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SUMMIT COUNTY  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

NICOLE MCALISTER	:	CASE NO. CV 2007-08-5813
	:	
Plaintiffs,	:	Judge Patricia A. Cosgrove
	:	
vs.	:	
	:	ORDER
AKRON METROPOLITAN HOUSING AUTHORITY	:	<u>Final and Appealable Order</u>
	:	
Defendant.	:	

This cause came before the Court upon the Administrative Appeal filed by Plaintiff-Appellant Nicole McAlister. This is an administrative appeal from a decision of the Akron Metropolitan Housing Authority terminating McAlister's ability to participate in the Housing Choice Voucher Program (HCVP).

On May 24, 2007, Appellant was notified of the cancellation of her Section 8 subsidy (Exhibit C) with the reason marked as: "Other: Violation of family obligations #7, #11, #20-B, and #20-C (copy attached) for head of household Nicole McAlister arrested for illegal drug activity or other criminal activity and for Morris Gaffney living in the unit unauthorized." Appellant filed the instant appeal.

The Hearing Officer determined that:

The Hearing Officer finds insufficient evidence offered to show Mr. Gaffney stayed there beyond the 15 days as allowed by the Family Obligations. However, the evidence is clear that Ms. McAlister entered pleas of guilty to the charges of Cocaine, marijuana and obstructing official business. (See Judgment Entry dated May 7, 2007).

The appeal herein is based solely on the allegation that the head of household was arrested for illegal drug activity or other criminal activity.

Appellant asserts that the decision to terminate the rent subsidy should be reversed because she is entitled to due process protection in keeping the rent subsidy. Appellant asserts that a subsidy for housing is a property interest and that termination of the subsidy must be afforded substantive due process. Appellant asserts that the hearing officer failed to determine if there was, in fact, conduct by Appellant that violated the family obligation at issue.<sup>1</sup> Appellant asserts that the record does not support the conclusion that she violated this obligation.

Appellant asserts that under the HCVP the definition of "drug-related criminal activity" means "the illegal manufacture, sale, distribution, use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug." 24 CFR 5.100. Appellant does not dispute that she plead guilty to drug possession charges, but asserts that the plea alone is not sufficient to satisfy the due process requirement to determine that Appellant violated the HCVP of drug related criminal activity. Appellant asserts that she plead guilty to the charges in order to enter into the felony drug court program and that she understood that by entering into the Drug Court Program that the charges would be dismissed if she successfully completed the program.

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<sup>1</sup> The family obligation at issue is "drug related criminal activity or violent criminal activity or other criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises."

Essentially Appellant argues that her guilty plea in exchange to enter into the Drug Court Program is not conclusive evidence of her violation of the family obligation of drug related criminal activity. Appellant further asserts that due process was denied in that she requested a continuance of the hearing to have an attorney present and that request was denied.

Appellee, AMHA, asserts in opposition that the HCVP plan provides that members may not engage in drug-related criminal activity. Appellee asserts that neither arrest, formal charge or conviction is required in order for a violation of the drug related criminal activity to be violated.

Appellant does not dispute that an arrest or conviction is not required in order for there to be a violation of the HCVP Family Obligation of drug related criminal activity. Appellant asserts that in the case at bar there is not a preponderance of substantial, reliable and probative evidence on the issue of drug related criminal activity.

The standard to be applied by this Court in an administrative appeal under Chapter 2506 is set forth in RC 2506.04, which provides, in relevant part:

The court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court.

The Court of Common Pleas must weigh the evidence in the record, and any additional evidence admitted under RC 2506.03, and determines whether there exists a preponderance of substantial, reliable, and probative evidence to support the agency decision. *Dudukovich v. Housing Authority* (1979), 58 Ohio St.2d 202.

The Ohio Supreme Court further stated in *Dudukovich*, at 207:

We caution, however, to add that this does not mean that the court may blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. The key term is "preponderance." If a preponderance of reliable, probative and substantial evidence exists, the Court of Common Pleas must affirm the agency decision; if it does not exist, the court may reverse, vacate, modify or remand.

In weighing the evidence, the Court of Common Pleas must give due deference to the administrative agency's resolution of evidentiary conflicts, since as the finder of fact, the agency had the opportunity to observe the witnesses' demeanor and weigh their credibility. See *Dudukovich*, supra; *Univ. of Cincinnati v. Conrad* (19), 3 Ohio St.2d 108, 111; *Budd Co. v. Mercer* (1984), 14 Ohio App. 3d 269, 273-274. This Court is bound by the evidence contained in the record and may not consider evidence outside the record. R.C. 2506.03 and *McAlpin v. Shirey* (1997), 121 Ohio App.3d 68.

At the hearing, Officer Russell Bassett, employed by AMHA, testified that he investigated the charges against Appellant. Officer Bassett testified that Appellant had "met the eligibility requirements to go to the Summit County's felony – felony drug court program, which she is into right now. So her case right now is in abeyance until she completes that program."

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The administrative record also contains a letter dated June 21, 2007 from Oriana House which states:

On 05-02-07, Ms. McAlister appeared in the Summit County Court of Common Pleas for Case #06-11-4045B. She entered a plea of Guilty to Possession of Cocaine (F5), Obstructing Official Business (M2) and Possession of Marijuana (MM). She was sentenced to a period of not less than six (6) months nor more than twelve (12) months incarceration and ordered to pay all fees and court costs associated with the case. However, since she met the eligibility requirements for the Felony Drug Court Program, execution of the sentence was held in abeyance on the condition that Ms. McAlister successfully complete 18 to 24 months in the

Summit County Felony Drug Court program. Therefore, upon successful completion of the program, the Guilty plea will be vacated and the criminal case will be dismissed.

Appellee asserts that AMHA does not require a conviction as evidence of criminal activity but that assistance may be terminated if it is determined "based on a preponderance of the evidence, that the household member has engaged in the activity, regardless of whether the household member has been arrested or convicted for such activity." Exhibit D3; 24 CFR §982.553(c).

The CFR regulations further set forth that the housing authority may admit a household member if it is determined "That the evicted household member who engaged in drug related criminal activity has successfully completed a supervised drug rehabilitation program approved by the PHA;" Exhibit D3; 24 CFR §982.553(a)(1)(A).

In the case at bar, the Hearing Officer correctly determined that evidence of a criminal conviction was not required in order to be in violation of the family obligations. However, this Court finds that the Hearing Officer's decision to terminate Appellant from the housing program is unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. This Court agrees with Appellant that the Hearing Officer failed to make an independent determination that Appellant engaged in the drug-related criminal activity as defined by the CFR. Under the HCVP drug-related criminal activity means "the illegal manufacture, sale, distribution, use of a drug or the possession of a drug with intent to manufacture, sell, distribute or use the drug." 24 CFR 5.100.

Even though a guilty plea may be admitted in a subsequent civil case, that guilty plea is not considered dispositive of the issues. Clinger v. Duncan (1957), 166 Ohio St. 216. A guilty plea is in the nature of an admission against interest. Freas v. Sullivan (1936), 130 Ohio St. 486.

Evidence that explains or contravenes an admission against interest can be introduced and considered.

The guilty plea by Appellant does not establish by a preponderance of the evidence that Appellant violated the drug related criminal activity section. This Court finds that Appellant is entitled to present evidence of the circumstances surrounding the guilty plea and then the Hearing Officer can make a determination as to whether there is a preponderance of the evidence, that the household member has engaged in the activity

Additionally, Appellant requested that the hearing be continued so that counsel could represent her. Appellant advised the Hearing Officer that she had retained counsel, but that her counsel was not available for the hearing.

R.C. 9.84 provides as follows:

Any person appearing as a witness before any public official, department, board, bureau, commission, agency, or representative thereof, in any administrative or executive proceeding or investigation, public or private, if he so requests, shall be permitted to be accompanied, represented, and advised by an attorney, whose participation in the hearing shall be limited to the protection of the rights of the witness, and who may not examine or cross-examine witnesses, and the witness shall be advised of his right to counsel before he is interrogated. This section shall not apply to proceedings before a grand jury.

Kirch v. Ohio Bureau of Workers' Comp (2003), 154 Ohio 3d 651, 655.

The term "witness" in R.C. 9.84 is used in its broadest sense and should not be interpreted to exclude a person who is also a party. Id.

In the case at bar, during the administrative proceedings, Appellant was sworn in and testified. Further, the hearing was to protect a property interest held by Appellant. Accordingly, this Court finds that a properly made request for a continuance to have counsel present should have been honored.

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In the case at bar, this Court finds that the decision of the Hearing Officer for AMHA is not supported by a preponderance of substantial, reliable and probative evidence.

IT IS ORDERED AND ADJUDGED that this Administrative Appeal by the Appellant is GRANTED.

IT IS FURTHER ORDERED AND ADJUDGED that the decision of the AMHA is REVERSED AND REMANDED to the administrative agency for action consistent with this opinion.

This is a final and appealable order. There is no just cause for delay.

  
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Judge Patricia A. Cosgrove

CC: Nicole McAlister  
James Casey