

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brenda L. Romagna :
 :
 v. : No. 1648 C.D. 2011
 : Submitted: March 16, 2012
 Housing Authority of :
 Indiana County, :
 Appellant :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
 HONORABLE MARY HANNAH LEAVITT, Judge
 HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY JUDGE LEAVITT

FILED: July 13, 2012

The Housing Authority of Indiana County appeals an order of the Court of Common Pleas of Indiana County (trial court) concluding that Brenda L. Romagna’s (Applicant) conviction for drug paraphernalia did not disqualify her for low cost housing assistance under the applicable statute and regulations. Applicant, a recovering drug and alcohol user, was rejected for housing assistance because of a drug paraphernalia conviction. The Housing Authority argues that the trial court erred. It contends that a conviction for possession of drug paraphernalia is a type of “drug-related criminal activity” that renders an applicant ineligible under the applicable statute and regulation. Given the definitions in the applicable law, we find no merit to the Housing Authority’s argument. We affirm.

The Housing Choice Voucher Program (Program), also known as the “Section 8 program,” provides housing at reduced costs to low-income families.

See Section 8(a) of the Housing and Community Development Act of 1974, 42 U.S.C. §1437f(a). The program is funded by the federal government but administered by local public housing authorities. 42 U.S.C. §1437f(o). The local housing authority evaluates all applicants, and this evaluation includes a criminal background check. The Housing Authority's background check on Applicant revealed her conviction for possession of drug paraphernalia,¹ in violation of Section 113(a)(32) of The Controlled Substance, Drug, Device and Cosmetic Act.² The Housing Authority rejected Applicant on the basis of this conviction.

Applicant appealed. A hearing officer reviewed the matter and concluded that Applicant had been properly denied assistance.

Applicant then appealed to the trial court, which heard the matter *de novo* because a record had not been made at the administrative hearing.³ The Housing Authority and Applicant each presented evidence.

Holly Hall, a Section 8 Coordinator, testified. She explained that in May 2011, Applicant applied for an apartment to be occupied by herself and her minor son. Hall's background check revealed Applicant's arrest for use or

¹ The record does not identify what paraphernalia Applicant possessed.

² Act of April 14, 1972, P.L. 233, No. 64, *as amended*, 35 P.S. §780-113(a)(32). It prohibits the following:

The use of, or possession with intent to use, drug paraphernalia for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packing, repacking, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of this act.

35 P.S. §780-113(a)(32).

³ Where a record before a local agency is incomplete a trial court may remand or may hear the appeal *de novo*. *Cain v. Allegheny County Housing Authority*, 986 A.2d 947, 952 n.7 (Pa. Cmwlth. 2009).

possession of drug paraphernalia on July 10, 2010, to which she had entered a guilty plea on April 26, 2011. Based on that conviction, Hall denied the application.

Hall explained that the Housing Authority's policy is that any drug-related or violent criminal activity within the three years prior to the application results in an automatic denial. She conceded that Applicant's conviction did not involve violence. She also acknowledged that the Housing Authority's policy is not mandated by federal law; rather, each local public housing authority is vested with discretion to make such decisions. The Housing Authority has exercised its discretion to deny admission for any drug-related activity, which it believes to include possession of drug paraphernalia. Should Applicant incur no new criminal convictions for the next three years, she will then be eligible.

Donna Franks, the hearing officer, testified. She acknowledged that Applicant presented evidence of her ongoing drug and alcohol rehabilitation at the hearing. However, because the prerequisite three years from the date of her arrest for possession of drug paraphernalia had not yet lapsed, she denied the appeal.

Applicant then testified. She explained that she was currently receiving housing assistance from the Indiana County Community Action Program (ICCAP). However, the Children and Youth Agency of Indiana County does not consider her residence acceptable because it is too close to a highway. Applicant's son cannot live with her until she finds more suitable accommodations. Accordingly, she sought housing from the Housing Authority. Applicant testified that she recently completed a ten-month program for alcohol and drug abuse. She continues to participate in a therapeutic program; takes parenting classes; and is complying with the terms of her probation. She submitted a letter from her doctor

stating that as of March of 2011, she has drug urine screenings every two weeks, and they have all been negative.

Applicant then presented the testimony of Susan Graham, her case manager for the past five months. Graham testified that Applicant is one of her favorite clients because she always reports prepared and on time. She testified that Applicant has done everything that has been asked of her and is on the road to recovery.

Shauna Frazee also testified for Applicant. Frazee works for ICCAP and at a homeless shelter, where Applicant stayed before her placement with ICCAP. Frazee explained that ICCAP will provide housing only for 18 months; she has been trying to obtain other housing for Applicant without success.

Finally, Michael Krafick, who works at the Armstrong-Indiana Drug and Alcohol Commission, testified. He explained that Applicant is enrolled in his program and is making significant progress. He testified that becoming homeless would have a negative impact on her recovery.

The trial court found that the testimony relating to Applicant's treatment efforts was irrelevant because the Housing Authority's regulation bans housing to those convicted of drug-related crimes for three years, regardless of their treatment efforts. However, the Housing Authority's regulation is limited to convictions for "drug-related criminal activity." The trial court found that possession of drug paraphernalia was not that type of conviction; sustained Applicant's appeal; and ordered the Housing Authority to process her application for housing.

The Housing Authority appealed to this Court and raises one issue for our review.⁴ It contends that the trial court erred in concluding that Applicant’s conviction for drug paraphernalia does not constitute drug-related criminal activity.⁵

We begin with a review of the applicable law. Regulations of the U.S. Department of Housing and Urban Development authorize a local housing authority to deny entry to an applicant who has engaged in “[d]rug-related criminal activity.” 24 C.F.R. §982.553(a)(2)(ii)(A)(1).⁶ This regulation defines “drug-related criminal activity” as

the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug.

24 C.F.R. §5.100. It defines “drug” as any “controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. §802).” 24 C.F.R. §5.100.

This regulation parrots Section 8(f)(5) of the Housing and Community Development Act of 1974, 42 U.S.C. §1437f(f)(5), which also defines “drug-related criminal activity” as “the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled

⁴ Applicant has not filed a brief in this appeal.

⁵ Our review is limited to whether the findings of fact are supported by substantial evidence, whether constitutional rights were violated or whether an error of law was committed. *Zajac v. Altoona Housing Authority*, 626 A.2d 1271, 1272 (Pa. Cmwlth. 1993).

⁶ The regulation also permits denial into the Program based on “[o]ther criminal activity which may threaten the health, safety, or right to peaceful enjoyment” of other residents or Housing Authority staff or agents. *See* 24 C.F.R. §§982.553(a)(2)(ii)(A)(3) and (4).

substance (as defined in Section 802 of title 21).” Title 21 states that a controlled substance is a

drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

21 U.S.C. §802(6). Title 21 incorporates the meaning of “drug” set forth in the Food, Drug, and Cosmetic Act, 21 U.S.C. §321(g)(1), which states as follows:

The term “drug” means (A) articles recognized in the official United States Pharmacopœia, official Homœopathic Pharmacopœia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clause (A), (B), or (C)....

21 U.S.C. §321(g)(1).

Neither the definition of “drug” nor “controlled substance” includes drug paraphernalia. The Housing Authority does not offer any authority for its view that these terms do include drug paraphernalia. It merely argues that the trial court’s analysis ignores the reality that possession of drug paraphernalia is a crime because it goes hand-in-hand with drug usage.

The trial court relied upon the Housing Authority’s own definition of “drug-related criminal activity,” which specifies possession or use of a drug as “drug related.” It does not mention drug paraphernalia. Notably, the elements of

the crime of possessing drug paraphernalia do not require actual possession of a drug. We agree with the trial court's analysis.

A recent decision of the Pennsylvania Superior Court is instructive. In *Commonwealth v. Pitner*, 928 A.2d 1104, 1111 (Pa. Super. 2007), the defendant argued that his sentence for possession and delivery of marijuana should have merged with his sentence for possession of drug paraphernalia, because the drug paraphernalia charge was based on the use of the plastic bags to store the marijuana. The Superior Court rejected this argument. It explained that “[t]he crime of possessing a controlled substance does not involve, as a statutory element, the possession of paraphernalia. See 35 P.S. §780-113(a)(16).”⁷ *Pitner*, 928 A.2d at 1111. Likewise, the court reasoned that “possessing paraphernalia does not have as a material element, the possession of a controlled substance. See 35 P.S. §780-113(a)(32).” *Pitner*, 928 A.2d at 1111. The Superior Court concluded that the separate offenses did not merge for the purpose of sentencing.

This Court's holding in *Keim v. Department of Transportation, Bureau of Driver's Licensing*, 887 A.2d 834 (Pa. Cmwlth. 2005), on which the trial court relied, is also instructive. In *Keim*, a licensee's operating privilege was suspended under Section 1532(c) of the Vehicle Code, 75 Pa. C.S. §1532(c), after he was convicted of manufacturing a controlled substance. Section 1532(c) states, in relevant part, that a license shall be suspended upon “conviction of *any offense involving the possession, sale, delivery, offering for sale, holding for sale or giving away of any controlled substance*” 75 Pa. C.S. §1532(c) (emphasis added).

⁷ Section 113(a)(16) of The Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-113(a)(16), prohibits “[k]nowingly or intentionally possessing a controlled or counterfeit substance by a person not registered under this act,” or by an appropriate board, or pursuant to a valid prescription.

Keim argued that his conviction for manufacturing a controlled substance was not one of the offenses specifically listed in the statute. We disagreed, determining that the phrase “any offense involving possession ... of a controlled substance” included manufacturing it, because one cannot manufacture a controlled substance without possessing it.

The trial court reasoned that a conviction for “drug-related criminal activity” requires the possession of a controlled substance; possession of drug paraphernalia does not. The Housing Authority’s definition of drug-related criminal activity does not specify that drug paraphernalia is “drug-related.” Nor does it use language broad enough to sweep possession of paraphernalia into the phrase “drug-related criminal activity.” Instead, the definition lists specific activities and they are limited to the actual use or possession of a drug, not paraphernalia.

We hold that under the Housing Authority’s own regulation, a drug-related criminal activity requires the actual use or possession of a drug, and it does not include possession of paraphernalia. Applicant’s drug paraphernalia conviction was not relevant to her eligibility for housing.⁸

Accordingly, the order of the trial court is affirmed.

MARY HANNAH LEAVITT, Judge

⁸ Applicant admitted to cocaine use at the hearing. However, the Housing Authority did not claim before the trial court or before this Court that this admission of prior drug use barred her entry into the program.

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	:	
Housing Authority of	:	
Indiana County,	:	
Appellant	:	

ORDER

AND NOW, this 13th day of July, 2012, the order of the Court of Common Pleas of Indiana County dated August 4, 2011 in the above captioned matter, is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge