COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
CIVIL ACTION
NO. **09H784CV000531**

KEISHAANN WEEKES,

Plaintiff

VS.

BOSTON HOUSING AUTHORITY,

Defendant

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT

Introduction

Plaintiff Keishaann Weekes ("Weekes") 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 Weekes's participation in the federal Section 8 Housing Choice Voucher Program.[1] The hearing officer who heard Weekes's informal administrative appeal upheld the BHA's decision to terminate based upon the BHA's determination that Weekes's committed a serious violation of her lease by failing to prevent her guest (Raymond McClean) from engaging in illegal drug related criminal activity in her apartment.[2] In response to Weekes'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 Weekes's complaint.

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[1] Weekes filed a second amended complaint on October 16, 2009.

[2] The BHA had also asserted as ground for termination that Weekes allowed McClean to live at her apartment as an unauthorized occupant in violation of her Section 8 family obligations. The hearing officer determined that "there is insufficient evidence to support a finding that Mr. McClean was residing in the unit." (Record Exhibit C, Hearing Officer Decision, p. 2). Neither party has challenged that finding and ruling in this certiorari action.

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 BHA has a Housing Choice Voucher Program Administrative Plan ("HCVP Plan") that sets forth the rules that govern the BHA's administration of the Section 8 program.[3] Section 13.5.2 of the HCVP

[3] The HCVP administrative plan was not included as part of the informal hearing record or otherwise introduced as evidence. However, in his decision the BHA hearing officer references the applicable provisions of the plan. For purposes of ruling on this petition I shall accept as true the accuracy of those references. I shall further assume, that the HCVP plan is consistent with the applicable HUD regulations that govern the Section 8 program, 24 CFR, § 982, et seq.

Plan includes a list of Section 8 participant "Family Obligations." See, 24 CFR § 982.551 (a) to (n). The family obligation of relevance here provides that Section 8 participants are prohibited from committing serious or repeated lease violations. Section 13.3 of the HCVP Plan provides that a participant's violation of the "family obligations" gives the BHA discretion to terminate that participant's Section 8 subsidy. Section 8(c)(1)(c) of the Section 8 lease addendum (BHA Exhibit C) provides that a landlord may terminate the tenancy if any member of the household or a guest engages in "any drug-related criminal activity on or near the premises."[4] Section 13.7.1 of the HCVP Plan affords a participant the right to an informal hearing to appeal the BHA's decision to terminate Section 8 assistance. Under Section 12.7.5(i) of the HCVP plan, "the hearing officer shall 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). [5]

The BHA is not a state agency subject to the administrative appeal provisions of G.L. c. 30A. Therefore, Weekes has sought relief by bringing an action in the nature of

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[4] A local housing authority's ability to terminate a "participant's" Section 8 assistance is governed by HUD regulations at 24 C.F.R. §§§ 982.551 – 553. The Section 8 regulations pertaining to termination of assistance generally, 24 C.F.R. § 982.552(c)(1)(i), provides that the PHA may terminate program assistance for a participant "[i]f the family violates any family obligations under the program (see § 982.551). See § 982.553 concerning denial or termination of assistance for crime by family member." The HUD regulations pertaining to termination of Section 8 assistance for drug-related criminal conduct, 24 C.F.R. § 982.553(b)(1), provides that "[t]he PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that . . . (i)(A) [a]ny household member is currently engaged in any illegal use of drugs . . . (B) [a] pattern of illegal use of a drug by any household member interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents . . . (ii) . . . any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing . . . (iii) . . . any household member violated the family's obligations under § 982.551 not to engage in drug-related criminal activity. . . . (iv) . . . any household member has violated the family obligation under §982.551 not to engage in violent criminal activity."

[5] Section 13.6.1 and 13.7.5 of the HCVP Plan provides that the hearing officer may consider any mitigating circumstances and other relevant circumstances presented by the participant including "the seriousness of the violation, the extent of participation or culpability of individual family members, mitigating circumstances 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 violation(s)."

certiorari pursuant to G.L. c. 249, § 4.[6] 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).[7]

Since I cannot substitute my judgment for that rendered by the BHA and the hearing officer, my consideration of Weekes's certiorari petition shall be based solely upon the evidence presented at the informal hearing. I shall limit my review of the Hearing Officer's decision to a determination as to whether the Hearing Officer's factual findings and legal conclusions were based upon legal error.

The following facts were presented by testimony and through documents submitted at the informal hearing.

At all times relevant to this action Weekes resided as a tenant at 186 Adams Street, Suite 1, in the Dorchester section of Boston. Her tenancy was subsidized under the provisions of the Section 8 program. Weekes and her three children are listed on her

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[6] Weekes commenced this action within the sixty-day limitation period set forth in G.L. c. 249, § 4. Although Weekes has chosen to pursue a certiorari petition, "[j]udicial review of the termination or deprivation of Federal housing benefits has long been framed as a claim for deprivation of a vested property interest without due process of law (citations omitted)." *Wojik*, supra. at p. 105, n.4.

[7] 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. . ."

lease as the only authorized occupants. The BHA administered Weekes's Section 8 voucher.

On February 9, 2009, the BHA gave Weekes a written notice entitled "Proposed Termination of Section 8 Rental Assistance" (BHA Record Exhibit A). The reason the BHA gave for terminating Weekes's Section 8 rental assistance was that she (1) failed to request BHA approval to add a family member as an occupant of the unit,[8] and (2) engaged in serious or repeated violations of her lease, specifically that on January 8, 2009, police seized marijuana in her apartment.

Weekes appealed that decision and requested that the BHA provide her with an informal hearing. The informal hearing was conducted before a BHA hearing officer on April 7, 2009.

In a written decision issued on May 19, 2009, the hearing officer upheld the BHA's decision to terminate Weekes's Section 8 rental assistance (Record Exhibit C). The hearing officer's decision was based upon his factual findings and legal conclusion that Weekes had allowed her apartment to be used for drug-related criminal activity. He concluded that such activity constituted a serious or repeated violation of Weeke's Section 8 lease, and for that reason constituted a violation of the family obligation set forth in Section 13.3 of the HCVP plan.

The hearing officer's factual findings regarding the alleged drug-related criminal activity were based entirely upon the statements set forth in a police incident report dated January 8, 2009 (BHA Record Exhibit B). The report states that at approximately 4:55 p.m., Boston police officers executed a search warrant and entered Weekes's apartment. Weekes and a man named Raymond McClean were present. The police report states that among other items the police recovered (1) "5 clear plastic bags containing a green vegetable matter *believed to be Class D marijuana*" (emphasis added) from McClean's front pocket, (2) "1 clear plastic bag containing a green vegetable matter *believed to be Class D marijuana* from kitchen drawer" (emphasis added), (3) "grey colored fuzion scale, and (4) "4 1x1 clear plastic baggies." The police report states that the seized vegetable matter was forwarded to the state laboratory for analysis.

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[8] See fn. 2, supra. at pg. 1.

Evidence other than the testimony of a chemist or certified state laboratory report may be used to establish that the substance that the police seized during the search of Weekes's apartment was marijuana. "Proof that a substance is a particular drug need not be made by chemical analysis and may be made by circumstantial evidence." *Commonwealth v. Dawson*, 399 Mass. 465 (1987). In other words, a police officer can, based upon his training and experience, render an opinion that a substance he seized from a suspect is a particular drug. However, the Supreme Judicial Court in *Dawson*, supra. at 467, cautioned that "[w]e suspect it would be a rare case in which a witness's statement that a particular substance looked like a controlled substance would alone be sufficient to support a conviction." At the informal hearing the BHA did not have to meet the criminal burden of proof in defending its decision to terminate Weekes's Section 8 subsidy. However, it had to prove by a preponderance of the evidence that marijuana was found in Weekes's apartment. At a minimum, in the absence of other corroborating evidence (such as the testimony of a chemist, a certified chemical analysis or the defendant's admission), what the BHA had to present at the informal hearing was testimony from a police officer who could opine based upon his personal knowledge and experience that the vegetable matter at issue was marijuana. That opinion would have to be supported with testimony regarding the specific factors (including his observations and sense impressions) that led the police officer to reach his conclusion. The court would then determine what weight to give that testimony.

The hearing record does not include a drug analysis report. There is no evidence in the hearing record that the state laboratory ever analyzed the "green vegetable matter" that had been seized during the search of Weekes's apartment. No police officer testified at the informal hearing. The record does not contain any affidavits or other written statements from any police officer that could be construed as an opinion (based upon the officer's education, training or experience) that the "green vegetable matter" was in fact marijuana. The statements set forth in the police report, standing alone, are insufficient to establish by a preponderance of the evidence that the "green vegetable matter" seized during the search of Weekes's apartment was marijuana. The words contained in the police report that vegetable matter is "believed to be" marijuana do not constitute opinion

evidence that is sufficiently reliable to support the hearing officer's finding that Weekes's apartment was used for illegal-drug related activity.

In his written decision, the hearing officer attempted to buttress his conclusion by suggesting that because Weekes "did not dispute that Mr. McClean was in possession of illegal drugs, which were packaged in a manner indicating an intent to sell or otherwise distribute them" (BHA Record Exhibit C, p.2), she in effect admitted that she allowed her apartment to be used for illegal drug-related activity. The hearing transcript does not provide any support for the hearing officer's conclusion that Weekes knew and admitted that marijuana was in her apartment at the time the police entered her apartment. A review of the hearing transcript shows that Weekes did not say (or fail to say) anything at the hearing that could be construed as an admission that marijuana was in her apartment or in McClean's possession at the time of the police search. Weekes testified only that (1) she did not know that McClean had been involved with illegal drugs (Transcript, p. 6), (2) that McClean "had a bag with him," (Transcript, p. 10), and (3) she "didn't have anything to do with what was going on. I really felt like if they felt I had something to do with it they would have arrested me too" (Transcript, p. 13). At best, Weekes's testimony could be construed by a rational fact finder to mean only that at the time of the search she did not know what illegal activity the police thought McClean was involved with, but that whatever that activity might be, Weekes was not involved. The testimony Weekes gave at the informal hearing is insufficient to support a finding that Weekes was aware that McClean was involved in illegal drug activity or that her apartment was being used for illegal drug activity. Weekes cannot be found to have admitted something that she did not know about.

For these reasons, I rule as a matter of law that the hearing officer's factual finding that marijuana was found or kept in Weekes's apartment is not supported by a preponderance of the evidence contained in the informal hearing record. Therefore, the hearing officer's legal conclusion that Weekes engaged in or allowed her apartment to be used for drug-related criminal activity in violation of her Section 8 lease is legally erroneous.

Conclusion

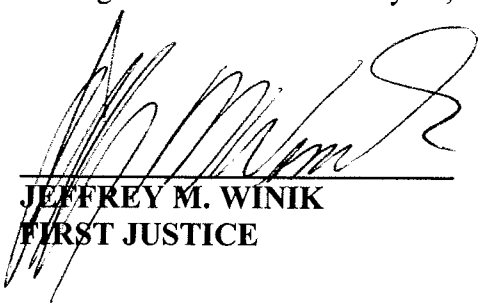
For these reasons, I rule on the merits of the BHA's **Motion for Judgment on the Pleadings and Weekes's Complaint** that the hearing officer's May 19, 2009 decision upholding the BHA's proposed decision to terminate Weekes's participation in the federal Section 8 Housing Choice Voucher Program must 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, Keishaann Weekes, on her complaint in the nature of certiorari under G.L. c. 249, § 4;
2. The decision of the hearing officer in the case of In Re: Keishaann Weekes, dated May 19, 2009, is vacated and reversed; and
3. The defendant, Boston Housing Authority, shall reinstate the plaintiff's Section 8 Housing Choice Voucher Program retroactive to May 19, 2009.

SO ORDERED.



JEFFREY M. WINIK
FIRST JUSTICE

December 10, 2009

cc: Erin Whelan Pennock, Esquire
Irene W. Inman, Esquire
David B. Gleich, Esquire