives in determining what sanction is appropriate. The Revere Housing Authority has not contended in this court proceeding that the sanction should be as severe as permanent disqualification of plaintiff from ever again receiving Section 8 benefits. It is readily apparent that not one but many alternatives might be fashioned between that extreme of permanent disqualification and the other extreme of no sanction whatsoever. Regardless of whether this choice among alternative sanctions be viewed as rulemaking or as merely application to the particular case of a general rule or standard derived from an authoritative source, the decision involves choice rather than ministerial application.

to meet it, even if the decision does not depend on disputable issues of fact as to which an evidentiary hearing would be required. This notice and opportunity are part of the "essence of due process." Cf. Eldridge, 424 U.S. at 348-49. Moreover, in view of the plaintiff's credible claim of extreme financial hardship, a decision maker's consideration of alternative remedies in this case might be affected by one or another resolution of disputed facts bearing upon her claim of excuse and her claim of notice to Housing Authority agents and acquiescence by them in the additional payments beyond the monthly rent stipulated in the lease. Thus, even though the fact of material misrepresentation was undisputed, the plaintiff was nevertheless entitled to a fair hearing before termination of her benefits.

In Goldberg, id. at 266-67, the Court states that "the pre-termination hearing need not take the form of a judicial or quasi-judicial trial." An eminent scholar, Professor Kenneth Davis, writing before Eldridge was decided and finding in Goldberg an "explicit requirement" of ten elements of a trial, concludes that the Court's statement that the hearing need not be a judicial or quasi-judicial trial "must be regarded as an inadvertence." K. Davis, Administrative Law Treatise § 7.00-1, p. 244 (Supp. 1976). It seems more appropriate for a District Judge to take the Court at its word - and especially so in light of Eldridge - and to recognize the possibility that the defendants in this case might have been able to fashion a hearing procedure that met due process requirements without providing a judicial or quasi-judicial trial. In any event, however, Goldberg explicitly states that, "of course, an impartial decision maker is essential." 397 U.S. at 271.

The evidence before the court indicates that the present case is the first instance in which the Housing

that in these circumstances good faith mistakes regarding the way the hearing is conducted may occur. If they substantially impair an essential element of fair hearing, however, the absence of bad faith cannot excuse the deficiency. When the hearing officer is a person regularly associated with the Housing Authority, even though only as a member of the governing board rather than in an executive or operational role, it is imperative that insulation be maintained between the hearing officer, on the one hand, and, on the other hand, the executive and operational personnel and the attorney who represents the latter group. Private off-the-record consultation between the hearing officer and any of the latter group, whatever the subject of the consultation may be, gives an appearance of bias. If on the subject matter of the hearing or on the way in which it has been or is to be conducted, such consultation is fundamentally inconsistent with the hearing officer's obligation to be scrupulously impartial.

The relationship among the hearing officer, the Housing Authority personnel, and the Housing Authority's attorney is an especially sensitive matter. The role of the hearing officer in this case required that he insulate himself from any sense of commitment to accepting the advice of Housing Authority personnel on the matters at issue in the case. If he did not understand that his role required such carefully guarded impartiality, the hearing offered to plaintiff on April 4 was fatally flawed for lack of an impartial decision maker. If he and others did understand that he was to be an entirely impartial decision maker, then the hearing was nevertheless fatally flawed because the hearing was so conducted that a single attorney was cast in two conflicting roles. The attorney was called upon, on the one hand, to perform

decision maker during the hearing.

The hazards of such a dual role were eloquently stated by the Joint Conference on Professional Responsibility of the American Bar Association and the Association of American Law Schools, Co-Chaired by John D. Randall and Professor Lon L. Fuller:

In a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by any arbiter who attempts to decide a dispute without the aid of partisan advocacy.

Such an arbiter must undertake, not only the role of judge, but that of representative for both of the litigants. Each of these roles must be played to the full without being muted by qualifications derived from the others. When he is developing for each side the most effective statement of its case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving--in analysis, patience and creative power. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.

Fuller and Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1160 (1958).

Taking the Court in Goldberg at its word, we need not conclude that an adversary, trial-type hearing such as is praised in this statement of the Joint Conference is the only type of hearing that will meet the requirements of due process. Nor is it necessary that the hearing either have all the characteristics of an adversary trial or none. But, with respect to the participation of their single attorney in the hearing, the Housing Authority cannot have it both ways. If they wish the attorney to serve as their zealous advocate, it cannot be given to him to serve also as the adviser to the impartial decision maker. To assign both functions to one person is to imperil both the fact and the appearance

For these reasons and on the basis of more detailed findings and conclusions separately filed, the Housing Authority will be temporarily enjoined from enforcing the termination order of June 7, 1979, pending disposition of the main action on the merits.

Robert E. Keeton

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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lp.

Marilyn Piretti et al.

v.

Carl Hyman et al.

Civil Action
79-622-K

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JUL 30 1979

NATIONAL CLEARINGHOUSE
FOR LEGAL SERVICES

July 23, 1979

Order

In accordance with the opinion and the findings of fact and conclusions of law filed this day, it is ordered that the Revere Housing Authority and its officers, agents, servants, and employees are directed as follows:

(1) To refrain from enforcing or giving any effect to the decision and order dated June 7, 1979.

(2) To issue to Plaintiff Marilyn Piretti a Section 8 Certificate of Family Participation and to process promptly any requests of hers for lease approval made pursuant to the Certificate.

(3) Pending trial of this case on the merits, to refrain from terminating Plaintiff Marilyn Piretti's Section 8 benefits on the basis of rental overpayments made by her to her landlords during the period August 1977 to December 1978, or on the basis of misrepresentations regarding such payments.

Robert E. Kerton

United States District Judge

