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NO. 67336-0-I

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

JACQUELYN NICHOLS,

Respondent,

v.

SEATTLE HOUSING AUTHORITY,

Appellant.

REPLY BRIEF

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INTRODUCTION

It is undisputed that SHA overpaid Nichols after she twice failed to timely report increased family income. It is also undisputed that SHA has “sole discretion” to enter a payment agreement or to terminate a Section 8 voucher where, as here, a participant fails to timely report income increases. ADMIN. PLAN, Ch. 19-1. Although SHA notified Nichols that it was terminating her voucher based on her failures to timely report income increases, and although SHA argued to Hearing Officer Chandola that Nichols’ failures supported termination, Chandola failed to consider this issue. Chandola thus exceeded his authority, so SHA was not bound by his decision.

Nichols never addresses this argument. And she concedes all material facts underlying the argument. Thus, Nichols essentially has no response to the appeal.

Kalhorn, the only hearing officer who considered SHA’s discretionary decision to terminate Nichols’ voucher based on her failure to timely report income increases, correctly upheld SHA’s discretionary decision. SHA correctly found that Nichols explanations were not credible, so reasonably terminated her voucher. This Court should reverse.

REPLY STATEMENT OF THE CASE

Nichols agrees that SHA has the right to terminate Section 8 participants who, like Nichols, fail to report increased family income. BR 8.¹ She does not dispute that SHA repeatedly told her that she had to report all increases. *Compare* BA 5-6 *with* BR 1-8. She admits that she failed to report her increased income, and that SHA overpaid her as a result. BR 3, 10.

Nichols also admits that SHA terminated her Section 8 voucher for “failing to report a change in her income. . . .” BR 1. She agrees that Chandola refused to address this argument, concluding (incorrectly) that the “sole issue” before him was whether SHA could terminate Nichols based on her old debt. CP 16; *compare* BA 14-15 *with* BR 1-8.

REPLY ARGUMENT

A. The parties agree on the standard of review.

The parties agree on the applicable standard of review, including that this Court views the facts in the light most favorable to the party prevailing in the highest forum exercising fact-finding authority. BA 11; BR 8, 15-16. As this Court recently explained,

¹Nichols submitted two different Briefs of Respondent. The second brief strikes out portions of the first. Nichols explains in a letter to the Court that the clerk instructed her not to designate the second brief as “amended.” SHA cites Nichols’ second brief, dated January 20, 2012.

when the Court reviews a trial court's decision on a *writ of certiorari*, it reviews the “decision of the body that makes the findings and conclusions relevant to the decision.” ***Mansour v. King Cnty.***, 131 Wn. App. 255, 262, 128 P.3d 1241 (2006) (quoting ***Davidson v. Kitsap Cnty.***, 86 Wn. App. 673, 681, 937 P.2d 1309 (1997)). This Court and the Superior Court both sit “in an appellate capacity, considering questions of law de novo and evaluating factual determinations under a substantial evidence standard. . . . The substantial evidence standard is ‘deferential and requires the court to view the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.’” ***Mansour***, 131 Wn. App. at 262-63 (quoting ***Sunderland Family Treatment Servs. v. City of Pasco***, 127 Wn.2d 782, 788, 903 P.2d 986 (1995)). The parties disagree only as to which findings deserve this deference. BA 11-12; BR 15-16.

The parties agree that Hearing Officers Chandola and Kalhorn presided over the highest “forum” exercising fact-finding authority. CP 14-15, 60-62. Both parties prevailed – Nichols before Chandola, and SHA before Kalhorn. As such, this Court

should view Chandola's findings in Nichols' favor, and view Kalhorn's findings in SHA's favor. BA 11; BR 15-16.

But Chandola's findings are irrelevant on appeal. Since Chandola believed (albeit mistakenly) that the "sole issue" before him was whether SHA could terminate Nichols based on her old debt, his findings pertain solely to the old debt. CP 14-16. SHA conceded that it could not terminate Nichols based on her old debt. BA 10 n.3. As such, the only issue Chandola ruled on is moot.

Kalhorn correctly found that Nichols failed to timely report her increased income and entirely failed to report her daughter's increased income. CP 60-61. She also correctly found that SHA argued this point to Chandola, who utterly failed to consider it (exceeding his authority). CP 62-63. And she correctly found that SHA reasonably believed that Nichols' explanations were not credible. CP 62-64. Again, these findings must be viewed in SHA's favor. BA 11.

Kalhorn's findings are also verities, since Nichols did not challenge them in the Superior Court. BA 11-12; ***Hilltop Terrace Homeowner's Ass'n v. Island Cnty.***, 126 Wn.2d 22, 30, 891 P.2d 29 (1995). Nichols claims that she did not have to challenge Kalhorn's findings, arguing that Kalhorn's decision is void, where

“SHA is bound by Chandola’s decision.” BR 16. Her sole support for this argument is *Marley v. Dep’t of Labor & Indus.*, holding that an order is void if the court lacked personal or subject matter jurisdiction. 125 Wn.2d 533, 536-37, 542, 886 P.2d 189 (1994). Nichols has never claimed that Kalthorn lacked personal jurisdiction. And Kalthorn plainly had subject matter jurisdiction, where both federal regulations and SHA’s Administrative Plan give hearing officers authority to review SHA’s termination decisions. 24 C.F.R. 982.555(a)(v); ADMIN. PLAN Ch. 20-3.

B. This Court should reverse, where Nichols does not even address SHA’s argument that it was not bound by Chandola’s decision, which exceeded his authority.

SHA’s primary argument on appeal is that it was not bound by Chandola’s decision, where he exceeded his authority by failing to address SHA’s argument that it properly terminated Nichols based on her second and third failures to report increased family income. BA 12-17. SHA plainly raised this argument before Chandola, walking Chandola through the applicable law; presenting facts showing that Nichols knew she had to report increased income, but failed to do so; and arguing that SHA properly terminated Nichols’ voucher because she failed to report increased family income. BA 7-8, 14. By failing to consider this issue,

Chandola exceeded his hearing-officer authority, erroneously failing to adjudicate material factual issues and to conform his ruling to the law. BA 14-15. Thus, SHA was not bound by Chandola's decision. BA 16-17.

Hearing Officer Kalhorn correctly found that SHA raised this issue before Chandola, arguing that it properly terminated Nichols based on her failure to timely report increased income. BA 16; CP 63. Finding that Chandola did not consider this argument, Kalhorn correctly ruled that SHA was not bound by Chandola's decision. CP 62-64.

Nichols concedes virtually every point underlying SHA's arguments on this issue, agreeing that:

- ◆ SHA may terminate Section 8 voucher participants for failing to report increased family income (BR 8);
- ◆ she failed to report her increased family income (BR 11);
- ◆ SHA "attempted to" terminate Nichols voucher for her failure to report increased family income (BR 1);
- ◆ Chandola "was to consider all relevant facts and conform his rulings to all relevant legal authority." (BR 9); and
- ◆ SHA is not bound by Chandola's decision if he exceeded his authority (BR 8).

Nichols never directly addresses SHA's argument that it was not bound by Chandola's decision. Instead she falsely claims that

her old debt was the only reason SHA gave Chandola for terminating Nichols' Section 8 voucher. BR 11. This is inconsistent with Nichols' admission that SHA terminated her voucher for "failing to report a change in her income." BR 1. And the record from Chandola's hearing plainly contradicts this assertion. CP 464, 467-68, 477, 493-94, 499. Nichols' concessions, along with the obvious fact that SHA raised this issue before Chandola, require reversal.

C. Nichols primarily focuses on a moot point – whether SHA could terminate Nichols based on her old debt.

Nichols focuses almost entirely on Chandola's decision that SHA could not terminate Nichols based on her old debt. BR 8-16. Since SHA concedes this issue, it is moot – as is much of Nichols' response. BA 10 n.3. To avoid confusion, SHA addresses Nichols' sub-arguments in support of this moot point.

Nichols argues that "Chandola had to decide two issues": (1) whether SHA overpaid Nichols; and (2) whether SHA proved by a preponderance of the evidence that "a payment plan (to repay the overpayment) was a more appropriate remedy than termination." BR 10. Nichols concedes the first issue, agreeing that SHA overpaid her after she failed to report her increased family income. BR 1, 10.

As to the second issue, Nichols claims that Chandola considered her explanations for failing to timely report increased income and that SHA argued only that it could terminate Nichols based on her old debt. BR 11-12.² Nichols concludes that a preponderance of the evidence demonstrated “that a payment plan . . . was the more appropriate remedy.” BR 12-13.

a. Contrary to Nichols’ claim, Chandola did not consider her explanations for failing to timely report her increased family income.

Contrary to Nichols’ claim, the record suggests that Chandola did not consider her explanations for failing to timely report increased income. *Compare* BR 11 *with* CP 14-19. Nichols cites only testimony. BR 11. She does not cite Chandola’s decision because she cannot – it says nothing about this issue. CP 14-19.

Nichols’ explanations for failing to timely report increased income are irrelevant to the only issue Chandola considered – whether SHA could terminate Nichols based on her old debt. CP 16. Chandola plainly stated that this was the “sole issue” before him. CP 16; BA 8, 13-15. He equally plainly (and equally

² As discussed above, the latter point is simply false. *Supra*, Argument § B; CP 464, 467-68, 477, 493-94, 499. SHA plainly argued to Chandola that Nichols’ failure to report her increased income justified termination. *Id.*

incorrectly) indicated that SHA did not rely on Nichols' failure to timely report increased family income as a basis for terminating her. CP 14, 18-19.³ In fact, when referencing SHA's termination letter, Chandola mentioned only the old debt, ignoring that the letter also states that SHA was terminating Nichols because she failed to timely report increased income. *Compare* CP 14 *with* CP 21-22. Thus, Nichols' explanations for her failures to report increased income were irrelevant, having no bearing on the only issue Chandola considered.

This Court must "presume" that Chandola did not consider Nichols' irrelevant testimony. ***State v. Read***, 147 Wn.2d 238, 242, 53 P.3d 26 (2002) ("we presume the judge in a bench trial does not consider inadmissible evidence in rendering a verdict"); ***State v. Jenkins***, 53 Wn. App. 228, 231, 766 P.2d 499 ("In a bench trial, there is even a more 'liberal practice in the admission of evidence' on the theory that the court will disregard inadmissible matters"), *rev. denied*, 112 Wn.2d 1016 (1989), citing ***State v. Miles***, 77 Wn.2d 593, 601, 464 P.2d 723 (1970)). Thus, Nichols' argument

³ Chandola incorrectly concluded that SHA could have, but did not, "take[] the position that it was exercising its discretion to terminate" Nichols simply because she owed SHA "rent or other amounts." CP 18-19.

that Chandola considered her excuses contradicts the record and the law.

b. SHA properly exercised its discretion to terminate Nichols, finding that her explanations for failing to timely report increased income where not credible.

SHA plainly proved by a preponderance of the evidence that Nichols failed to timely report increased family income, which Nichols does not even dispute. BR 10-11; *supra*, Reply Statement of the Case. It is also undisputed that SHA may “at its sole discretion,” terminate Section 8 participants who, like Nichols, fail to timely report increased family income. ADMIN. PLAN Ch. 19-1; BA 13; BR 8; 24 C.F.R. §§ 982.551(b) & .552(c)(i). In other words, Nichols did not even contest that SHA had sufficient grounds to terminate her. *Id.* Kalthorn, the only hearing officer who considered this issue, correctly ruled that SHA “established by a preponderance of the evidence that Ms. Nichols breached her participant obligations by failing to report income on two occasions.” CP 64.

Thus, the only question was – and is – whether SHA properly exercised its “sole discretion” to terminate Nichols. Kalthorn, the only hearing officer who addressed this issue, correctly

ruled that “SHA did not find [Nichols’ explanations] credible or justifiable”:

SHA has the authority (not the obligation) to terminate Ms. Nichols’ HCV based upon her failure to report an increase family income. . . . It is not for this hearing officer to substitute her own judgment for that of SHA so long as it is not arbitrary or capricious . . . SHA could reasonably conclude that the importance of timely reporting income changes should have been driven home. . . . She also had a long history with SHA, with numerous annual reviews and at least two HCV orientations. Ms. Nichols failed to report income not once, but twice in 2009 and 2010. The total HAP overpayment was in excess of \$3,000.00. SHA did not find credible or justifiable Ms. Nichols’ assertion that she did not think she had to report interim income changes until the next annual review and that her failure to list Melissa’s income on the March 15, 2010 Declaration was an oversight.

CP 64 (footnotes omitted). This amply supports SHA’s discretionary decision to terminate Nichols’ voucher. Kalhorn correctly concluded that “SHA’s exercise of its right to terminate [Nichols’ voucher] is reasonable and not arbitrary or capricious.”

CP 64.⁴

Nichols incorrectly asserts that the preponderance standard applies to SHA’s discretionary decision to terminate her voucher. BR 9, 11, 13. SHA’s Administrative Plan provides that it is in SHA’s

⁴ Neither the Plan nor the C.F.R.s establish the standard a hearing officer would apply upon reviewing SHA’s discretionary decision. Although the APA does not apply (*Riggins v. Hous. Auth. of Seattle*, 87 Wn.2d 97, 102, 549 P.2d 480 (1976)), hearing officer Kalhorn correctly concluded that she could overturn SHA’s discretionary decision only if it was arbitrary and capricious. CP 62, 64.

“sole discretion” to enter a payment agreement. ADMIN. PLAN, Ch. 19-1. This discretionary decision is not a fact that can be reviewed for the sufficient quantum of evidentiary support.

Nichols’ reliance on *Mansour v. King County* is misplaced. BR 9, 11, 13 (citing 131 Wn. App. 255). There, King County ordered Mansour to remove his dog from the County within 48 hours after the dog severely injured the neighbors’ cat. *Mansour*, 131 Wn. App. at 261. Mansour appealed the removal order to the King County Board of Appeals, who upheld the removal order, as did the Superior Court. 131 Wn. App. at 261-62. This Court reversed, holding that the Board erroneously considered only whether the County’s removal order was arbitrary and capricious, failing to apply any evidentiary standard to the factual disputes underlying the removal order. *Id.* at 264-66.

Again, SHA proved by a preponderance that Nichols failed to timely report increased income. CP 64. *Mansour* is inapposite.

D. Nichols fails to address SHA’s remaining arguments.

Nichols fails to address SHA’s argument that the Superior Court erroneously granted the writ, where Kalhorn’s decision was not erroneous or illegal. BA 17. Kalhorn correctly ruled that SHA

was not bound by Chandola's decision because he failed to consider material, factual and legal arguments, as required. BA 17.

Nichols also fails to address SHA's argument that Kalhoun correctly ruled that SHA properly terminated Nichols' voucher based on her failure to timely report income increases. BA 17-18. In fact, Nichols agrees that she failed to report her income increases and that that her voucher could be terminated for failing to report income increases. BR 8, 10-11. Again, she effectively ignores SHA's primary argument. This Court should reverse.

CONCLUSION

This Court should reverse the Superior Court and reinstate SHA's decision to terminate Nichols' voucher.

RESPECTFULLY SUBMITTED this 6th day of March, 2012.

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CERTIFICATE OF SERVICE BY MAIL

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