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WILLIE BANKS, JR., APPELLANT, V. THE HOUSING AUTHORITY OF THE CITY OF OMAHA ET AL., APPELLEES.

795 N.W.2d 632

Filed January 28, 2011. No. S-10-302.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.
2. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it.
3. **Administrative Law.** Administrative action must not be arbitrary or capricious.
4. **Administrative Law: Appeal and Error.** The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Liliana E. Shannon and Scott M. Mertz, of Legal Aid of Nebraska, for appellant.

George B. Achola and Natalie Baumgarten, of Housing Authority of the City of Omaha, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

The Housing Authority of the City of Omaha (OHA) terminated housing benefits for Willie Banks, Jr., after he was allegedly involved in criminal activity. A hearing officer confirmed the termination of benefits, and Banks filed a petition in error in Douglas County District Court. The court affirmed the hearing officer's decision. Banks appeals.

SCOPE OF REVIEW

[1] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence

supports the decision of the agency. *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008).

FACTS

In 2008, Banks resided in a unit of OHA-operated housing on Florence Boulevard (Florence unit). In early 2009, while Banks was still living in the Florence unit, he was approved for a federally subsidized housing choice voucher program, commonly referred to as "Section 8" housing, which is also administered by OHA.

Based on a report that Banks had committed an assault and robbery, his lease for the Florence unit was terminated. When he did not move out as requested, OHA filed a forcible entry and detainer action (restitution action) in county court. Before a hearing was held on the restitution action, Banks moved out of the Florence unit and into the Section 8 housing. OHA determined that Banks had previously been evicted from OHA housing, and it terminated his Section 8 benefits. At Banks' request, an informal hearing was held on the termination of benefits, and the hearing officer upheld the termination. The district court affirmed the hearing officer's finding.

A detailed chronology of the events follows:

• December 12, 2008: Banks was allegedly involved in an assault and robbery when he knocked down a person and took the person's billfold, which contained $6 and identification.

• December 17, 2008: OHA staff received a report that Banks was involved in an assault and robbery.

• January 5, 2009: Banks' application for assistance under Section 8 was approved.

• January 14, 2009: OHA mailed a "***THREE DAY NOTICE FOR FAILURE TO COMPLY WITH LEASE*** (Eviction for Criminal Activity)" to Banks at the Florence unit. The notice stated that Banks had violated the lease and the "'**One Strike and You're Out**'" addendum to the lease. The notice stated: "**YOUR RENTAL AGREEMENT WILL BE CONSIDERED AUTOMATICALLY TERMINATED ON THE THIRD DAY AFTER RECEIPT OF THIS NOTICE AND YOU SHALL IMMEDIATELY QUIT, VACATE AND SURRENDER POSSESSION OF THE ABOVE-DESCRIBED PREMISES**,"

and "You are not entitled to a grievance hearing in this termination."

• February 3, 2009: OHA filed the restitution action against Banks after he refused to vacate the Florence unit as directed by the 3-day notice. Trial was set for February 17.

• February 5, 2009: Banks' Section 8 housing passed inspection.

• February 12, 2009: E-mail correspondence in the record indicates that according to OHA personnel, Banks was evicted from the Florence unit and turned in his keys. One e-mail noted that the "eviction hearing" was scheduled for February 17 but that OHA counsel would dismiss the restitution action because Banks turned in his keys to the unit. A reply e-mail stated that the Section 8 housing Banks planned to move to had passed inspection, but stated: "We will process all the paper work and give the owner a 30 day notice and terminate him just as soon as we receive the lease and contracts."

• February 17, 2009: The restitution action was dismissed at the request of OHA.

• March 10, 2009: Banks was notified that his Section 8 benefits would be terminated effective May 1 because "**[y]ou were evicted from [the] Florence [unit]. You were served with a 3 day notice on January 14, 2009. Per OHA legal Department you surrendered your keys on February 12, 2009.**" The letter quoted two sections of the federal regulations: "**CFR 982.551 Obligations of participant.** *(e) Violation of lease. The family may not commit any serious or repeated violation of the lease. (g) Owner eviction notice. The family must promptly give the* [*public housing agency*] *a copy of any owner eviction notice*," and "**CFR 982.552** [**Public housing agency**] **denial or termination of assistance for family.** *(ii) If any member of the family has been evicted from federally assisted housing in the last five years*." The letter also advised Banks that he had the right to an informal hearing. Attached was a document titled "**TENANT HEARING/REVIEW RIGHTS**." A notice was also sent to the landlord of the Section 8 property.

• March 12, 2009: Banks submitted a request for an informal hearing, stating: "You siad [sic] that I got evicted From [the] Florence [unit] but I didn't."

• March 31, 2009: An informal hearing was held before a hearing officer.

• April 14, 2009: The hearing officer issued a two-page decision in which she stated that the notice for criminal activity served on Banks gave him 3 days to vacate and surrender the premises. The "eviction action" was filed to obtain restitution when Banks did not vacate after the 3 days expired. OHA dismissed the court proceedings when Banks turned in his keys prior to the court date. Based on the evidence presented during the hearing, the hearing officer determined that Banks should remain terminated from the Section 8 program.

The district court determined that the evidence was sufficient to support the decision of the hearing officer and that the decision was not arbitrary or capricious. Because Banks vacated the Florence unit prior to the hearing for restitution, there was no need for OHA to further pursue its action in court; it had obtained the relief it sought. Banks chose to vacate the premises rather than contest the eviction proceeding in court. OHA's dismissal of the restitution action was "appropriate and logical."

The district court stated that adopting Banks' position would frustrate the intent of federal housing laws and their enforcement because a public housing tenant could avoid the consequences of his own behavior by willfully failing to comply with the terms of the lease; refusing to vacate and surrender the premises, forcing the housing authority to take legal action; vacating the premises prior to a court hearing; and then arguing that he was entitled to continue to receive housing assistance because there was no court order evicting him. The court affirmed the hearing officer's decision. Banks appeals.

ASSIGNMENTS OF ERROR

Banks assigns the following errors: (1) The district court erroneously upheld the termination of Banks' Section 8 housing benefits, in that the hearing officer's decision was not supported in law or by fact; (2) the administrative decision violated OHA's administrative plan by finding that an eviction occurred when there was no legal eviction order; and (3) the

district court exceeded its authority by making findings of fact not properly before the reviewing court.

ANALYSIS

[2-4] Our review of OHA's decision requires us to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. See *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008). The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it. *Id.* In addition, the administrative action must not be arbitrary or capricious. *Id.* The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Id.*

The issue before us is whether Banks' Section 8 housing benefits were properly terminated, as determined by the hearing officer and affirmed by the district court.

OHA is a public housing agency established pursuant to state and federal housing programs. *Thirty LLC v. Omaha Housing Authority*, 17 Neb. App. 715, 771 N.W.2d 165 (2009). OHA operates a public housing program, which provides housing such as the Florence unit, and the Section 8 program, under which low-income individuals are eligible for rent subsidies that can be applied to a home of their choice in the private sector. *Id.* An individual may apply for Section 8 benefits, and if qualified, the individual is issued a housing voucher. See *id.* The individual is responsible for finding a suitable housing unit of his or her choice, which the owner agrees to rent under the program. See *id.* Section 8 housing is a federal program created by the U.S. Department of Housing and Urban Development.

OHA operates pursuant to the Nebraska Housing Agency Act (Act), Neb. Rev. Stat. §§ 71-1572 to 71-15,168 (Reissue 2009). See *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58 (2005). Under the Act, the landlord-tenant relationship and the termination of such relationship are governed by state law applicable to privately owned residential

property. § 71-15,138. Concerning termination of tenancy, § 71-15,139 states:

> (1) A housing agency may adopt and promulgate reasonable rules and regulations consistent with federal and state laws, rules, and regulations and the purposes of the . . . Act concerning the termination of tenancy. Any resident so terminated shall be sent a written notice of termination setting out the reasons for such termination, and any resident served with a notice shall be given the opportunity to contest the termination in an appropriate hearing by the housing agency. A resident may contest the termination in any suit filed by the housing agency in any court for recovery of possession of the premises.
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> (3) A housing agency may, after three days' written notice of termination and without an administrative hearing, file suit and have judgment against any resident for recovery of possession of the premises if the resident, any member of the resident's household, any guest, or any other person who is under the resident's control or who is present upon the premises with the resident's consent, engages in any drug-related or violent criminal activity on the premises, or engages in any activity that threatens the health, safety, or peaceful enjoyment of other residents or housing agency employees. Such activity shall include, but not be limited to, any of the following activities of the resident, or the activities of any other person on the premises with the consent of the resident: (a) Physical assault or the threat of physical assault . . . .

Thus, under the Act, OHA has the authority to file suit for recovery of the premises if the resident engages in violent criminal activity. The definition of criminal activity includes the commission of physical assault or the threat of physical assault. Banks was accused of committing an assault and robbery, and the OHA acted within its jurisdiction in filing the restitution action.

Federal regulations also set out the grounds upon which a public housing agency may deny admission or terminate assistance. See 24 C.F.R. § 982.552(c) (2010). These grounds

include: "[i]f any member of the family has been evicted from federally assisted housing in the last five years" and "[i]f the family has been engaged in criminal activity or alcohol abuse as described in § 982.553." § 982.552(c)(1)(ii) and (xi). A public housing agency may prohibit admission to a housing program if any household member is engaged in or has engaged in "(2) Violent criminal activity; (3) Other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity." 24 C.F.R. § 982.553(a)(2)(ii)(A) (2010). The regulations provide that the agency

> may terminate assistance for criminal activity by a household member as authorized in this section if the [agency] determines, 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*.

§ 982.553(c) (emphasis supplied).

Under these regulations, Banks' housing benefits could have been terminated solely based on the alleged assault, even though he was not charged with any crime. The original 3-day notice Banks received was subtitled "Eviction for Criminal Activity." The hearing officer's decision noted that Banks was served a 3-day notice for "criminal activity." There was evidence presented at the hearing that Banks had committed an assault and robbery. This court cannot reweigh the evidence or make independent findings of fact. We determine whether the evidence supports the agency decision. Because federal regulations allow the agency to terminate assistance if a family member is involved in criminal activity, which can include an assault, the agency's decision to terminate Banks' housing benefits is supported by the evidence.

Banks next argues that he voluntarily moved out of the Florence unit and that, therefore, he was not evicted. A public housing agency may deny assistance or terminate benefits if the individual or family "has been evicted from federally assisted housing in the last five years." § 982.552(c)(1)(ii). Banks asserts that because he turned in his keys and the restitution action was dismissed, he had not been "evicted" within

the previous 5 years, and that, therefore, his benefits could not be terminated. However, he fails to recognize that his benefits could also be terminated for participation in criminal activity, and he does not deny that he committed a criminal act.

It is true that no judicially executed judgment of eviction was entered, because OHA dismissed the action after Banks turned in his keys to the Florence unit. However, if OHA had proceeded with the hearing and evidence was presented that Banks had moved out of the unit, the restitution action would have been found to be moot.

OHA had the authority to deny Banks benefits based on federal regulations that allow a public housing agency to deny or terminate benefits to a tenant who has taken part in violent criminal activity. Banks knocked down another person, reached into the person's jacket, and took a billfold. There was sufficient evidence before the hearing officer to support the finding that Banks was evicted for criminal activity. The decision was not arbitrary or capricious.

Banks also argues that the hearing officer's decision violated OHA's administrative plan by finding that an eviction occurred when there was no legal eviction order. The portion of the administrative plan Banks asks this court to consider was offered at the hearing on the petition in error, but it was not presented to the hearing officer. The district court made no ruling on the exhibit. The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008). The hearing officer did not have the administrative plan before her, and the district court made no ruling on whether the administrative plan should have been received into evidence. We cannot review any alleged violation of the administrative plan when it was not properly before the hearing officer.

Finally, Banks claims that the district court exceeded its authority by conducting a de novo review of the facts and making findings of fact that were not part of the record before the agency. He argues that the language in the court's order

questioned Banks' motives, which should not have been an issue before the court.

The district court stated, "Instead of contesting the eviction proceeding in court, Banks chose to vacate the premises." Banks argues that this is a finding of fact that goes beyond the hearing officer's order. However, this finding had been made by the hearing officer, who stated that Banks turned in his keys prior to the court date, which resulted in OHA's dismissal of the court proceedings. The district court's comment was merely part of its analysis. It was not a new finding of fact or the result of de novo review.

CONCLUSION

The decision of OHA to terminate Banks' housing benefits was not arbitrary or capricious. The evidence showed that he had been involved in criminal activity, and federal regulations provide that a public housing agency may deny or terminate benefits on that basis. The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF C.R., ALLEGED TO BE DEVELOPMENTALLY DISABLED AND A THREAT OF HARM TO OTHERS.
STATE OF NEBRASKA, APPELLEE, V.
C.R., APPELLANT.

793 N.W.2d 330

Filed January 28, 2011. No. S-10-307.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Mental Health: Proof.** The Developmental Disabilities Court-Ordered Custody Act requires that the State prove by clear and convincing evidence that the subject is a person in need of court-ordered custody and treatment.
4. **Mental Health: Public Health and Welfare: Proof: Words and Phrases.** A threat of harm to others, as contemplated by the Developmental Disabilities