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NO. 67336-0-1

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

SEATTLE HOUSING AUTHORITY,

Respondent/Appellant,

v.

JACQUELYN NICHOLS,

Plaintiff/Respondent.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT JACQUELYN NICHOLS

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 **ORIGINAL**

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I. INTRODUCTION

The Section 8 Housing Choice Voucher program (Section 8) is a federally-funded program that provides residential rent subsidies to low-income families to secure suitable housing on the open market. See 42 U.S.C. § 1437f(o). The U.S. Department of Housing and Urban Development (HUD) administers the Voucher Program by contracting with local public housing authorities, which in turn issue Section 8 Vouchers to individual families. A family participating in the voucher program pays about 30% of its household income in rent; the voucher covers any difference between the family's portion of the rent and the overall rent for the dwelling.

Respondent Jacquelyn Nichols (Nichols) holds a Section 8 Voucher from Appellant Seattle Housing Authority (SHA), which she uses to rent an apartment for herself and her daughter. In 2010, SHA attempted to terminate Nichols from the Section 8 program for failing to report a change in her income to SHA in a timely manner, resulting in an overpayment of Nichols' housing subsidy. Nichols offered to enter into a payment plan with SHA to pay back the excess subsidies over time, but SHA refused. Therefore, Nichols exercised her right to contest the termination of her voucher at an administrative "informal hearing."

The hearing took place before Varn Chandola, an independent hearing officer appointed by SHA. At the hearing, Nichols explained that she suffers from depression and bi-polar disorder, mental health disorders that impair her ability to meet deadlines and caused her trouble in meeting SHA reporting requirements in the past. She stated that her failure to report the income change on time was accidental, and argued that instead of terminating her from the program, SHA should allow her to pay off the excess subsidies over time. SHA argued that Nichols was not eligible for a payment plan. SHA argued that its Administrative Plan does not allow Section 8 tenants to have multiple payment plans in place with SHA, and that Nichols still owed SHA from a prior overpayment that had occurred in 2002.

In his written decision, Chandola found Nichols was eligible for a payment plan. Though Nichols had not repaid SHA for the 2002 debt, Chandola found that debt had become time-barred. Under both HUD authority and SHA's Administrative Plan, a time-barred debt cannot serve as a basis for denying or terminating a family's voucher. Therefore, Chandola overturned the termination of Nichols' voucher, and directed SHA to enter into the payment plan instead.

But instead of entering into the payment plan, SHA declared that it would not be bound by Chandola's ruling. SHA then assigned the case to

a different hearing officer, Joan Kalhorn, and directed Kalhorn to hold additional proceedings in the matter. Kalhorn, after a series of hearings and exchanges with SHA's General Counsel, ultimately ruled in SHA's favor and upheld the termination decision.

A public housing agency is bound by informal hearing decision unless that decision is outside the hearing officer's authority or contrary to law. Nichols contends SHA is bound by Chandola's original ruling. She filed for a Writ of Review in King County Superior Court, arguing that SHA's General Counsel acted unlawfully by disavowing Chandola's ruling and directing Kalhorn to rehear the case. The Superior Court (Hon. Laura Inveen) agreed, and issued an order in June 1, 2011, directing SHA to abide by Chandola's decision. SHA appeals.

SHA claims Chandola "exceeded his authority" because the mere fact that Nichols failed to report her income on time compelled him to sustain the voucher termination. But Chandola's ruling was within his authority, because neither SHA rules nor HUD policy requires a public housing agency to terminate a voucher for this type of infraction. Instead, a housing authority may consider all relevant circumstances in deciding whether to terminate a voucher for non-reporting of income, including such factors as the unintentional nature of the violation, the harsh effects on non-culpable household members (such as Nichols' daughter), the

mitigating effects of a disability, and the availability of other remedies—
such as a payment plan. The Superior Court was correct to find that SHA
was bound by Chandola’s ruling, and its order should be sustained.

II. STATEMENT OF ISSUES

SHA hearing officer M. Varn Chandola (Chandola) conducted an informal hearing on SHA’s voucher termination claim against Nichols. Chandola found that SHA should allow Nichols to enter into a payment plan for the excess rent subsidies she received, instead of terminating her from the program. The Superior Court found Chandola’s ruling was legally correct and within the hearing officer’s authority. Was SHA bound by Chandola’s decision?

III. STATEMENT OF THE CASE

3.1 SHA’s termination of Ms. Nichols’ Section 8 voucher.

SHA sent Nichols a Section 8 voucher termination notice on May 25, 2010. The notice, in summary, alleged that Nichols had received an overpayment of housing subsidies in 2010, because she had failed to promptly inform SHA of an increase in her household income. The notice also stated that Nichols owed an unpaid balance on a prior overpayment that had occurred in 2002, and that “[s]ince you are currently in the process of repaying a debt to SHA, you are not eligible to enter into a new

Payment Agreement for the newly determined overpayments in lieu of termination” CP at 291-292.

3.2 Chandola hearing.

Nichols requested an “informal hearing” to contest SHA’s termination of her voucher. SHA held the hearing on June 24, 2010, and Chandola presided as the hearing officer. CP at 284-289. Two SHA staff members represented SHA at the hearing. CP at 459, 464. They stated: that SHA was required to terminate Nichols’ Section 8 voucher pursuant to SHA’s Administrative Plan CP 465, 478.

Nichols represented herself. CP at 460. Both Nichols and her then sixteen year-old daughter testified on Nichols’ behalf. CP at 460. They stated: that the overpayment was unintentional, that they would like to enter into a repayment agreement with SHA, that Nichols suffers from a disability that may have contributed to the overpayment, and that they would become homeless if the termination was upheld CP 484-496.

Following the hearing, Chandola issued a written decision. In the decision, Chandola ruled that SHA could not terminate Nichols’ voucher, but should allow her to remain in the program and repay the 2010 overpayment. CP at 284-289. Chanola found that the prior payment plan, from the 2002 debt, did not make Nichols ineligible for a payment plan

because the 2002 debt was time-barred and could not be used as a basis to deny her a payment plan for the 2010 overpayment. CP at 288.

3.3 SHA determination to not be bound by Chandola's decision and subsequent proceedings.

On July 15, 2010, James Fearn (Fearn), General Counsel for SHA, notified Nichols that it would not be bound by Chandola's decision. CP 296-297. Because Nichols was unrepresented, she did not have counsel to challenge Fearn's decision at that time. CP 460.

Fearn arranged for a second hearing before a different SHA hearing officer, Joan Kalhorn (Kalhorn), who heard the matter on August 31, 2010. CP at 303, 307, 309, 317-322. Nichols was unrepresented at that hearing. CP at 317. But rather than conducting a new hearing on original evidence, Kalhorn determined that the issue to be decided was "[s]hall SHA's rejection of a hearing officer's decision be reviewable before any re-adjudication of the matter on the facts? If yes, under what procedures?" CP 317-318. Kalhorn then issued a written decision on September 14, 2010, which stated that she would reopen Nichols' hearing on the issue of whether or not SHA properly overturned Chandola's decision, or Chandola's ruling. "alternatively and much preferably, I will withhold my ruling on the merits of the case until SHA determines a procedure whereby a Participant can obtain an independent review of an

SHA's ruling that it will not be bound by a hearing officer's decision and applies the procedure to the first hearing officer's decision in this matter" CP at 322. Kalhorn did not reach the merits of the voucher termination.

In response to Kalhorn's September 14, 2010, decision, Fearn, wrote a letter to Kalhorn in which he explained that Chandola's decision was "null and void." CP at 325. Fearn ordered Kalhorn to rehear Nichols' informal hearing (on the voucher termination) de novo. CP at 324-326. Kalhorn did as Fearn directed, presiding over a third hearing on January 11, 2011. CP 328. Nichols did not have legal representation at the hearing. CP 328. Kalhorn issued a written decision dated January 22, 2011, which upheld SHA's termination decision. See CP 328-335. Following Kalhorn's decision, SHA announced it would stop paying Nichols' rental assistance starting March 1, 2011.

3.4 Application for Writ of Review.

After obtaining legal counsel, Nichols filed a Verified Application for Writ of Review in King County Superior Court on February 15, 2011. CP at 271-335. After a series of briefs and oral arguments at two separate hearings, Judge Inveen (Inveen) issued an Order on Review directing SHA to comply with Chandola's ruling. CP at 684-686. The Order on Review voided all subsequent decisions made in Nichols' case (i.e., by Fearn and

Kalhorn). CP at CP at 684-686. The Order on Review is the subject of SHA's appeal. CP at 693-697.

IV. ARGUMENT

4.1 Standard of Review.

SHA is bound by Chandola's decision unless Chandola's decision, exceeded his authority, was contrary to law, or involved an issue for which Nichols was not entitled to a hearing. See 24 CFR 982.555(f).

Chandola's factual findings are reviewed for substantial evidence. See *City of Seattle, Seattle Police Department v. Werner*, 163 Wn.App. 899, 261 P.3d 218 (2011). His rulings on issues of law are reviewed de novo. See *City of Seattle, Seattle Police Department v. Werner*, 163 Wn.App. 899, 261 P.3d 218 (2011).

4.2 Chandola's ruling does not exceed his authority.

4.2.1 Both SHA and Chandola had discretion in deciding whether to terminate Nichols.

A public housing agency may, but is not required to, terminate a Section 8 voucher participant for failure to timely report income changes. See 24 CFR 982.552(c)(2). In deciding whether to terminate a participant on such a discretionary basis, such as a failure to timely report income changes, SHA may consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability individual

family members, mitigating circumstances related to the disability of a family member, and the effects of termination on other family members who were not involved in the failure to report. See 24 CFR 982.552(c)(2)(i). Whether the termination of Nichols' voucher, rather than a payment plan, represented the proper exercise of SHA discretion was thus the critical issue for Chandola to decide in the hearing on Nichols' voucher termination. See 24 CFR 982.555, *Mansour v. King County* 131 Wn.App. 255, 266, 128 P.3d 1241 (Div. 1, 2006).

4.2.2 Chandola had specific duties set forth in law in making his decision SHA had burden to prove termination decision was proper by preponderance of evidence.

As the hearing officer, Chandola was charged with determining whether SHA's termination of Nichols' voucher was in accordance with the law, HUD regulations and PHA policies. See 24 CFR 982.555(a)(1). Chandola was to consider all relevant facts and conform his rulings to all relevant legal authority including but not limited to Federal, State and local law, HUD policies, internal SHA policies, in particular the Section 8 Administrative Plan (see Chapter 20, Section E, SHA administrative plan) and Chandola was required to adjudicate all material factual issues raised at the hearing. See Chapter 20, Section E, SHA administrative plan. SHA's administrative plan states that "[i]n adjudicating factual issues at informal hearings, the burden of production and persuasion with respect to

any fact shall be on the party asserting the fact” see Chapter 20, Section E, SHA administrative plan, see also 24 CFR 982.555(e)(6), see also *Basco v. Machin*, 514 F.3d 1177, 1182, (11th Cir., 2008) (PHA has the burden of persuasion and must initially present sufficient evidence to establish a prima facie case ...thereafter the Section 8 participant has the burden of production to refute the housing authority’s case). Determining whether SHA met its burden of proof to support its decision is clearly within the hearing officer’s scope of authority. See Chapter 20, Section E, SHA administrative plan, see also 24 CFR 982.555(e)(6), see also *Basco v. Machin*, 514 F.3d 1177, 1182 (11th Cir., 2008).

4.2.3 Chandola had authority to determine the proper remedy.

More particularly, Chandola had to decide two issues in Nichols’ case. The first was whether SHA proved by a preponderance of the evidence that SHA overpaid the housing subsidy. The second was whether SHA proved by a preponderance of the evidence that voucher termination was the appropriate remedy. Nichols did not challenge the existence of the overpayment itself, only that a payment plan (to repay the overpayment) was a more appropriate remedy than termination. Chandola, of course, found that SHA did not prove (by a preponderance of the evidence) that termination of Ms. Nichols’ voucher was the

appropriate remedy. This finding was well within Chandola's authority. For instance, in *Mansour v. King County*, this Court held that an agency seeking to enforce a removal order must prove both the violation and the remedy it has imposed by a preponderance of the evidence. See *Mansour v. King County*, 131 Wn.App. 255, 266; 128 P.3d 1241 (Div. 1, 2006).

4.2.4 When considering all circumstances Chandola found that offering Nichols a repayment plan was the proper remedy.

Chandola had the authority to consider all relevant circumstances surrounding the overpayment when deciding whether to uphold the termination of Nichols' voucher. See 24 CFR 982.555(c)(2). To this end, Chandola considered that Nichols' failure to report her income was unintentional, CP at 484-486, 492, 496, that termination of Nichols' voucher would have a harsh impact on other household members (Nichols' daughter) who were not involved in the failure to report, CP at 483-486, 490-493, and that Nichols was a person with a disability and the disability may have contributed to her failure to timely report her income change CP at 483, 485-490, 496, 500.

Furthermore, the only reason SHA presented Chandola for not entering into a payment plan with Nichols was SHA's erroneous belief that Nichols was ineligible for a payment plan due to the 2002 debt. CP 285-290. Indeed, the record strongly suggested that SHA staff would even

have offered Nichols a payment plan themselves, had it not been for this erroneous belief. SHA's termination notice stated that "[s]ince you are currently in the process of repaying a debt to SHA, you are not eligible to enter into a new [p]ayment [a]greement for the newly determined overpayments in lieu of termination." CP at 291-292, 599. Also, SHA's representative testified that SHA cannot enter into a payment plan with a participant who already has a payment plan for a different overpayment CP at 464-465, 478¹.

"Substantial evidence is the existence of a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding." See *City of Seattle, Seattle Police Department v. Werner*, 163 Wn. App. 899, 906, 261 P.3d 218 (2011), citing *Hilltop* 126 Wn.2d 22, 29, at 34, 891 P.2d 29). Under the substantial evidence standard, an appellate court is not to substitute its own judgment for that of the fact finder. See *Id.* Assuming Chandola was correct that the 2002 debt did not render Nichols ineligible for a payment plan, the evidence before Chandola was certainly sufficient to persuade a fair-minded, rational person that a

¹ "[a]nd so I want that to be noted, that that is a policy we have, that if we do know that there is some noncompliance we can start a payment agreement with the family" (CP at 465). Ms. Myers goes on to testify that "[a]nd this is where the termination letter on page 27 comes from. Because Seattle Housing Authority is stating that this - - that the termination is because, '[w]e're terminating your participation of Section 8 Program because you're already under ' - - ' for a program violation because you're already under another payment agreement, and we don't enter into a second payment agreement'" (CP at 478 lines 5-11).

payment plan, rather than termination, was the more appropriate remedy. And because SHA could not prove by a preponderance of the evidence that the remedy they implemented was appropriate, Chandola was well within his authority to overturn SHA's termination decision and order SHA to enter into a payment plan with Nichols. See *Mansour v. King County* 131 Wn.App. 255, 266, 128 P.3d 1241 (Div. 1, 2006).

4.3 Chandola's Ruling Is Not Contrary to Law, HUD Regulations, or HUD Requirements.

The remaining question, whether Nichols' unpaid 2002 debt made her ineligible for a payment plan, was a question of law. In reviewing an appeal from a Writ of Review, the appellate court reviews issues of law de novo *City of Seattle, Seattle Police Department v. Werner*, 163 Wn.App. 899, 906, 261 P.3d 218 (2011), citing *Hilltop Terrace Homeowner's Ass'n v. Island County* 126 Wn.2d 22, 29, 891 P.2d 29.

SHA's Section 8 Administrative Plan, which SHA admitted into evidence at the hearing, does state that SHA will not enter into a payment plan with a participant who is currently repaying a subsidy overpayment in a payment plan. CP at 285. But the Administrative Plan also states (at Chapter 19, Section C) that the 2002 debt should have been discharged CP at 287. Specifically, that provision of the Administrative Plan states that after 6 years, debts shall be written off. CP at 287. Chandola ruled, based

on this provision, that “[c]onsidering that the very chapter SHA relies on to argue that it lacks the discretion to offer the participant a new payment agreement based on the existence of an older preexisting debt agreement actually requires it to discharge the old debt itself, SHA’s reliance on the chapter is groundless.” There was no question that more than six years had elapsed since March 31, 2003, when Nichols was previously terminated from SHA’s Section 8 program for defaulting on the 2002 debt. CP at 287. And SHA presented no evidence or argument suggesting that Chandola misinterpreted that provision of the Administrative Plan. Chandola considered that SHA entered into a 2009 repayment agreement with Nichols for the 2002 debt but even still he found the debt invalid CP 287-289. This finding was within Chandola’s discretion

Chandola’s decision that the 2002 debt to SHA was invalid was not contrary to HUD regulations or law. In fact, Federal law prohibited SHA from denying Ms. Nichols’ Section 8 application or terminating her voucher based on this 2002 debt as HUD prohibits housing authorities from denying or terminating federal housing assistance based on time barred debts. See Section 8 Housing Assistance Payments Program, 49 Fed. Reg. at 12218 and 24 CFR 982.552(c)(1)(v). 24 CFR 982.552 permits denial and termination of assistance when a family currently owes rent or other amounts to the Housing Authority in connection with Section

8 or public housing assistance (see 24 CFR 982.552(c)(1)(v), emphasis added). Debts barred by collection are not currently owed to the PHA. “Past debt to a PHA is not grounds for denial of assistance. The PHA may not deny assistance if the debt...is not valid for any reason (e.g. a rent claim extinguished by the statute of limitations.”). See Section 8 Housing Assistance Payments Program, 49 Fed. Reg. at 12218 HUD reaffirmed this stating that [24 CFR 982.552(c)(1)(v)] does not allow the [PHA] to deny assistance for a debt...that is barred by the statute of limitations. By definition, an amount a family currently owes is not barred by the statute of limitations.” See Section 8 Certificate and Voucher Programs Conforming Rule, 60 Fed. Reg. at 34689. According to HUD’s interpretation, a debt that is barred by the statute of limitations is not “currently owed.”

This Court’s factual review is deferential and requires the court to view the evidence and reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority See *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 903 P.2d 986 (1995), citing *Freeburg v. City of Seattle*, 71 Wn.App. 367, 859 P.2d 610 (Div. 1, 1993). Therefore, deference should be given to Chandola’s factual findings and the evidence

and reasonable inferences therefrom should be viewed in the light most favorable to Nichols.

4.3.1 SHA is bound by Chandola's ruling.

As stated above, Chandola's ruling is neither exceeded Chandola's authority nor is contrary to law; therefore, SHA is bound by Chandola's ruling. See 24 CFR 982.555(f). SHA did not have the authority to determine his decision was not binding and hearing officer Kalhorn had no authority to hold additional proceedings in the matter. See 24 CFR 982.555(f).

4.3.2 Kalhorn's findings are void.

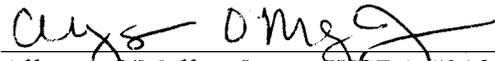
In their opening brief, SHA asserts that Kalhorn's findings are verities because Nichols did not challenge Kalhorn's findings of fact. Because SHA is bound by Chandola's decision pursuant to 24 CFR 982.555(f), Kalhorn's decisions are void her findings of fact do not stand. See *Marley v. Department of Labor and Industries*, 125 Wn.2d 533, 886 P.2d 189 (1994), concluding that orders are void when the issuing tribunal lacked subject matter jurisdiction over the claim, see also Order on Review CP at 684-687). For this reason, Nichols did not directly challenge, nor did she need to challenge, specific findings of fact in Kalhorn's decisions.

V. CONCLUSION

For the reasons set forth above, Respondent Jacquelyn Nichols respectfully requests that this Court affirm the trial court's Order on Review.

RESPECTFULLY SUBMITTED this 20th day of January, 2012.

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I, Marie Nguyen, certify under penalty of perjury under the laws of the State of Washington that on the 20th day of January, 2012, I caused a copy of the following documents:

1. Brief of Respondent Jacquelyn Nichols; and
2. This Declaration of Service.

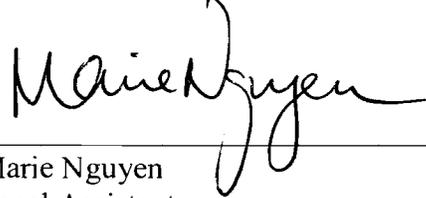
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