



BOSTON HOUSING AUTHORITY

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COMMONWEALTH OF MASSACHUSETTS

rec'd 12/17/2015

SUFFOLK, ss:

**CITY OF BOSTON
Boston Housing Authority**

In re:



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សូមទូរស័ព្ទលេខខាងក្រោមនេះឬ អញ្ជើញមកមើលផ្ទះរបស់យើងផ្ទាល់។

Sa a sé yon dokiman enpòtan. Si ou bezwen entèpretasyon, tanpri rele nimewo telefòn ki anba la a oswa vini nan biwo nou.

Tani waa dhokomentu muhiim ah. Haddii aad rabto tarjumad, fadlan wac lambarka hoos ku qoran ama imow xafiisyadayada.

هذه وثيقة مهمة. وإذا كنت في حاجة إلى ترجمة فورية، يرجى الاتصال على رقم الهاتف المذكور أثناء أو أن تتفضل بالمجيء إلى مكتبنا. إن كان لديك مستند يستلزم فهمه، أقر به ترجمة أن تفضل دأريد، نطقاً يا شماره تلفن زیر تماس بگیريد یا به دفتر ما مراجعه کنید.

Telephone No.: 617-988-4579

DEPARTMENT OF GRIEVANCES AND APPEALS
TERMINATION OF SECTION EIGHT BENEFITS HEARING DECISION

Client No.:



Hearing No.:



Date of Hearing:

6/15/2015

Present:



Tenant

Jacob Love, Advocate

Lynn Weissberg, TAP Supervising Attorney

Mary McDonough, Leased Housing Representative

Andrew Gouldson, Hearing Officer

BACKGROUND

On 6/15/2015 Boston Housing Authority ("BHA") Department of Grievance and Appeals ("DGA") heard an appeal brought by [REDACTED] ("Tenant") against a decision of BHA Leased Housing Division ("Leased Housing") seeking termination of assistance. Leased

Housing proposed termination by Notice dated 2/13/2015 alleging one (1) violation: (1) a family member is engaged in drug related criminal activity.

In support of its case Leased Housing submitted Boston Police Incident Report #152004319 dated 1/16/2015 ("Report") and read it into the record. The pertinent parts of the Report are as follows. Persons 4 Type Offender is listed as [REDACTED] with his address listed as the subsidized unit address. The Report states Officers affected a traffic stop after they observed a Ford Fusion make a right turn without utilizing its left turn directional. Report states Officers asked for the operator's license and registration as well as the rental agreement and the operator acknowledged he was not listed on the rental agreement. Report states while Officer Hawkins returned to the unmarked Boston Police cruiser to verify the information received Officer Dervan began to speak to the operator and observed a small brown paper bag resting on the drivers floor under the operator's legs. Report states Officer Dervan asked the operator what was in the bag and he briefly lifted it up off the ground and Officer Dervan observed a Good Sense Sandwich bag box of clear plastic bags along with a medium sized plastic bag of green leafy substance believed to be marijuana resting at the bottom of the paper bag.

Report states Officer Dervan, based on his training and experience, believed the presence of sandwich bags along with the medium sized bag (approximately 1.00oz) of green leafy substance believed to be marijuana, were indicators of street level drug distribution and seized the contraband and placed the operator, [REDACTED] under arrest. Report states Officer Dervan recovered a black Smith & Wesson H.R.T. from [REDACTED]'s right jean pocket and upon further examination discovered the knife was a switch black in violation of Unlawfully Carried Dangerous Weapon. [REDACTED] was charged with various traffic violations and Possession with intent to distribute Class D.

Leased Housing submitted the Recertification Questionnaire and Family Obligations signed and dated 4/23/2014 certifying Tenant understands the obligations and the information contained in the Recertification Questionnaire is true and complete. [REDACTED] is listed as a member of the family composition. Leased Housing argued that Mr. [REDACTED]'s arrest for Possession with intent to distribute Class D constitutes drug related criminal activity which is prohibited by provision 11 of the Family Obligations and therefore, termination of assistance should be upheld.

In response, Tenant stated that the charges were all dismissed and submitted the Criminal Docket. Tenant stated that there are significant mitigating circumstances sufficient to offset any violation that may have occurred. Tenant stated that the first available evidence of the conclusion of the criminal case became available the week prior to the hearing. Regarding the drug related charge, the Docket shows it was dismissed on 2/24/2015. Tenant stated that she has lived on [REDACTED] for a little more than one (1) year. Tenant stated she applied for housing in 1990 and was approved in 2006. Tenant stated Mr. [REDACTED] is twenty (20) years old and works at [REDACTED] Supermarket. Tenant stated he cleans after himself around the house. Tenant stated she told him to discontinue associating with the same crowd after this incident and he has done so. Tenant stated she works as an in home caretaker for the elderly through a Cerebral Palsy organization. Tenant stated she works approximately thirty-two (32) hours a week. Tenant stated her hours fluctuate based on the health of her clients.

Tenant stated that she is a fifty-eight (58) year old woman suffering from osteoporosis. Tenant stated she takes medication for her condition which affects her joints particularly her knees which are sore and ache after a long work day. Tenant stated that there is no one else to help her take care of her daily activities other than her son. Tenant stated she applied for Section 8 after a fire. Tenant stated she is willing to do everything to comply with her Section 8 Obligations. Tenant stated that she and her son would be homeless without Section 8

Assistance. Tenant stated that her other family in the area are in the Section 8 program so she cannot reside with them and she has no other relatives in the area.

Tenant submitted Associate Justice DeVecchio's 5/26/2015 Order on Defendant's Motion to Suppress and Judge Poole's allowance of Mr. [REDACTED]'s motion to dismiss Count's 1 and 3 as indicated in the Criminal Docket. Tenant argued that the Report does not meet the substantial indicia of reliability requirements in Costa. Tenant argued that the Report contains false information that is later directly contradicted by later testimony which show that it is an unreliable source of evidence to support termination of assistance. Tenant argued that all charges against Mr. [REDACTED] have been dismissed which provides support that the Report is unreliable and provides a significant mitigating circumstance to offset any activity engaged in. Finally, Tenant argued that there are significant other mitigating factors to consider in favor of reversing the proposed termination. Tenant stated she was not involved in any alleged activity, had no reason to know of any activity bearing in mind Mr. [REDACTED] was not held responsible for, and termination of her assistance considering her positive past participation and medical conditions would be a harsh and unjust result. Tenant also indicated that the quantity of the marijuana is listed as an ounce which has been decriminalized without conceding that the marijuana was Mr. [REDACTED]'s based on the lack of evidence indicating ownership in the Report.

FINDINGS OF FACT

1. There is insufficient reliable evidence contained in the Report to establish that Mr. [REDACTED] engaged in Possession with intent to distribute Class D
2. There is sufficient evidence to establish that Mr. [REDACTED] was in possession of marijuana based on the first hand observations of Officer Dervan

DISCUSSION

Chapter 13 of the BHA Administrative Plan for Section 8 Programs ("Administrative Plan") addresses termination of assistance. Pursuant to Section 13.3, the BHA may terminate the family's Section 8 assistance due to violations of the Section 8 Family Obligations. Among other things, the Family Obligations prohibit family members from engaging in drug-related criminal activity. Administrative Plan § 13.5.2; see also 24 CFR §§ 982.553(b)(1)(i)(A), 982.553(b)(1)(iii).¹ Section 13.7.1 of the Administrative Plan guarantees a participant family's right to an informal hearing when the BHA has proposed to terminate assistance. Assistance may be terminated based on criminal activity regardless of whether the household member has been arrested or convicted, but the decision to terminate must be supported by a preponderance of the evidence presented at the hearing. 24 C.F.R. § 982.553(c); Administrative Plan § 13.7.5(i). In Costa v. Fall River Housing Authority, the court held that, "hearsay evidence may form the basis of a PHA's decision to terminate Section 8 assistance so long as that evidence contains substantial indicia of reliability." 453 Mass. 614, 627 (2009). The court in Costa warned that, "reliance on hearsay that is anonymous, uncorroborated, or contradicted by other evidence will create particular risk of error." *Id.* at 626.

In this case, Leased Housing relying on the Report alone argued that it contains the substantial indicia of reliability to establish that Mr. [REDACTED] a member of the family composition engaged in drug related activity.² The Report contains the first hand observations

¹ Drug-related criminal activity is defined as "The manufacture, sale, distribution, or use, or the possession with intent to manufacture, sell or distribute a controlled substance." BHA Administrative Plan § 13.1.1.

² Leased Housing argued the omission of the word "criminal" in its Notice of Proposed Termination was a scrivener's error. The Proposed Termination is not deficient based on this omission as it correctly notified Tenant of the relevant provisions Leased Housing relied upon in proposing termination all of which contain the complete language.

of Officer Dervan specifically related to what he observed located in the paper bag. Officer Dervan describes it as one (1) medium plastic bag of green leafy substance believed to be marijuana. Officer Dervan states that based on his training and experience the totality of the circumstances indicate street level drug distribution. In that regard, I find that Officer Dervan is a reliable source of identification that the substance he observes to be a green leafy substance is in fact marijuana. However, I find that there is insufficient reliable evidence at the time and through the subsequent legal proceedings to conclude that Mr. [REDACTED] was engaged in drug distribution. As a result, Leased Housing's evidence is sufficient to establish that Mr. [REDACTED] was in possession of marijuana but not that he was in possession of marijuana with the intent to distribute.

Considering the court documents Tenant submitted in regards to the presence of marijuana it was argued that the Officers lacked probable cause to sustain an arrest based on intent to distribute and the quantity of marijuana recovered was decriminalized and therefore, could not sustain an arrest for criminal possession, a lesser included crime. There were no arguments presented to contradict Officer Dervan's conclusion that the substance was in fact marijuana. Therefore, the dismissal of the intent to distribute charge contradicts Officer Dervan's conclusion that Mr. [REDACTED] was engaged in drug distribution but not that he was in possession of marijuana. Although none of the court documents specifically state the same, I find that the presence of marijuana in a paper bag with other plastic bags absent any more corroborative evidence is insufficient to establish intent to distribute marijuana. I do not credit the inference that presence of a weapon provides circumstantial evidence of intent to distribute marijuana. What remains reliable is Officer Dervan's opinion, based on his training and experience, that the substance was marijuana even if he was incorrect that there was probable cause to arrest for intent to distribute.³ Decriminalizing possession of an ounce or less of marijuana in Massachusetts resulted in the dismissal of the lesser included charge of simple possession by virtue of the state criminalization scheme controlling marijuana not because Mr. [REDACTED] was not in possession of marijuana.

Possession of marijuana remains a crime under federal law which has not decriminalized possession in any amount. Tenant is subsidized in a federally funded program. Currently there is no legal authority stating that federally subsidized participants in the Section 8 program in Massachusetts are exempt from the drug related criminal activity provision based on state decriminalization statutes. Finally, possession of marijuana absent an intent to distribute must result in a finding of intended use. This is supported by the reasoning behind what is sometimes referred to as the decriminalization of a "personal use" quantity of marijuana. If not for distribution or use, and absent any evidence putting ownership or control into question, there is no other reasonable explanation why an individual would possess a controlled substance. I find no evidence in the record to suggest that the marijuana belonged to anyone other than Mr. [REDACTED] or that he did not possess the marijuana for personal use. The dismissal of the lesser included charge was predicated on the fact that in Massachusetts possession of marijuana based on its weight is still illegal but not criminal while possession of marijuana under federal law regardless of quantity is still a criminal offense. As a result, Mr. [REDACTED]'s possession of

Furthermore, the omission did not create any confusion and Tenant understood the allegation and argued against it as though it were written correctly and completely in the Proposed Termination.

³ It is important to note that the Dismissal from Judge Poole is handwritten on the Motion to Dismiss. There is no finding from the court that Officer Dervan was incapable of making the determination he did when he observed the marijuana and the attending circumstances. The Order granting the Motion to Suppress states that evidence of the presence of marijuana and the circumstantial evidence related to its seizure was suppressed and therefore, inadmissible. Therefore, the Report stands alone and no substantive decision was made whether Officer Dervan's observations of the marijuana were reliable. The court found that Officer Dervan's observations of the traffic violations was insufficient to establish probable cause for the threshold traffic stop. Lacking probable cause to stop the car all evidence recovered as a result was suppressed.

marijuana constitutes a violation of the Section 8 program rules prohibition against engaging in drug related criminal activity. Leased Housing is authorized to terminate Tenant's Section 8 Assistance on that ground.

Still, pursuant to Sections 13.6.1 and 13.7.5(j) of the Administrative Plan, "mitigating circumstances presented by the Participant" and all other relevant circumstances, such as "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)" may be taken into consideration when determining whether termination of assistance is warranted.

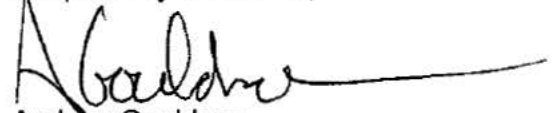
In this case, Leased Housing established a violation of the program. However, the decriminalization of marijuana in Massachusetts is persuasive that as a community mere possession of an ounce or less of marijuana is considered a lesser offense and thereby less of a threat to the health and safety of the community than other controlled substances. This is an objective consideration taking into account that the law was enacted after a ballot initiative in favor of decriminalizing "personal use" amounts of marijuana passed by popular vote. With this context in mind, the program violation established in this case is not serious albeit a violation nonetheless. The mitigating circumstances in this case are sufficient to offset the seriousness of the violation.

The effect of termination on Tenant who is innocent of the violation would be harsh in light of the violation itself and the exacerbating effect it would likely have on her medical condition because termination of assistance would likely cause homelessness. Mr. [REDACTED] based on this incident, does not have a criminal record and faced no punishment for the incident after all the charges were dismissed. Regardless, Tenant stated that she has advised him to remain away from the group of friends he was associating with at the time and he has acted accordingly. Tenant stated earnestly that she would comply with all the obligations required of her and her family in the Section 8 program. Tenant stated she and her son are employed. In this case, the mitigating circumstances are sufficient to offset the program violation as termination of assistance would produce a harsh result considering the nature of the violation and the effect termination of assistance would have on the remaining family member not involved in the violation.

DECISION

Based on the foregoing reasons, the decision of Leased Housing is hereby **reversed**.

Respectfully submitted,



Andrew Gouldson
Hearing Officer

Date: December 14, 2015

cc: R. Olsen, Leasing Officer
B. Sheerin, Director of Special Programs and Policy
J. Welch, Leased Housing Administrative Aide
A. Marcolina, Leased Housing Attorney
TAP, Advocate