A04-0435

==========

STATE OF MINNESOTA

IN SUPREME COURT

BETH ANN HINNEBERG,
Appellant,

v.

BIG STONE COUNTY HOUSING AND REDEVELOPMENT AUTHORITY,
Respondent

BRIEF OF *AMICI CURIAE* BY THE NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS; MINNESOTA CHAPTER, NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS; NORTH CENTRAL REGIONAL COUNCIL, NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS; AND HOUSING AND DEVELOPMENT LAW INSTITUTE

James A Lee. Jr.
LEGAL AID SOCIETY OF MINNEAPOLIS
430 First Avenue North, Suite 300
Minneapolis, MN 55401-1780
Attorneys for Appellant

William J. Watson
BIG STONE COUNTY ATTORNEY
37 Northwest Second Street
Ortonville, MN 56278
Attorney for Respondent

William F. Maher
Florida Bar No. 140175
630 Eye Street, NW
Washington, D.C. 20001
(202) 289-3500
Attorney for Amici Curiae, N*ational Association of Housing and Redevelopment Officials; Minnesota Chapter, National Association of Housing and Redevelopment Officials; and North Central Regional Council, National Association of Housing and Redevelopment Officials, appearing pro hac vice*

Lisa Walker Scott
District of Columbia Bar No. 435547
Housing and Development Law Institute
630 Eye Street, NW
Washington, D.C. 20001
(202) 289-3400
Attorney for Amici Curiae Housing and Development Law Institute
(202) 289-3400

Keith S. Moheban, Alison C. Archer
Leonard, Street and Deinhard, PA
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Attorneys for Amici National Association of Protection and Advocacy Systems, Inc., and Home Line

TABLE OF CONTENTS

[TABLE OF CONTENTS CONTINUED ON NEXT PAGE]

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

[TABLE OF AUTHORITIES CONTINUED ON NEXT PAGE]

OTHER AUTHORITY

INTEREST OF THE *AMICI CURIAE* [1]

The National Association of Housing and Redevelopment Officials (NAHRO), located in Washington, D.C., is a nationwide non-profit organization whose mission is to facilitate the development and sound management of housing and rental assistance for low-income families as well as community development. Formed in 1933, with more than 3,000 member agencies and 17,000 individual Associates, NAHRO is the nation's oldest and largest non-profit organization representing local officials and agencies engaged in providing affordable housing to low-income families. Collectively, NAHRO members administer approximately 1,739,000 units of Section 8 voucher rental assistance (approximately 80 percent of the nation's total).

Minnesota Chapter, National Association of Housing and Redevelopment Officials (Minnesota NAHRO) is a non-profit membership organization of housing professionals who operate public housing and administer rental assistance throughout Minnesota. Its members include approximately 136 public housing agencies and 365 individual housing professionals serving such agencies, who are devoted to furthering the delivery of decent, safe and sanitary housing and/or rental assistance to families in Minnesota.

North Central Regional Council, National Association of Housing and Redevelopment Officials (NCRC NAHRO) is a non-profit membership organization affiliated with NAHRO with members in 8 states, including Minnesota. Its membership

[1] Pursuant to Minn. R. Civ. App. P. 129.03, the *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici curiae*, their members, or their counsel has made any monetary contribution to the preparation or submission of this brief.

includes approximately 520 local housing agencies and 3,560 individual housing professionals engaged in the delivery of public housing and rental assistance to low-income families.

Housing and Development Law Institute (HDLI), located in Washington, D.C., is a twenty-one year old non-profit member organization that serves as a legal resource on public and affordable housing issues nationwide. HDLI's more than 300 members, located in Minnesota and elsewhere across the nation include executive directors currently managing Section 8 and/or public housing programs for small, medium, and large public housing and redevelopment agencies. HDLI and its members have considerable expertise in the relatively complex Section 8 Housing Choice Voucher Program generally, and with respect to portability policies, in particular.

Public housing agencies represented by the *amici curiae* are the government entities responsible for the administration of the federal Section 8 Housing Choice voucher rental assistance program. The *amici curiae* are concerned with ensuring that the nation's federal housing assistance programs operate successfully and in accordance with congressional intent. In this regard, the *amici curiae* believe that a judicial mandate requiring the Respondent to disregard its policies, as urged by Appellant, would have a destructive effect, nationwide, on Section 8 voucher programs operated by smaller housing authorities, particularly those in rural areas. The *amici curiae* therefore consider the decision in this case to involve a matter of considerable national significance.

STATEMENT OF LEGAL ISSUES

Notwithstanding that other issues are addressed by the respective parties and by other *amici*, this brief is directed only to the following issues, which *amici curiae* suggest are dispositive in this case:

1. Do the Fair Housing Amendments Act and its implementing regulations require the Big Stone County Housing and Redevelopment Authority (Big Stone County HRA) to grant the Appellant's request for accommodation?

2. Do the Americans With Disabilities Act and its implementing regulations require Big Stone County HRA to grant the Appellant's request for accommodation?

3. Is Appellant's request for accommodation that Big Stone County HRA waive its policy requiring a non-resident applicant for a Section 8 voucher to reside 12 months within its jurisdiction before porting out to another jurisdiction, a fundamental alteration to the agency's Section 8 program?

STATEMENT OF CASE AND FACTS

Amici curiae hereby adopt and incorporate herein by reference the Statement of Case and Facts set forth in the brief of Respondent in whose support this brief is offered. *Amici curiae* also offer the following additional information pertinent to the arguments made in this brief.

The Appellant, Beth Hinneberg, (Hinneberg) presently resides in a rental apartment in Hopkins, Minnesota, the location where she proposed to use the voucher obtained from Big Stone County HRA. Hopkins is served by the Section 8 Housing Choice Voucher program operated by the Metropolitan Council Housing and Redevelopment Authority (MCHRA). MCHRA operates the largest housing voucher

program in Minnesota under which the agency presently administers 5,871 vouchers. The agency has utilized its entire authorized federal voucher funding since September 2001. Approximately 5,000 families are presently listed on MCHRA's wait list, which has been closed since December 2001. In April 2005, the MCHRA began taking families off the list, an action also previously taken in fall of 2003. The current wait for applicants for vouchers at MCHRA is estimated to be 3 to 5 years, and the Authority is presently considering lengthening this estimate to 5 to 7 years (information supplied by agency).

By contrast, Big Stone County HRA is a small rural agency that serves a county with a total population of approximately 5,500 persons. As noted in Respondent's brief, Big Stone County HRA's voucher program presently consists of 34 vouchers. The agency's waiting list has 19 families, 8 of which are not residents of Big Stone County (5 reside in the Twin Cities area, 2 reside in Chicago, 1 resides in Columbus Ohio).

With the probable exception of the proportion of non-resident applicants, the differences in these two programs are typical of differences between voucher programs in metropolitan and non-metropolitan areas generally. As would be expected, non-metropolitan voucher programs are on the whole smaller[2], have shorter waiting lists[3], and have a significantly lower subsidy cost per voucher than programs operated in

[2] Information provided the U.S. Department of Housing and Urban Development (HUD), indicates that non-metropolitan voucher programs are smaller (35% of non-metropolitan voucher programs administer 100 or fewer vouchers, as contracted with 17% of similarly sized programs located in metropolitan areas). HUD Voucher Mgmt. System data 2004.

[3] *See, Waiting in Vain: An Update on America's Rental Housing Crisis,* U.S. Dep't of Housing and Urban Development. (2000)

metropolitan areas (see discussion p 19 *infra*). They also have a higher voucher turnover rates.[4]

These differences bear upon this case in two ways. Their shorter waiting lists and higher turnover rates make smaller, non-metropolitan voucher programs attractive for waiting list shopping. The higher subsidy cost of vouchers in metropolitan areas means that a voucher ported to a metropolitan area from a non-metropolitan area such as Big Stone County may cost the originating agency between two and three times the cost of the same voucher if used in its own jurisdiction, reducing the number of vouchers serving local families by this multiple.

LEGAL ARGUMENTS

1. Under the United States Housing Act, Big Stone County HRA has the discretion to adopt and apply the policy that Appellant demands be waived.

The federal Section 8 Housing Choice Voucher rental assistance program is governed by the United States Housing Act of 1937 (U.S. Housing Act). 42 U.S.C §1437 *et seq*. It is implemented by federal regulations codified at 24 C.F.R. Part 982. Under the federal regime, appropriations for rental assistance are distributed to local housing agencies, which administer the program under contracts subject to federal law and regulation. The U.S. Housing Act contemplates that local agencies administering the federal housing programs shall have "the maximum amount of responsibility and flexibility in program administration." (42 U.S.C. §1437 note (1)(C))

[4] *See generally, Housing Choice Voucher Patterns: Implications for Participant and Neighborhood Welfare,* Devine *et. al*., U. S. Dep't of Housing and Urban Development (2003), Apps. C-4, D-4 showing turnover rates states and 50 largest PHAs.

Voucher program regulations provide that public housing agencies must adopt written administrative plans that establish local policies for administration of the program in accordance with HUD requirements. The administrative plan sets forth PHA policy on matters for which the PHA has discretion to establish local policies. (24 C.F.R. §982.54(a)). The plan is required to cover the PHA's policy on a variety of subjects including restrictions, if any, on the number of moves by a participant family [referencing 24 C.F.R. §982.314(c), which provides that the policy may apply to moves both within and outside of the PHAs jurisdiction under portability procedures]. Id.

The permissibility under federal law of a restriction on porting to a location outside of the PHA's jurisdiction during the initial 12-month period following initial receipt of housing assistance is specifically addressed in statute (42 U.S.C. §1437f(r)(1)(B)). This section also provides that the Secretary of HUD may establish exceptions to the authority of public housing agencies to prohibit ports to nonresident applicants during the first 12-months of participation. (42 U.S.C. §1437f(r)(1)(B)(ii)) In conformance with the statutory provisions, HUD's regulations at 24 C.F.R. §982.353(c)(2) provide:

> (2) The following apply during the 12 month period from the time a family described in paragraph (c)(1) of this section [nonresident] is admitted to the program:
>
> …
>
> (ii) The family does not have any right to portability;
>
> (iii) The PHA may choose to allow portability during this period.

In promulgating this regulation, the HUD Secretary clearly could have, but did not, elect to create an exception for disabled persons or persons requiring specialized medical care.

The statutory differentiation between nonresidents and residents has as its obvious purpose, enabling PHAs to discourage waiting list shopping by voucher applicants.[5] The statute and regulation recognize a PHA's legitimate interest, within limits, to protect of its voucher program from waiting list shopping so that the agency may serve local needs.

---

[5] The language relating to a 12-month period in which non-resident applicants are not permitted to port, was initially enacted as a mandatory requirement in §147 of the Housing and Community Development Act of 1992 (Pub. L. 102-550, October 28, 1992). The House Committee Report for relating to the 1992 Act explained the rationale for the provision:

"This [portability] system has also led to instances of waiting list shopping where families that reside in areas with long waiting lists, shop the waiting lists in surrounding areas. When they find a shorter list, the family will place their name on the shorter list and upon receiving assistance in this new area will use such assistance in the jurisdiction where the family resides, without ever living in the new area that supplies the assistance. This waiting list shopping has resulted in some small agencies being unable to assist local residents….Another problem is the effect of the difference in fair market rents between the originating area and the receiving area…further undercutting the number of local families the originating family can serve…." H. Rep 102-760, at 90 (July 30, 1992).

The statutory provision relating to the 12 month prohibition on porting was made discretionary with PHAs in Section 553 of the Quality Housing and Work Responsibility Act of 1998 (QHWRA) (title V, Pub. L. No. 105-276, October 21, 1998). The committee report for the House bill later enacted in part as QHWRA confirmed the purpose of the 12-month prohibition on porting by non-resident applicants:

"Because of reported abuses, in 1992 Congress enacted legislation that somewhat limits portability of assistance. At that time it was reported that families were 'wait-list shopping;' that is, getting on waiting lists for Section 8 assistance in areas with short or no waiting lists and obtaining certificates or vouchers from a local PHA with no intention of living in the PHA's jurisdiction. After receiving assistance, the families immediately leased units in some other area…" H.R. Rep. 104-461, 104th Cong 2d Sess. (1992) at 97 (February 1, 1996).

2. The adoption by Big Stone County HRA of a 12-month restriction on ports by nonresident applicants is consistent with overall federal policy relating to the distribution of housing assistance.

The Big Stone County HRA voucher program, and of other housing agencies across the nation were initially funded under a distributive scheme set forth in subsection 213(d) of the Housing and Community Development Act of 1974 (42 U.S.C. §1439(d)). This subsection provides, among other things, that the Secretary of HUD shall allocate assistance the first time it is made available:

> ….on the basis of a formula that is based on the relative needs of different States, areas and communities, as reflected in data as to population, poverty, housing overcrowding, housing vacancies, amount of substandard housing, and other objectively measurable conditions specified in the regulation....(42 U.S.C. §1439(d)(1)(A)(i)).

This language does not apply to assistance that the Secretary determines "is incapable of geographic allocation." (42 U.S.C. §1439(d)(1)(B)(ii)).

The statutory allocation provisions are implemented by HUD regulations entitled "Allocations of Housing Assistance Funds," codified at 24 C.F.R. Part 791. Based on the statutory criteria relating to poverty and relative need, these regulations allocate funding to HUD Field Offices for further distribution to entities administering the funding. Each Field Office is required to develop allocation areas that "provide for the equitable distribution of available budget authority consistent with the relative housing needs of each allocation area…" (24 C.F.R. §791.404). HUD Field Offices are further instructed

that "each allocation area shall be the smallest practicable area, but of sufficient size that at least three eligible entities are viable competitors for funds…"

While these provisions set forth a federal scheme for allocating initial funding rather than contract renewal funding, they do evidence a clear federal intent that federal housing assistance funding be dispersed geographically throughout all areas of the nation having sufficient housing needs to justify such funding.[6] By imposing the 12-month requirement on ports by voucher holders who are not residents at the time of application, Big Stone County HRA seeks to preserve the voucher program for the very low-income residents of Big Stone County, an objective that is entirely consonant with the federal distributive scheme.

Big Stone County HRA exercised permissible local discretion in imposing a 12 month initial prohibition on ports by nonresident applicants, and it did so for the legitimate purpose of preserving its rental assistance resources for use by the local community it serves.

3. The Fair Housing Amendments Act of 1988 does not require Big Stone County HRA to grant Appellant's request for an accommodation to her disability.

A. Big Stone County HRA's decision to deny Appellant's accommodation request was not discriminatory because it resulted from a uniform application of a policy equally applicable to both disabled and non-disabled applicants and was not based on Appellant's disability.

[6] As noted in the appendices to the *amici curiae* brief of the National Association of Protection and Advocacy Systems, and Home Line, the poverty rate in Big Stone County exceeds that of both Hennepin County and Minnesota as a whole. Moreover, Big Stone County has more than twice the proportion of elderly persons as Hennepin County or the State of Minnesota and has a disabled population of 17% as contrasted with 13% in Hennepin County. Amicus Brief, Quick Facts A2-A5.

Section 804 of the federal Fair Housing Act, as amended, provides in pertinent part that it shall be unlawful:

> (f) (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of –
>
> (A) that buyer or renter,
>
> . . .
>
> (2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with that dwelling, because of a handicap of –
>
> (a) that person; or
>
> . . .
>
> (3) For purposes of this subsection, discrimination includes—
>
> . . .
>
> (B) a refusal to make reasonable accommodations in rules policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling….
>
> (42 U.S.C. §3604(f)).

The policy of Big Stone County HRA prohibiting ports by nonresident applicants during the first 12 months after entering the program is neutral. It applies equally to all applicants who are not residents of Big Stone County at the time of entering the program. The policy makes no distinction between disabled and non-disabled applicants, who are treated equally under the policy. Inasmuch as no assertion is made that the policy discriminates against Appellant "because of" her handicap, the policy is facially nondiscriminatory. Any finding of discrimination under the Fair Housing Act must rest on the refusal of Big Stone County HRA to grant Appellant's request for a reasonable accommodation waiving the agency's policy.

B. Under the Fair Housing Amendments Act a housing provider is not required to grant a request for reasonable accommodation if the request results in a fundamental alteration of the provider's policies or program.

The concept of reasonable accommodation has a long history in law regarding disability discrimination. Interpreting the disability protections in federal grant programs contained in Section 504 of the Rehabilitation Act (29 U.S.C. §794), the U.S. Supreme Court held that section 504 does not compel educational institutions to make substantial modifications in their programs to allow disabled persons to participate. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Quoting *Davis* in 1987, the Supreme Court confirmed its position, ruling: "Accommodation is not reasonable if it either imposes 'undue financial or administrative burdens' on a grantee…or requires 'a fundamental alteration in the nature of [the] program…'" *School Board of Nassau County v. Arline*, 480 U.S. 273 (1997).

The *Davis* standard is recognized cross-cutting and governs determinations regarding the reasonableness of requested accommodations are reasonable under the Fair Housing Act.[7] This standard is also recognized as applicable to the Americans With Disabilities Act, having been codified in its implementing regulations. (28 CFR §35.130(b)(7)).

In enacting the federal disability protections, Congress sought to protect disabled persons from discrimination. It did not intend to confer special rights on disabled persons beyond the right to be free from discrimination based on their disabilities. *See e.g., M.H. v. Montana High School Association*, 929 P. 2d 239 (Mt. 1996), *citing Pottgen v. Missouri State High School Activities Association*, 40 F.3d 926 (8th Cir. 1994). "The

[7] "Rehabilitation Act case law also applies to claims under the FHA." *Giebler v. M&B Associates*, 343 F.3d 1143, 1148-49 (9th Cir. 2002); *Smith and Lee Assocs. V. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996).

requirement of reasonable accommodation does not entail an obligation to do everything that is humanly possible to accommodate a disabled person." *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995). The existence of disability thus does not *per se* entitle a disabled person to relief from legitimate generally applicable requirements or entitle a person to preferential treatment.[8]

A federal district court has ruled, for example, that disability did not entitle a person to preference on a Section 8 waiting list to the disadvantage of other applicants and in contravention of federal selection preferences. *Liddy v. Cisneros*, 823 F. Supp. 164 S.D.N.Y. 1993). Similarly, a federal appeals court refused to compel a landlord to participate in the Section 8 program, where the landlord had for its own legitimate and lawful reasons elected no longer to participate in the program. *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998). The Seventh Circuit Court of Appeals has ruled that a disabled person was not entitled to have his arrest record disregarded as a reasonable accommodation to allow his admission to assisted housing where the criminal background criteria applied alike to both disabled and non-disabled applicants. *Tally v. Lane, et al.*, 13 F. 3d 1031 (7th Cir. 1994). In *Whitfield v. Public Housing Agency of the City of St. Paul*, Civ. File No. 03-6096 (PAM/RLE), 2004 U.S. Dist. LEXIS 24714 (D. Minn. December 7, 2004), the federal district court refused to relieve a mentally disabled tenant of the basic obligations of tenancy so as to prevent her eviction, where the housing

[8] "But we find nothing in the Americans with Disabilities Act giving persons with disabilities preferential treatment in Section 8 housing programs or excluding disabled persons from the reporting requirements of such programs." *Schultz v. Dakota County Comm. Devel. Agency*, Minn. Ct. App. October 12, 2004 Unpublished. 2004 Minn. App. LEXIS 1153 [Copy attached as Appendix I.].

agency had otherwise previously accommodated her in an effort to achieve lease compliance. With respect, particularly, to requested waivers of rules and regulations as reasonable accommodations, the U.S. Sixth Circuit Court of Appeals, in denying equitable relief to a disabled plaintiff who sought free parking adjacent to her place of employment, has stated: "In cases involving waiver of applicable rules and regulations, the overall focus should be on 'whether waiver of the rule in the particular case would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change.'" *Jones v. City of Monroe,* 341 F. 3d 474 (6th Cir. 2003).

Conceding that numerous instances can be found in which particular accommodations have been ruled appropriate under the circumstances, these and similar cases affirm the principle that there is no automatic entitlement to a particular reasonable accommodation but rather that the disposition of such a request entails an individualized process of weighing the benefit to the requestor, on the one hand, and burden upon the accommodating party, on the other. As stated, there is no entitlement to an accommodation that alters the fundamental nature of the provider's program or defeats the very purpose of a rule sought to be waived.

C. Appellant's accommodation request is a fundamental alteration of Big Stone County HRA's Section 8 voucher program.

As previously mentioned, Big Stone County HRA has very limited resources for its voucher program. The law allows the agency, when considering Appellant's request for reasonable accommodation, to evaluate the impact of granting such an accommodation on its voucher program.

Big Stone County HRA elected to avail itself of the option to prohibit ports by nonresident applicant for 12 months as a disincentive to the very thing that has happened here. Whether Appellant initially applied for assistance in Big Stone County in an effort to "shop" waiting lists, the result is the same, the loss of available voucher assistance to a metropolitan jurisdiction. In this regard, it should be noted that the subsidy cost of a voucher in Hopkins is generally twice that in Big Stone County, so that the requested port to Hopkins will cause the agency to lose the ability to serve *two* families residing in Big Stone County.

The precedent that Appellant has requested the agency to set, if accommodated, will almost certainly result, ultimately, in the substantial or complete attrition of Big Stone County's voucher program. The number of disabled persons among the more than 12,000 applicants on Section 8 waiting lists in the Minneapolis metropolitan area alone is sufficient to inundate Big Stone's waiting list.[9] Perhaps because news of this litigation has spread, Big Stone County HRA now also has 8 nonresident applicants (the waiting list typically contains 3 to 5 applicants in total) from as far away as Chicago and Columbus Ohio. Granting Appellant's request for reasonable accommodation, or a decision of the Court mandating such action, will make it extremely difficult or impossible for Big Stone County HRA to decline similar requests by disabled applicants in the future.

[9] The Minneapolis Public Housing Authority (MPHA) has about 7,000 persons on its Section 8 waiting list, of whom an estimated 1,407 are disabled. Of the approximately 5,000 persons on MCHRA's Section 8 waiting list, an estimated 1,249 are disabled.

The prospect that the federal resources provided for its voucher program will no longer be available to the residents of Big Stone County represents, at the least, a fundamental alteration of Big Stone's voucher program. Big Stone has a legitimate interest in maintaining its program and is therefore entitled to deny this request for reasonable accommodation. Additionally, the requested accommodation defeats the very purpose Big Stone's policy to prohibit ports by nonresident applicants during the first 12 months of program participation.

4. The Americans with Disabilities Act does not require Big Stone County HRA to grant Appellant's request for a reasonable accommodation.

A. Appellant is not a "qualified person with disabilities" under the American's With Disabilities Act.

Title II of the Americans With Disabilities Act (ADA) provides: "Subject to the provisions of this subchapter, no qualified individual with a disability shall by reason of such disability be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. (42 U.S.C. §12132). For these purposes, the Act defines "a qualified individual with a disability" as:

> "an individual with a disability, who, with or without reasonable modifications to rules, policies or practices, the removal of architectural, communication or transportation barriers, or the provision of auxiliary services, meets the essential eligibility requirements for the receipt of services. (42 U.S.C. §12131(2)).

As the statutory text indicates, in order to assert she has suffered discrimination by reason of her disability under Title II of the ADA, Appellant must first establish that she

is "a qualified individual with disabilities." That is, she must establish that she meets the essential eligibility requirements for receipt of assistance. The issuance of the voucher to Appellant confirms that she has, in the determination of the Agency, met the essential eligibility requirements relating to income and suitability for tenancy. This means that, as a non resident at the time of application, Appellant is eligible to receive assistance for the lease of a unit located within the jurisdictional area of the Big Stone County HRA.

Under the policies of the Agency, however, Appellant is not, without the reasonable accommodation she has requested, eligible to receive assistance to lease a unit located outside the agency's jurisdictional area. If Appellant is not entitled to the reasonable accommodation, she cannot establish her eligibility for assistance to lease a unit outside the agency's jurisdiction, and she is therefore not a qualified individual with a disability entitled to protection under Title II. For the reasons stated below *amici curiae* urge that Appellant is not entitled to the requested accommodation.

B. Under the Americans With Disabilities Act, the administrator of a governmental assistance program is not required to grant an accommodation request, if the request results in undue burden or a fundamental alteration of the nature of the service, program or activity.

The regulations of the U.S. Department of Justice implementing Title II of the ADA provide in pertinent part:

> (7) A public entity shall make reasonable modifications in policies, practices or procedures, when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity. (28 C.F.R. §35.130(b)(7)).

Under these regulations, the applicable legal test for evaluating entitlement to an accommodation is substantively identical to that used under the Fair Housing Act and Section 504 of the Rehabilitation Act.

The U.S. Supreme Court has consistently recognized that consideration of reasonable accommodation under the ADA, as with such considerations under Section 504 and the Fair Housing Act, involves a balancing of interests and that an accommodation is not reasonable if it imposes an undue financial or administrative burden or requires a fundamental alteration of a public entity's rules, policies or program. *See e.g., Olmstead v. L.C. by Zimring*, 527 U.S. 581, 592-595 (1999); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2002); *Tennessee v. Lane*, 541 U.S. 509, 532 (2004).

C. Appellant's accommodation request fundamentally alters the nature of Respondent's Housing Choice voucher program and the voucher program itself.

This case, unlike the many others in which public entities have been required to accommodate, involves a requested accommodation that carries the real potential of substantially eliminating the program as a benefit to local residents. This is not a matter of inconvenience to the Big Stone County HRA, but rather a threat to its essential mission, which is to provide affordable housing assistance to Big Stone County residents.

While the immediate request is relief from the Agency's policy, the ultimate consequence of that relief will almost certainly be a radical change in the ability of the Agency to serve persons residing in its jurisdiction. An accommodation that spells the virtual demise of the Agency's program, as a benefit to the residents of Big Stone County, would seem *per se* to impose an undue burden and to constitute a fundamental

alteration of the program. In view of this, *amici curiae* suggest that Appellant is not entitled to the requested accommodation under Title II of the ADA.

5. A ruling that Appellant is entitled to the requested accommodation in this case will have a serious and adverse impact on smaller non-metropolitan public housing agencies administering voucher programs throughout the nation.

As previously mentioned, housing agencies located in urban areas typically have longer Section 8 voucher program waiting lists that those located in rural or non-metropolitan areas. In general, applicants at urban agencies experience longer wait periods than those at rural agencies both as a function of the length of the waiting lists and because urban voucher programs typically experience lower voucher turnover rates than programs in rural areas. These characteristics combine to make rural agencies attractive targets for Section 8 waiting list shopping by applicants. The sole barrier to such shopping is the 12 month prohibition on ports by nonresident applicants. Nonresidents who do not desire to live in the area of the housing agency issuing the voucher are discouraged from applying. Those who do become part of the population within the jurisdictional area the housing agency seeks to serve.

If the experience of MCHRA and the MPHA serve as an example, the proportion and number of disabled applicants on Section 8 waiting lists is quite substantial (an estimated 2,656 on the waiting lists of these two agencies alone, is more than 20% of all applicants.) A decision that Appellant is, or may be, entitled to the requested accommodation will have a ripple effect resulting in a large number of applications to smaller non-metropolitan agencies by disabled applicants who presently reside in urban areas and whose intention will be to port out immediately just as Appellant seeks to do.

It is no secret that legal aid agencies are well-networked. This circumstance would be a natural consequence of effective representation by legal aid providers of their clients.

The difficulty for smaller rural, non-metropolitan agencies will in some cases by exacerbated by the relatively higher voucher subsidy costs in urban, metropolitan areas. An analysis of current data available from HUD's Voucher Management System reveals that average voucher subsidy costs for non-metropolitan housing agencies which, like Big Stone County HRA, administer 50 or fewer vouchers, is approximately $263 per month, as contrasted with an average subsidy of approximately $663 per month for the 21 housing agencies in metropolitan areas operating the largest programs of 10,000 vouchers or more – A multiple of approximately 2.5 to 1. Recent HUD guidance,[10] allows a PHA to deny a port if it can demonstrate in a detailed cost reduction plan that it will actually lack the funding to cover the housing assistance payments for the family if the family moves to a higher cost area.[11]

CONCLUSION

For the reasons stated above, *amici curiae* respectfully urge the Court to rule as a matter of law that the accommodation requested by Appellant would impose an undue burden on Big Stone County HRA and would require a fundamental alteration of its policies and program. Alternatively, the matter should be remanded to the housing agency for further determination: 1) if an alternative accommodation may be appropriate

[10] 24 C.F.R. §982.314(e)(1); HUD Notice PIH 2005-1(HA).

[11] Presumably, in the case of disabled persons, requests for reasonable accommodation will also include a demand for full funding of the ported voucher in the new location..

and feasible, and 2) whether the requested accommodation imposes an undue burden on the agency or requires a fundamental alteration of its policy and its voucher program.

Respectfully submitted,

Dated: May 23, 2005

William F. Maher, Florida Bar #140175
Attorney for Amici Curiae, N*ational Association of Housing and Redevelopment Officials (NAHRO); Minnesota Chapter, NAHRO North Central Regional Council NAHRO appearing pro hac vice*
630 Eye Street, NW
Washington, D.C. 20001
(202) 289-3500

Lisa Walker Scott
District of Columbia Bar #435547
Attorney for Amicus Curiae, Housing and Development Law Institute appearing pro hac vice
630 Eye Street, NW
Washington, D.C. 20001
(202) 289-3400

A04-0435

==========

STATE OF MINNESOTA

IN SUPREME COURT

_____

BETH ANN HINNEBERG,
Appellant,

v.

BIG STONE COUNTY HOUSING AND REDEVELOPMENT AUTHORITY,
Respondent

_____

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, *ET AL.*

APPENDIX I

Source: Legal > States Legal - U.S. > Minnesota > Cases > MN State Cases, Combined
Terms: schultz and dakota county community development agency (Edit Search)

*2004 Minn. App. LEXIS 1153, **

Nancy **Schultz,** Relator, vs. **Dakota County Community Development Agency,** Respondent.

A03-1099

COURT OF APPEALS OF MINNESOTA

2004 Minn. App. LEXIS 1153

October 12, 2004, Filed

NOTICE: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. STAT. § 480A.08, SUBD. 3 (2002).

PRIOR HISTORY: Dakota County Community Development Authority.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Relator, tenant, challenged the judgment of the hearing officer, Minnesota, finding that respondent, county community development agency (CDA), had acted appropriately in terminating her from the Section 8 housing program.

OVERVIEW: The tenant entered the CDA's federally subsidized Section 8 housing program in 1996. In 2002, the CDA reviewed the tenant's file and documented numerous inconsistencies regarding the reported composition of her household. The CDA later sent the tenant a letter informing her that her participation in the Section 8 program was being terminated because she had failed to report income of household members as required for the Section 8 program. The tenant argued that the hearing officer's decision was arbitrary and capricious. The appellate court ruled that the hearing officer articulated a rational connection between the facts and the decision that termination was warranted, and the decision was not arbitrary and capricious. The record included substantial evidence showing that the tenant failed to report changes in household composition and income as required by the CDA and the Department of Housing and Urban Development, which were grounds for termination. The tenant did not contest that she failed to report changes in household composition and income, but instead offered various explanations for such failures.

OUTCOME: The judgment was affirmed.

CORE TERMS: household, hearing officer, composition, reporting, housing authority, termination, subsidy, housing, Disabilities Act, arbitrary and capricious, failed to report, housing program, notified, adult, substantial evidence, articulated, terminated, recertification, regulation, monthly, tenant, accurately reflect, reexamination, terminating, attachment, rebut, administrative agency, required to report, failure to report, opposing party

LexisNexis(R) Headnotes • Hide Headnotes

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review

HN1 An agency's quasi-judicial decision must be supported by substantial evidence not be arbitrary and capricious. The agency's conclusions are not arbitrary and capricious so long as a rational connection between the facts found and the ch made has been articulated. An agency decision-maker must consider all impor aspects of the case. Decisions of administrative agencies enjoy a presumption correctness and a reviewing court defers to an agency's conclusions regarding conflicts in testimony, the weight given to expert testimony, and the inference be drawn from testimony. More Like This Headnote

Public Health & Welfare Law > Public Housing & Public Buildings > Low-Income Housing

HN2 Failure to comply with the local housing authority's reporting requirements ma serve as a ground for termination from the Section 8 housing program. 24 C.F 982.552(c)(1)(i) (2003). More Like This Headnote

Public Health & Welfare Law > Public Housing & Public Buildings > Low-Income Housing

HN3 Under federal regulations, before a hearing on a participant's termination from Section 8 housing program, the participant must be given the opportunity to examine any local housing authority documents that are directly relevant to th hearing. If the housing authority does not make the document available for examination on request of the participant, the housing authority may not rely the document at the hearing. 24 C.F.R. § 982.555(e)(2)(i) (2003). More Like This Headnote

Public Health & Welfare Law > Public Housing & Public Buildings > Low-Income Housing

HN4 At a hearing on a person's termination from the Section 8 housing program, th person must be given the opportunity to present evidence, and may question witnesses. 24 C.F.R. § 982.555(e)(5) (2003). More Like This Headnote

Civil Procedure > Appeals > Records on Appeal

HN5 Minn. R. Civ. App. P. 110.03 provides that if a transcript is unavailable, the appellant may prepare a statement reflecting what took place at the proceedi and provide a copy of the statement to the opposing party and to the district or administrative agency that presided at the proceeding; the opposing party then make proposed amendments to the statement and submit them to appel and the court or agency. The district court or administrative agency may then adopt one of the proposed statements submitted by the parties, or incorporat own amendments to one of the statements and adopt the amended version. T rule does not require that the parties agree on the content of the statement. More Like This Headnote

Public Health & Welfare Law > Public Housing & Public Buildings > Low-Income Housing

Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage

HN6 There is nothing in the Americans with Disabilities Act giving persons with disabilities preferential treatment in Section 8 housing programs or excluding disabled persons from the reporting requirements of such programs. American with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213. More Like This Headnote

COUNSEL: Nancy **Schultz,** Rosemount, MN (Pro se relator).

Mary G. Dobbins, Mary G. Dobbins & Associates, Edina, MN (for respondent).

JUDGES: Considered and decided by Willis, Presiding Judge; Randall, Judge; and M

Judge.

OPINIONBY: WILLIS

OPINION: UNPUBLISHED OPINION

WILLIS, Judge

Relator argues that (1) respondent housing authority acted arbitrarily and capriciously terminating her from its housing-subsidy program, (2) the housing authority violated h rights to examine her file and to present evidence, (3) the statement of the proceeding adopted by the hearing officer did not accurately reflect the proceedings, and (4) her ri under the Americans with Disabilities Act were violated when she was terminated from program. Because the hearing officer articulated a rational connection between her find and her decision and because we find no violation of relator's rights, we affirm.

FACTS

Relator Nancy **Schultz** entered the **Dakota County Community Development Agen** (CDA) federally subsidized "Section 8" housing program in October 1996. **[*2]** CDA administers the program under regulations promulgated by the United States Departme Housing and Urban Development (HUD). **Schultz** has a degenerative bone disease that prevents her from working. When she entered the Section 8 program, her two younges children, Troy, who was 17 years old at the time, and Jason, who was 15, lived with he

Continued participation in the Section 8 program requires the subsidy recipient to apply recertification on at least an annual basis. On the recertification application, the particip must identify each member of the household and state the monthly income of each adu member of the household. If an adult member of the household claims to receive no inc he must sign a form attesting that he currently receives no income and promising to re any income to CDA within 30 days of its receipt. If there is such a reported change in in CDA may then recalculate the amount of the subsidy to which the head of the household entitled.

The recertification process also requires the program participant to sign a "statement of tenant responsibilities," a form in which she promises to notify CDA within 30 days of a changes in the household **[*3]** composition or income. Household income is any incom earned by adult members of the household. By signing the statement of tenant responsibilities, the participant acknowledges that "failure to report changes in my hous size to [CDA] within 30 days of the change will result in termination of my housing assistance" and that the participant "will notify [CDA] of all changes in my household in within 30 days of the change."

In October 2002, CDA reviewed **Schultz's** file and documented numerous inconsistencie regarding the reported composition of her household. CDA notified her that all future ch in her household composition must be reported in writing within 30 days of the change. April 2003, CDA obtained information regarding Jason's and Troy's incomes from the Minnesota Department of Economic Security showing that, combined, they had earned m than $ 43,000 in the 17 quarters preceding the first quarter of 2003. **Schultz's** CDA file included no record that **Schultz** reported any of this income. On May 2, 2003, CDA sent **Schultz** a letter informing her that her participation in the Section 8 program would be terminated effective June 30, 2003, because she had "failed **[*4]** to report income of household members as required for the Section 8 program."

Schultz exercised her right to an informal hearing, which was held on May 21, 2003. **Schultz** was represented by counsel. CDA asserted that not only had **Schultz** failed to

changes in her household income, but also she had failed to report changes in the composition of her household, as is required by CDA reporting requirements and HUD regulations. CDA further claimed that **Schultz** was aware of the reporting requirements because in the past she had reported decreases in household income that benefited her by resulting in an increase in her monthly housing subsidy. CDA alleged that **Schultz** had intentionally misreported information to maximize the amount of her housing subsidy and to remain eligible for a subsidy for a two-bedroom apartment.

Schultz claimed that her understanding was that she was not required to report changes in household income unless the change resulted in an increase in monthly household income of at least $ 2,000. n1 **Schultz** also claimed that Troy moved in and out of her apartment frequently, staying with her only when he was between jobs, and that Troy did not contribute any of **[*5]** his income to the household. Jason, who appeared at the hearing, claimed that he had notified CDA of income that he received while working at a job in 2000 but did not recall if he had notified CDA about other changes in his income.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Under the CDA policies in effect since 1999, monthly household income increases of less than $ 2,000 would not result in recalculation of the participant's subsidy. Before 1999, the threshold was $ 500.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The hearing officer concluded that CDA had "acted appropriately" in terminating **Schultz** from the Section 8 program. The officer concluded that CDA had "successfully demonstrated that Ms. **Schultz** and/or other adult members of her household failed on more than one occasion to report changes in household composition and/or household income." The officer also concluded that CDA had shown that **Schultz** was aware of CDA reporting requirements because on more than one occasion she did report household changes that resulted in a change in CDA records.

Schultz filed this pro se appeal and **[*6]** requested that a transcript of the hearing be made. But CDA informed her that the audiotape recording of the hearing was of such poor quality that transcription was impossible. This court then ordered the parties to prepare a statement of the proceedings under Minn. R. Civ. App. P. 110.03. On February 3, 2004, the hearing officer adopted the statement of the proceedings submitted by CDA.

DECISION

I.

Schultz argues that the hearing officer's decision was arbitrary and capricious because the officer did not consider all of the relevant circumstances surrounding her failure to report changes in her household composition and income and because the decision was not supported by substantial evidence. **HN1**An agency's quasi-judicial decision must be supported by substantial evidence and not be arbitrary and capricious. *Carter v. Olmsted County Hous. & Redevelopment Auth.*, 574 N.W.2d 725, 729 (Minn. App. 1998). "The agency's conclusions are not arbitrary and capricious so long as a 'rational connection between the facts found and the choice made' has been articulated." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001). **[*7]** An agency decision-maker must consider all important aspects of the case. *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 730 (Minn. App. 1997). Decisions of administrative agencies enjoy a presumption of correctness and a reviewing court defers to an agency's

conclusions regarding conflicts in testimony, the weight given to expert testimony, and the inferences to be drawn from testimony. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d at 278.

Schultz does not contest that she failed to report changes in household composition and income. She instead offers various explanations for such failures, arguing that she was not required to report the changes because they would not have affected her housing subsidy or because they were temporary. But the statements of tenant responsibilities signed annually by **Schultz** required her to report all changes in household composition and income, and, under federal regulations, **Schultz** was required to comply with the reporting requirements developed by CDA. *See* 24 C.F.R. § 982.551(b)(1) (2003) (stating that a Section 8 participant "must supply **[*8]** any information that the [local housing authority] determines is necessary in the administration of the program"); 24 C.F.R. § 982.551(b)(2) (2003) (stating that a Section 8 participant "must supply any information requested by the [local housing authority] for use in a regularly scheduled reexamination or interim reexamination of family income and composition in accordance with HUD requirements"). HN2 Failure to comply with the local housing authority's reporting requirements may serve as a ground for termination from the program. 24 C.F.R. § 982.552(c)(1)(i) (2003).

The record includes substantial evidence showing that **Schultz** failed to report changes in household composition and income as required by CDA and HUD; such failure is a ground for termination from the program. Therefore, the hearing officer articulated a rational connection between the facts and the decision that termination was warranted, and the decision was not arbitrary and capricious.

II.

Schultz argues that CDA violated her rights by not allowing her to see documents in her CDA file before the hearing. HN3 Under federal regulations, before a hearing on **[*9]** a participant's termination from the Section 8 housing program, the participant "must be given the opportunity to examine . . . any [local housing authority] documents that are directly relevant to the hearing . . . If the [housing authority] does not make the document available for examination on request of the [participant], the [housing authority] may not rely on the document at the hearing." 24 C.F.R. § 982.555(e)(2)(i) (2003). The right to examine documents was communicated to **Schultz** in an attachment to the May 2003 letter notifying her that she was being terminated from the housing program. **Schultz** does not claim, and the record does not show, that she requested to see any documents in her CDA file before the hearing. Because **Schultz** did not request to see the contents of her CDA file before the hearing, her rights were not violated when she did not do so.

Schultz also argues that she offered to produce evidence to rebut the evidence presented by CDA but was not given the opportunity to do so. Under the relevant federal regulation, HN4 at a hearing on a person's termination from a Section 8 housing program, the person "must be given the opportunity **[*10]** to present evidence, and may question any witnesses." 24 C.F.R. § 982.555(e)(5) (2003). The attachment to CDA's May 2003 letter also informed **Schultz** of her right to present evidence. All of the exhibits presented by CDA at the hearing, with the exception of a list chronicling **Schultz's** failures to comply with reporting requirements, were documents from **Schultz's** CDA file. Had **Schultz** taken advantage of her opportunity to view the file before the hearing, she could have prepared evidence to rebut CDA's exhibits. Because **Schultz** was notified of her rights more than two weeks before the hearing but opted not to exercise them, her argument that she was not given the time or opportunity to present rebuttal evidence is without merit.

III.

Schultz argues that the statement of the proceedings adopted by the hearing officer was not agreed on by the parties, as she claims is required by Minn. R. Civ. App. P. 110.03 (2003). She further claims that because the statement ignores her arguments it does not accurately represent the proceedings and is evidence that the hearing officer did not consider **Schultz's** arguments.

It is not necessary, as **Schultz** contends, **[*11]** that the parties agree to the contents of a statement of the proceedings. HN5 Minn. R. Civ. App. P. 110.03 provides that if a transcript is unavailable, the appellant may prepare a statement reflecting what took place at the proceeding and provide a copy of the statement to the opposing party and to the district court or administrative agency that presided at the proceeding; the opposing party may then make proposed amendments to the statement and submit them to appellant and the court or agency. The district court or administrative agency may then adopt one of the proposed statements submitted by the parties, or incorporate its own amendments to one of the statements and adopt the amended version. *Id.* The rule does not require that the parties agree on the content of the statement. *See* Minn. R. Civ. App. P. 110.03 cmt. (explaining that 1998 amendments were "intended to clarify that the trial court is not bound by the parties' submissions but may modify the statement based on the court's own recollection").

Moreover, the record shows that the statement of the proceedings adopted by the hearing officer does not ignore the arguments presented by **Schultz** in the hearing and emphasized **[*12]** in **Schultz's** proposed statement of the proceedings. **Schultz** has not shown that she made relevant arguments at the hearing that were not addressed in the statement of the proceedings adopted by the hearing officer, and the arguments that she claims are not reflected in the statement are not relevant to the issue of whether she failed to meet CDA's reporting requirements. Thus, nothing in the record suggests that the statement of the proceedings adopted by the hearing officer does not accurately reflect what occurred at the hearing or that it prejudices **Schultz.**

IV.

Finally, **Schultz** argues that "she feels she has rights under the [Americans with Disabilities Act] to public housing assistance, in order to sustain her life" and that those rights were violated. But we find HN6 nothing in the Americans with Disabilities Act giving persons with disabilities preferential treatment in Section 8 housing programs or excluding disabled persons from the reporting requirements of such programs. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (2003)). Therefore, we conclude that **Schultz's** rights **[*13]** under the Americans with Disabilities Act were not violated by her termination from the program.

Affirmed.