



Department of
Housing Preservation
& Development

nyc.gov/hpd

Office Of The First Deputy
Commissioner
100 Gold Street
New York, N.Y. 10038

RAFAEL E. CESTERO
Commissioner

DOUGLAS APPLE
First Deputy Commissioner

KIMBERLY D. HARDY
Special Counsel

INFORMAL HEARING DECISION

IN THE MATTER OF:

New York, New York

Date of Informal Hearing: August 26, 2009

The New York City Department of Housing Preservation and Development ("HPD") operates a Housing Choice Voucher Program ("Section 8") in accordance with Title 24 of the Code of Federal Regulations Part 982 and the Department of Housing Preservation and Development Housing Choice Voucher Program's Administrative Plan ("Administrative Plan"). Federal rules and regulations authorize HPD to conduct Informal Hearings regarding the termination of assistance to a participant of the HPD Section 8 Program. HPD is also authorized to have an impartial staff member conduct Informal Hearings.

This Informal Hearing was scheduled for August 26, 2009 at 12:00 PM at the office of HPD, 100 Gold Street, New York, NY 10038. The Informal Hearing of _____ began at 12:11PM and ended at 1:28 PM. Shalini Gajadharsingh appeared as the HPD Hearing Officer.

INFORMAL HEARING ATTENDEES

The following individuals were present at the Informal Hearing:

Hearing Officer:

Shalini Gajadharsingh, Esq.

For HPD:

Barbara Porter, ("HPD Hearing Representative")

Alexandra Warren, ("Director of Budget Policy and Special Programs")

For Participant:

do (the "Participant")

(Senior Case Manager _____)

C.J. Masimore, Esq. (Staff Attorney at MFY Legal Services)

Aapta Garg (Project Organizer at MFY Legal Services)



LIST OF EVIDENCE SUBMITTED

The HPD Representative entered the following evidence into the Record:

Exhibit #1: HPD Application for Rental Assistance, March 1, 2003

Exhibit #2: HPD Housing Voucher, signed May 01, 2003

Exhibit #3: Housing Assistance Payment Contract, May 1, 2003
a) Part C of HAP Contract; Tenancy Addendum

Exhibit #4: HPD Administrative Plan dated July 2008 (Mandatory Termination of Assistance)

Exhibit #5: Paragraph 2 of the Code Federal Regulation 982.553 dated 2008

Exhibit #6: N.Y. State Criminal Justice Sex offender Report dated 09/12/08

Exhibit #7: N.Y. State Division of Criminal Justice Frequently Asked Questions (Referring to #2 and #7 Explanation of Level and Status)

Exhibit #8: HPD Notice: "*Notice of Section 8 Pre-Termination and Mandatory Conference*," Sept 29, 2008 (certified and regular mail)
a) Certified Mail returned November 14, 2008 (unclaimed)

Exhibit #9: Termination Notice, February 17, 2009

Exhibit #10: Appeal dated 03/03/09

Exhibit #11: Updated N.Y. State Criminal Justice Sex Offender Report dated May 28, 2009
a) Participant's Birth Certificate

Exhibit #12: HUD memo regarding guidance for sex offenders and assisted housing dated July, 16 2009

The Participant, _____, entered the following evidence into the Record:

Exhibit A: Letter from the New York State Division of Criminal Justice services informing registered sex offenders of new legislation extending the length of

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registration for individuals already registered pursuant to the Sex Offender Registration Act.

Exhibit B: Closing Memo

- a) Letter from Social Security Administration
- b) Letter from the Commission for the Blind and Visually Handicapped
- c) Section 8 Application for Rental Assistance
- d) Pre-Termination Notice of Section 8 Non-Compliance
- e) Notice of Section 8 Rent Subsidy Termination
- f) Letter from HUD to HPD
- g) z email

Exhibit C: Requested Documents from Informal Hearing's Statement of Understanding

- a) Judicial determination of [redacted]'s risk offender level, dated November 19, 1998
- b) Copies of [redacted] Criminal Court case
- c) Sex Offender Registration Act, Approved July 26, 1995
- d) March 11, 2002 SORA amendments
- e) January 18, 2006 amendments
- f) Sex Offender Registration Act, Correction law §168-h
- g) New York State Criminal Justice Sex Offender Report dated September 4, 2009

The testimony given and evidence presented at the Informal Hearing, together with HPD's entire case file, constitute the Informal Hearing Record (hereinafter referred to as the "Record.")

FINDINGS OF FACT

[redacted] (the "Participant") residing at [redacted] S New York, New York 10010 (the "Premises"), requested this Informal Hearing after receiving a Section 8 Rent Subsidy Termination Notice (the "Termination Notice") issued by HPD on August 31, 2009. The Termination Notice gave the following reason for termination: "*Failure to comply with program regulations.*"¹ The Participant appealed this decision and requested this Informal Hearing. The purpose of the Informal Hearing was to determine, based on the testimony and evidence presented, whether or not to uphold the decision by HPD to terminate from the Section 8 Program.

¹ Exhibit 9



Participant is a fifty-two year old vision-impaired tenant living in a support SRO Single Room Occupancy (SRO). Participant receives \$724.00 per month in Supplemental Security Income. Prior to his admission to the Section 8 Subsidy program, the Participant lived at the homeless shelter Barrier Free Living. As a resident of Barrier Free Living, he began working with the Commission for the Blind and Visually Handicapped. He obtained training classes at Helen Keller Services for the Blind and at Lighthouse International. The Participant used these classes to learn how to navigate the local neighborhood within a five block radius of his apartment. The Commission for the Blind and Visually Handicapped assisted Mr. [redacted] with his Section 8 application, dated March 1, 2003.² Mr. [redacted] was the sole household member at the time of the application.³ On May 1, 2003, HPD issued a Housing Assistance Payment contract.⁴ HPD would pay \$522.00 of the \$704.00 monthly rent. The Participant was responsible for the remaining balance.⁵

Federal regulations prohibit the admission of applicants to the Section 8 Program if any household member is subject to a lifetime sex offender registration requirement.⁶ The events that led to termination in the case began when HPD commenced a "comprehensive review of procedures". Alexandra Warren, Director of Policy Budget and Special Programs, stated at the Informal Hearing that HPD "did a data match with the Department of Corrections and anyone that had shown up with a sex-related crime was then compared with the New York Sex Offender registry. Anyone that we confirmed with date of birth and photos, we sent a letter of Termination. We contacted (Department of Housing and Urban Development) HUD because the statute regarded admission. HUD responded if people who were statutorily ineligible for admission to the program were nevertheless admitted due to an administrative error or oversight on the part of the Public Housing Authority, these participants must be terminated". Mr. [redacted] was discovered as a participant in the Section 8 program who was a risk level 2 and subject to a lifetime sex offender registration requirement.

Thus, on September 22, 2008, HPD sent the Participant a Pre-Termination Notice of Section 8 Non-Compliance ("Pre-Termination Notice"). The Pre-Termination Notice stated the Participant would be terminated because: "HPD has obtained information from a sex offender registry that [redacted] a member of your household, is subject to a lifetime sex offender registration requirement. See Attached Printout."⁷ A copy of the Sex Offender Report was attached to the Pre-Termination Notice.⁸ The Pre-Termination Notice was sent via certified and

² Exhibit 1

³ Exhibit 1

⁴ Exhibit 3

⁵ Exhibit 3

⁶ Exhibit 4

⁷ Exhibit 8

⁸ Exhibit 8



regular mail. On November 14, 2008, the certified mail was returned to HPD.⁹ On February 17, 2009, HPD sent the Participant a Termination Notice for “*failure to comply with program regulations.*” On March 03, 2009, the Participant appealed HPD’s termination.¹⁰

The Informal Hearing was conducted on August 26, 2009. The Participant was represented by MFY Legal Services staff attorney C.J. Masimore, Esq. The Participant admits to being a Level 2 sexual offender. He stated that he was incarcerated after pleading guilty to “*Robbery in the Second Degree and Sexual Abuse in the First Degree*” in 1996. As a result of this plea, the Participant became a registered sex offender. The Participant stated that at the time he believed he was agreeing to a ten year period of registration, not a requirement to register as a sexual offender for a lifetime. After the plea agreement, New York State passed new regulations in 2006 requiring Risk Level 2 offenders to become lifetime registrants. The Participant’s attorney raised several arguments on the Participant’s behalf. First, the Participant argued HPD failed to provide Mr. [redacted] a constitutionally adequate notice. The Participant’s second argument is that HPD lacks the statutory and regulatory authority to terminate the subsidy based on Mr. [redacted]’s recently acquired lifetime registrant status.

After the Informal Hearing, the Participant submitted documents showing that in 1996, his Level 2 sexual offender status made him a ten year registrant on the New York State Registry. The Participant submitted the Sex Offender Registration Act approved in July 1995. The July 1995 Sex Offender Registration Act provided for someone adjudicated as a sex offender to register annually “for a period of ten years from the initial date of registration.” The Participant also submitted the March 2002 Sex Offender Registration Act amendments showing that he was still not a lifetime registrant at the time of his Section 8 application.¹¹ Finally, the Participant submitted documents indicating that he became a lifetime registrant due to January 2006 Sex Offender Registry Amendments passed after his admission into the Section 8 subsidy program, which now require him, as a level two offender to register annually for life.¹²

ANALYSIS

The Section 8 Housing Choice Voucher Program is a federally funded housing subsidy program with the “purpose of aiding low income families in obtaining a decent place to live and of promoting economically mixed housing.”

Under this Program, qualifying low income families that demonstrate rent hardship and need receive housing assistance in the form of a rent subsidy paid directly to their respective

⁹ Exhibit 8a

¹⁰ Exhibit 10

¹¹ Exhibit C, c, d

¹² Exhibit C, e



landlords, in the form of Housing Assistance Payments (“HAP”). HPD’s Administrative Plan outlines various action and inaction that are mandatory grounds for termination of the subsidy. Chapter fifteen of the Administrative Plan states HPD must deny assistance to an applicant *if any member of a household is subject to a lifetime registration requirement under a State sex offender registration program*¹³. The Participant, _____, is a Level 2 lifetime sexual offender registrant under New York State law. Mr. _____ made the following arguments for the reversal of his Section 8 termination: a) HPD failed to provide the Participant a constitutionally adequate notice and b) HPD lacks authority to terminate the Participant’s Section 8 subsidy based on his lifetime registrant status.

After a review of the Record and by a preponderance of the evidence, HPD’s termination should be reversed.

A. HPD DID NOT VIOLATE PARTICIPANT’S DUE PROCESS RIGHTS

The Participant claims that HPD’s Pre-Termination Notice and Notice of Termination did not sufficiently notify him of his reasons for Termination and thus violated his due process rights. Due process requires “meticulous adherence to notice requirements given the nature and importance of the rent subsidy.”¹⁴ Section 8 participants facing a possible termination of assistance are entitled to timely and adequate notice detailing the reasons for a proposed termination. The requirement of notice is to inform the tenant of the allegations so that he can prepare a defense. The Participant states this notice requirement is important “where recipients have challenged proposed terminations as resting on...misapplication of rules or policies to the facts of particular cases.”¹⁵ The Participant claims HPD did not give adequate notice because the Pre-Termination Notice only states that the Participant is subject to a lifetime sex offender registration requirement. Participant further states the Notice of Termination is even less sufficient, merely stating that Participant’s subsidy would be terminated for failure to comply with regulations. As a result, the Participant claims that he had to surmise on his own which program regulation he violated to warrant termination of assistance. Thus he did not have constitutionally adequate opportunity to prepare a defense.

After a review of the record, I find that the Participant did not have to surmise the reason for his termination because he was adequately notified on both the Pre-Termination Notice and Notice of Termination. HPD’s Administrative Plan instructs that “HPD must give the family a written notice of intent to terminate, with reasons as well as notify them of their right to an informal hearing prior to the proposed date of termination.”¹⁶ The Pre-Termination Notice stated

¹³ HPD Administrative Plan

¹⁴ *Goldberg v. Kelly*, 397 U.S. 254, 268-268

¹⁵ Exhibit B, page 4

¹⁶ HPD Administrative Plan

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that his subsidy was being discontinued because he is subject to a lifetime sex offender registration requirement and stated failure to respond within fifteen calendar days from the date of the notice may result in termination of the Section 8 subsidy. The Pre-Termination Notice was sent via regular and certified mail. The Certified Mail receipt indicated that the Pre-Termination Notice was never claimed. Upon Mr. [REDACTED]'s failure to respond to the Pre-Termination Notice, HPD issued a Notice of Section 8 Rent Subsidy Termination. The Termination Notice gave him twenty one days to respond. The Termination Notice also noted, "*You may be represented by an attorney or other representative of your choice at the informal hearing. If you or your representative wish to review the contents of your file, you may do so... HPD will provide you with a copy of the documents in your file at a cost of twenty-five cents per page.*" The Termination Notice indicated that HPD would answer any further inquiries the Participant may have had. Additionally, HPD attached an Appeal of Section 8 Subsidy Termination form to the Termination Notice. Mr. [REDACTED] checked the box indicating, "*I would like an informal hearing to contest the termination of my Section 8 subsidy. I am not the person portrayed in the enclosed sex offender public registry...*" The fact that Mr. [REDACTED] checked off this box on his Appeal form demonstrates that he knew the reason for his Termination.

Finally, the Participant's procurement of legal representation for this Informal Hearing and the detailed exhibits and memos by his counsel suggests that HPD allotted the Participant a reasonable time and opportunity to prepare a defense.

B. PARTICIPANT SHOULD NOT BE TERMINATED FROM THE SECTION 8 PROGRAM BECAUSE HE WAS NOT A LIFETIME REGISTRANT AT THE TIME OF APPLICATION AND HAS NOT COMMITTED ANY NEW ACTS REQUIRING TERMINATION ACCORDING TO THE HPD ADMINISTRATIVE PLAN AND HUD GUIDELINES

The Participant argues the Quality Housing and Work Responsibility Act of 1998 ("QHRA"), which governs admission and termination from the Section 8 program does not grant HPD the authority to terminate the Participant's subsidy because he is a participant and not an applicant. Participant is correct that the QHRA does not address persons already participating in the Section 8 program. However, the language of the Act does not explicitly limit HPD's authority to applicants. A *Question and Answer* sheet issued by HUD for *Housing Finance Agencies* (HFA's) contains essentially the same guidance as was received by HPD, as testified to by Ms. Warren.

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Below is the question and answer in its entirety:¹⁷

Question:

What should PHAs [Public Housing Authority's] do if they know of current residents of Section 8 properties who are listed on the sex offender register, but have done nothing to break the terms of their current lease?

Answer:

The statutory prohibition is limited to admissions and screening provisions. The statute and its implementing regulations are silent with respect to termination of tenancy for sex offenders subject to a lifetime registration requirement under a State sex offender registration program. Current residents of units with Section 8 project-based assistance are not subject to the prohibition of admission to Federally-assisted housing if any member of the household is subject to a lifetime registration requirement under a State sex offender registration program. PHAs and Owners are not prohibited by the statute or regulation from establishing policies and procedures and a lease provision that provides sex offenders subject to a lifetime registration requirement under a State sex offender registration program residing in Federally-assisted housing is a cause for termination of tenancy.

Although the guidance quoted above was directed to HFA's which administered project based assistance, the same reasoning can be applied to tenant based vouchers, such as Mr. [redacted]'s. This shows that the guidance received by HPD from HUD headquarters was indeed the same guidance that HUD has given to other Public Housing Agencies. Thus, Mr. [redacted]'s claim that HPD's sweep for offenders is unauthorized is incorrect. The guidelines intend to reach current participants who were admitted to the program due to the possible mistake of the participant or the agency. Further, Courts have established HPD's authority to terminate current recipients of Section 8 when not in compliance with HUD regulations, such as criminal activity. In *Chevron v. NRDC*, the court ruled that courts will defer to an agency's interpretation of a statute when a statute is ambiguous or there is a gap that Congress intended the agency to fill and the agency's interpretation is reasonable.¹⁸ Thus, HUD's interpretation of the regulations "it is entrusted to administer" is entitled due deference. HPD must comply with HUD's direction until a reviewing court determines HUD's interpretation is not permissible or contrary to congressional intent.

Although HPD's interpretation of HUD regulations is entitled due deference under the *Chevron* analysis, Mr. [redacted]'s case is distinguishable from the sex offender cases mentioned in the HUD letter. Mr. [redacted] was not a lifetime sex offender at the time of application to the Section 8 subsidy program in 2003.¹⁹ At the time of his admission, the Participant was subject to

¹⁷ "HFA Questions and Concerns About the Screening and Eviction for Drug Abuse and Other Criminal Activity: Final Rule" [05/07/2002 9:56 AM Final] Found at <http://www.hud.gov/offices/hsg/mfl/gendocs/evictionfaq.pdf>

¹⁸ *Chevron v. NRDC*, 467 U.S. 837, 844

¹⁹ Exhibit C, d



a ten year sex offender registry requirement.²⁰ Thus, he was not an ineligible applicant, in 2003 at the time of application, and was not erroneously admitted to the Section 8 program. Mr. only became a lifetime sex offender registrant in 2006 as a result of the January 2006 Sexual Offender Registry amendments, which required a level two offender to register annually for life.²¹ Consequently, the HUD regulations should not apply to Mr. , because he has not committed any action while a participant on the section 8 program which would require termination. Thus, Mr. termination from the Section 8 Subsidy program should be reversed.

DETERMINATION

Based on the foregoing and a complete review of the Record HPD's decision to terminate Mr. 's Section 8 rent subsidy is hereby reversed.

Date of Informal Hearing Decision: April 15, 2010

Hearing Officer: Shalini Gajadharsingh
Shalini Gajadharsingh, Esq.

Cc:

Participant

C.J. Masimore, Staff Attorney, MFY Legal Services, 299 Broadway, New York, NY 10027

Aapta Garg, MFY Legal Services, 299 Broadway, New York, NY 10027

HPD/ Section 8 Representative

File

²⁰ Exhibit C, d

²¹ Exhibit C, e

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