IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Danella Bray,	:	
	:	
Appellant	:	
	:	
v.	:	No. 1515 C.D. 2013
	:	
McKeesport Housing Authority	:	Argued: November 12, 2014

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION BY
JUDGE COHN JUBELIRER **FILED: April 21, 2015**

Danella Bray appeals from the Order of the Court of Common Pleas of Allegheny County dismissing Ms. Bray's appeal from the McKeesport Housing Authority's (Authority) decision denying Ms. Bray's application for federally-subsidized public housing (Authority Decision). The trial court dismissed the appeal pursuant to this Court's holdings in Cope v. Bethlehem Housing Authority, 514 A.2d 295, 297 (Pa. Cmwlth. 1986), and McKinley v. Housing Authority of the City of Pittsburgh, 58 A.3d 142, 144-45 (Pa. Cmwlth. 2012), which held that a housing authority's decision was not an "adjudication" under Section 101 of the

Administrative Agency Law, 2 Pa. C.S. § 101, because applicants for public housing do not have a personal or property interest in those benefits and, therefore, are not subject to judicial review. On appeal, Ms. Bray argues that an aggrieved applicant for public housing should be entitled to judicial review. Because we conclude that public housing applicants have a protected property interest in their eligibility for those benefits being determined in accordance with the applicable law and regulations, we agree.

Ms. Bray, a previous tenant of the Authority, applied for public housing with the Authority on January 22, 2013. The Authority denied Ms. Bray's application on February 1, 2013 but, in accordance with federal law,[1] provided Ms. Bray with an opportunity to appeal that denial and request an informal administrative hearing before a hearing officer. At the February 14, 2013 hearing, Ms. Bray and two Authority witnesses testified. (Informal Appeal Hearing Transcript (Hr'g Tr.), February 14, 2013, R. Item 3.) The Authority's Tenant Selector stated that she denied Ms. Bray's application because, after reviewing Ms. Bray's rental history with the Authority, she concluded that Ms. Bray owed the Authority $1,002.68

[1] Pursuant to Section 6(c)(3) of the United States Housing Act, 42 U.S.C. § 1437d(c)(3), and the federal regulation at 24 C.F.R. § 960.208(a), a housing authority "must promptly notify any applicant determined to be ineligible for admission to a project of the basis for such determination, and must provide the applicant, upon request, within a reasonable time after the determination is made, with an opportunity for an informal hearing on such determination." 24 C.F.R. § 960.208(a). In Cope we indicated that "an informal hearing does not require an authority to 'call' witnesses, and that it does not require a complete record, sworn testimony, or a formal decision with findings of fact and legal conclusions." Cope, 514 A.2d at 296 (citing Singleton v. Drew, 485 F.Supp. 1020, 1025 (E.D. Wis. 1980)).

from her prior tenancy and any outstanding debt had to be satisfied.[2] (Hr'g Tr. at 1-2.) Ms. Bray acknowledged owing the fees and stated that she would pay them within the week because she was expecting her income tax refund check on February 18, 2013. (Hr'g Tr. at 6-7.) The hearing officer indicated that she would wait to decide Ms. Bray's appeal to see if Ms. Bray paid the Authority the outstanding amount. (Hr'g Tr. at 10.) Ms. Bray received her tax refund and paid the Authority $1,002.68 on February 21, 2013. (Authority Decision, Finding of Fact (FOF) ¶ 4.)

Thereafter, on March 15, 2013, the hearing officer issued the Authority Decision, upholding the Authority's denial of Ms. Bray's application, in which she made findings of fact and conclusions. (Authority Decision, Conclusion ¶ 2.) The hearing officer concluded that Ms. Bray had a history of habitually paying her rent late and did not establish by substantial evidence that her rental payments would improve. (Authority Decision, Conclusion ¶ 1.) The Authority Decision stated that "[y]ou may appeal this decision to the Court of Common Pleas of Allegheny County within thirty (30) days of the date of this Decision." (Authority Decision at 2.)

Ms. Bray appealed the Authority Decision to the trial court, arguing, *inter alia*, that the hearing officer considered evidence that was adverse to Ms. Bray *that*

[2] The Tenant Selector indicated that Ms. Bray owed $569.60 in rent. (Hr'g Tr. at 2.) However, the manager of the Authority property at which Ms. Bray had resided appeared to testify that Ms. Bray owed $280 in rent, appliance fees, and late fees for October and November, and the remainder of the outstanding amount was for constable fees, court costs, and fees to clean out Ms. Bray's apartment after she was evicted. (Hr'g Tr. at 3-5.)

had not been submitted into evidence at the informal hearing. (Notice of Statutory Appeal at ¶ 15, R. Item 2.) However, the trial court issued an Order on July 11, 2013 dismissing Ms. Bray's appeal pursuant to Cope. (Trial Ct. Order, July 11, 2013.) Ms. Bray appealed to this Court, and the trial court directed her to file a Concise Statement of the Errors Complained of on Appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), Pa. R.A.P. 1925(b). (Trial Ct. Order, Sept. 11, 2013.) In its opinion, pursuant to Pa. R.A.P. 1925(a), the trial court, respectfully, expressed its disagreement with this Court's holdings in Cope and McKinley. (Trial Ct. 1925(a) Op. at 1-2.) The trial court observed that, pursuant to Cope and McKinley, "employees of housing authorities, when reviewing applications for housing benefits, are free to interpret [the] federal regulations however their fancy strikes them and regardless of the actual purpose or intent of those regulations." (Trial Ct. 1925(a) Op. at 2.) The trial court stated that this matter raises an issue of first impression regarding the Pennsylvania Constitution and this Court now has the opportunity to consider whether Cope infringes upon an applicant's right to judicial review as guaranteed by the Pennsylvania Constitution and to equal protection under the Fourteenth Amendment of the United States Constitution. (Trial Ct. 1925(a) Op. at 3.) This matter is now ready for our Court's review.[3]

Ms. Bray raises numerous challenges to this Court's conclusion in Cope, and repeated in McKinley, that a housing authority's determination denying an

[3] "This Court's review of the trial court's order dismissing the appeal for lack of jurisdiction is limited to determining whether the trial court abused its discretion or committed an error of law." Morningstar v. Mifflin County School District, 760 A.2d 1221, 1223 (Pa. Cmwlth. 2000).

application for public housing is not an appealable adjudication. Ms. Bray asks that we revisit the Court's decisions in Cope and McKinley, which she asserts are inconsistent with numerous federal court decisions holding that applicants for public housing do have a property interest in an eligibility determination for public housing that is protected by due process. Although acknowledging that this Court is not bound by those federal cases, Ms. Bray asserts that the federal decisions offer guidance and following such decisions will avoid having litigants "'walk across the street'" to get a different result in federal court than in state court. (Bray's Br. at 55 (quoting Werner v. Plater-Zyberk, 799 A.2d 776, 782 (Pa. Super. 2002) (citations omitted).) The Authority contends that the federal case law Ms. Bray cites is distinguishable and does not support the conclusion that Ms. Bray has a protected property interest, particularly where there is no explicit mandatory language indicating that housing benefits will be granted if the substantive predicates of the regulations are met. (Authority's Br. at 17 (citing Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 463 (1989)).)[4]

[4] Ms. Bray further asserts that this Court's interpretation of the term "adjudication" in Cope and McKinley as not applying to applicants for public housing deprives her of the right to equal protection pursuant to the Fourteenth Amendment of the United States Constitution because this construction treats these applicants differently from other similarly situated applicants for social welfare benefits, who do have a right to appeal despite their status as mere applicants. Ms. Bray also argues that this Court's interpretation of the term "adjudication" in Cope and McKinley deprives her of the right to judicial review of the Authority Decision as guaranteed by Article 5, Section 9 of the Pennsylvania Constitution, Pa. Const. Art. 5, § 9, ("[t]here shall be . . . a right of appeal from . . . an administrative agency to a court of record or to an appellate court . . . and there shall be such other rights of appeal as may be provided by law"), because a housing authority's administrative decisions are "adjudications" under a more complete reading of that term's definition in the Administrative Agency Law. According to Ms. Bray, Cope and McKinley examined only the property interest aspect of the definition of adjudication and, therefore, do not preclude a different conclusion based on a broader reading of the definition of adjudication.

(Continued…)

Section 752 of the Local Agency Law states, in pertinent part, that "[a]ny person aggrieved by an adjudication of a local agency who has a direct interest in the adjudication shall have the right to appeal therefrom."[5] 2 Pa. C.S. § 752. There is no question that Ms. Bray is aggrieved by and has a direct interest in the result of the Authority Decision; thus, if she is able to establish that the Authority Decision is an "adjudication" as defined by Section 101 of the Administrative Agency Law, she would be entitled to judicial review of the Authority Decision pursuant to Section 752 of the Local Agency Law.

To the extent Ms. Bray argues that Article 5, Section 9 of the Pennsylvania Constitution provides an independent right of appeal, this Court has rejected this broad interpretation of the Constitution. Wheeler v. Pennsylvania Board of Probation and Parole, 862 A.2d 127, 129 (Pa. Cmwlth. 2004) (citing McVickar v. Department of Transportation, 388 A.2d 775, 776 (Pa. Cmwlth. 1978)). Nevertheless, we note that although Article 5, Section 9 is not self-executing, the Administrative Agency Law and Local Agency Law, 2 Pa. C.S. §§ 751-754, were enacted to implement the appeal rights set forth in the Pennsylvania Constitution. Appeal of Bowers, 269 A.2d 712, 715 (Pa. 1970).

We acknowledge the Authority's assertions that Ms. Bray's constitutional challenges must fail because she has not served the Attorney General of Pennsylvania with notice as required in Rule 521 of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 521 (requiring that a party who challenges "*the constitutionality of any statute* . . . in an appellate court" in a matter "to which the Commonwealth or any officer thereof, acting in his official capacity, is not a party, . . . to give immediate notice in writing to the Attorney General . . . of the existence of the question") (emphasis added). However, Ms. Bray is not challenging the constitutionality of the Local Agency Law or the Administrative Agency Law; she is arguing that *this Court's interpretation of* those statutes is contrary to the United States and Pennsylvania Constitutions. Thus, notice to the Attorney General was not required.

[5] Housing authorities are considered local agencies because they do not meet the definition of "Commonwealth government" set forth in Section 102 of the Judicial Code, 42 Pa. C.S. § 102 (defining Commonwealth government as not "includ[ing] any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision or local authority"). Ford ex rel. Pringle v. Philadelphia Housing Authority, 848 A.2d 1038, 1050 (Pa. Cmwlth. 2004).

Section 101 of the Administrative Agency Law defines the term "adjudication," in pertinent part, as:

> Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made. The term does not include any order based upon a proceeding before a court or which involves the seizure or forfeiture of property, paroles, pardons or releases from mental institutions.

2 Pa. C.S. § 101. To be an adjudication, the action "must be an agency's final order, decree, decision, determination or ruling [first requirement] and . . . it must impact on a person's personal or property rights, privileges, immunities, duties, liabilities or obligations [second requirement]." Guthrie v. Borough of Wilkinsburg, 478 A.2d 1279, 1281 (Pa. 1984). There is no dispute that the Authority Decision was the Authority's final determination on Ms. Bray's application and, accordingly, the first requirement is satisfied. It is the second requirement which is the focus of this case.

This Court, *sua sponte*, addressed the issue of whether a public housing authority's denial of an application met the second requirement and, thus, constituted an adjudication in Cope. In Cope, the applicants, who previously had received public housing assistance, filed an application to re-enter public housing. Cope, 514 A.2d at 295. The housing authority denied the application "on the basis that they were not considered desirable applicants." Id. at 295-96. The applicants appealed to the trial court, which first remanded to the housing authority for a hearing to make a record, and then affirmed. Id. at 296. The applicants appealed to this Court. Id. Our Court explained that, although the trial court and parties

treated the matter as an adjudication, in order for the applicants "to be entitled to the benefits and protections of the Local Agency Law, [they] must have had a personal or property right in the matter which is the subject of the adjudication." Id. The applicants asserted that they were entitled to have the housing authority consider their application in accordance with federal regulations; this Court found that the federal regulations only required an "informal hearing" and not the full hearing that those who are already public housing tenants are entitled to receive based on their possession of a property interest in their public housing. Id. at 296-97. We held that the applicants could not invoke the Local Agency Law because their "limited due process rights to be properly *considered* for public housing" were not the same as having "the requisite personal or property right to *have* public housing." Id. at 297 (emphasis in original). Because this Court found that the applicants did not have a cognizable personal or property interest, we held that the housing authority's determination was not an adjudication, and the trial court had no basis for treating the matter as an appeal. Id. at 297.

Over twenty-five years later, Cope provided the basis to again affirm the dismissal of a public housing applicant's appeal. In McKinley,[6] the applicant applied for public housing, which the housing authority denied because the applicant's conviction for involuntary manslaughter rendered her ineligible for admission per the housing authority's policy. McKinley, 58 A.3d at 143. The applicant sought a grievance hearing, which was held, and the hearing officer upheld the denial. Id. The applicant appealed to the trial court, which held that it had to dismiss the applicant's appeal because it was bound to follow Cope until it

[6] The trial court judge in this matter was the trial court judge in McKinley.

was overruled. Id. On appeal to this Court, the applicant argued that our Court should not follow Cope because, *inter alia*, federal law and regulations created a reasonable expectation or entitlement, which is a property interest, to having her eligibility for public housing properly considered, an entitlement that federal courts have supported. Id. at 144. However, noting that Cope previously addressed the issue raised and held that no property interest existed, we declined in McKinley to consider the federal case law, stating that the United States Supreme Court had not held that an applicant, as opposed to a recipient of public benefits, has a protected property interest, and the Pennsylvania state courts are not bound by decisions of the other federal courts. Id. at 144-45 (citing Lyng v. Payne, 476 U.S. 926, 942 (1986); Werner, 799 A.2d at 782).

Although recognizing that we are not *bound* by federal case law, our Supreme Court has expressed its willingness to obtain guidance from the United States Courts of Appeals and District Courts when the construction and interpretation of federal statutes or case law is at issue, Council 13, American Federation of State, County and Municipal Employees, AFL-CIO v. Rendell, 986 A.2d 63, 78 (Pa. 2009); Commonwealth v. Ragan, 743 A.2d 390, 396 (Pa. 1999), as has our Superior Court, Werner, 799 A.2d at 782 (citations omitted) (suggesting that Pennsylvania courts should follow the United States Court of Appeals for the Third Circuit or, if it has not ruled, seek guidance from other federal courts, whenever possible). As previously done by our Supreme and Superior Courts in other cases, we will examine federal court interpretation of the federal statute and regulations at issue here to obtain guidance in our analysis. We begin by reviewing the United States Housing Act (Housing Act) under which the Authority

provides the federal housing benefits at issue. Section 2 of the Housing Act states that the purpose of public housing is to "remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families; and . . . to address the shortage of housing affordable to low-income families." 42 U.S.C. § 1437(a)(1).

To remedy the shortage of safe, affordable housing, the United States Congress enacted a comprehensive statutory framework pursuant to which the Department of Housing and Urban Development (HUD) has promulgated numerous regulations that include express requirements for determining tenant eligibility. These eligibility requirements are *mandatory*, establishing the criteria a public housing authority *must consider* and what it *may not consider* when reviewing an application for public housing. See generally, Section 6(c) of the Housing Act, 42 U.S.C. § 1437d(c); 24 C.F.R. §§ 960.201-.208. The federal regulations found at 24 C.F.R. §§ 960.201-.208 set forth the standards and criteria for eligibility and selection of public housing tenants and require, *inter alia*, that: a housing authority establish written policies for admission of tenants, 24 C.F.R. § 960.202; the criteria must reasonably relate to individual applicants' attributes and not attributes imputed because of the applicants' membership in a particular group, 24 C.F.R. § 960.203(a); and the criteria must be in accordance with 24 C.F.R. § 5.105 (requiring nondiscrimination and equal opportunities to public housing pursuant to, *inter alia*, the Fair Housing Act, 42 U.S.C. §§ 3601-3619), 24 C.F.R. § 960.202(c)(3). In addition, where unfavorable information is received about an applicant, the federal regulations require a housing authority to consider mitigating

factors, including "the time, nature, and extent of the applicant's conduct" when determining whether to approve an application. 24 C.F.R. § 960.203(d).

When an individual meets the eligibility criteria set forth in State or Federal law for federally-funded benefits, that individual has a statutory entitlement to those benefits. Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (determining what level of due process was required prior to terminating public welfare benefits). The welfare claimants in Goldberg "had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). Nevertheless, the United States Supreme Court required the administrative process determining eligibility to comply with due process. Board of Regents, 408 U.S. at 577; Goldberg, 397 U.S. at 260-266. In Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926), the United States Supreme Court indicated that where a government entity creates eligibility rules, those rules provide an individual within the eligible class an interest and claim to which procedural due process attaches and, even though the governmental entity retains discretion in its ultimate decision, that discretionary power "must be . . . exercised after fair investigation, with such a notice, hearing[,] and opportunity to answer for the applicant as would constitute due process."[7] Id. at 119, 123. See also Board of

[7] Goldsmith involved an individual who met the admission eligibility requirements to practice before the United States Board of Tax Appeals but was denied admission without a reason or an opportunity for the accountant to challenge the denial. Goldsmith, 270 U.S. at 119-20. Although the Supreme Court disposed of the matter on other grounds, it offered this analysis regarding eligibility rules and the interests and claims created thereby.

Regents, 408 U.S. at 576 n.15 (discussing Goldsmith's analysis regarding the interests and claims created by eligibility requirements). The principles discussed in Goldberg and Goldsmith regarding the existence of eligibility criteria and the creation of a protected interest in a determination of one's eligibility have been recognized and applied, as Ms. Bray asserts, by multiple federal courts in the public housing context on numerous occasions.

In Ressler v. Pierce, 692 F.2d 1212 (9th Cir. 1982), applicants and potential applicants for Section 8[8] housing benefits argued that they were denied due process because of the manner by which the owners of subsidized housing processed their applications for rent subsidies. Id. at 1213. The United States Court of Appeals for the Ninth Circuit held that, because there are regulations and guidelines that limit the discretion of property owners in the application and selection process for Section 8 housing, the public housing applicant had a property interest that was protected by due process. Id. at 1215-16. The Ninth Circuit concluded that the applicant "ha[d] a constitutionally protected 'property' interest in [the public

[8] Section 8 or "Low-income housing assistance" benefits are defined in 42 U.S.C. § 1437f and "aid[] low-income families in obtaining a decent place to live and . . . promot[e] economically mixed housing" by making "assistance payments . . . with respect to existing housing in accordance with the provisions of this section." 42 U.S.C. § 1437f(a). Section 8 benefits include both tenant-based assistance, i.e., vouchers, which is portable, and project-based assistance, which is attached to a specific federally-subsidized location. 42 U.S.C. § 1437f(f)(6)-(7), (o); Baldwin v. Housing Authority of the City of Camden, New Jersey, 278 F.Supp.2d 365, 369 n.3 (D. N.J. 2003). Like the public housing assistance benefits at issue here under Section 6, 42 U.S.C § 1437d, Section 8 and the related HUD regulations set forth explicit criteria and guidelines for determining applicant eligibility, see, e.g., 42 U.S.C. § 1437f(o), 24 C.F.R. § 982.201-.202, and once an applicant receives a determination that he or she is eligible for benefits, the applicant is then able to seek to obtain benefits by applying for actual housing units. Eidson v Pierce, 745 F.2d 453, 460-61 n.6 (7th Cir. 1984).

housing] benefits by virtue of her membership in a class of individuals whom the . . . program was intended to benefit." Id. at 1215. Explaining that the applicant was "a primary beneficiary of the . . . program, and her receipt of benefits is closely monitored by HUD under the implementing regulations and guidelines," the Ninth Circuit Court held that the applicant "ha[d] a sufficient 'property' interest in Section 8 benefits to entitle her to due process safeguards *in the processing of her application*." Id. at 1216 (emphasis added).

In Vandermark v. Housing Authority of the City of York, 663 F.2d 436 (3d. Cir. 1981), the United States Court of Appeals for the Third Circuit reviewed allegations of applicants for Section 8 benefits who claimed that the City of York's housing authority was using improper criterion for determining the applicants' eligibility for assistance. Id. at 437-39. Although the Third Circuit ultimately concluded that no due process violation occurred and did not explicitly state that the applicants possessed a protected property interest in their eligibility for benefits, Vandermark has been interpreted as recognizing an applicant's property interest in being able to establish his or her eligibility and certification for a Section 8 housing voucher. See Eidson v. Pierce, 745 F.2d 453, 461 n.6 (7th Cir. 1984); Everett v. Housing Authority of the City of Shamokin, __ F.Supp.2d __, __, No. 4:13-CV-1515, 2014 WL 4411603, at *9 (M.D. Pa., September 5, 2014); Baldwin v. Housing Authority of the City of Camden, New Jersey, 278 F.Supp.2d 365, 378 n.35 (D. N.J. 2003).

Multiple United States District Courts have also recognized the existence of a protected property interest in a proper public housing eligibility determination

even where the applicant may not have an entitlement to, or property interest in, a particular housing unit. In Baldwin, a case involving the denial of a Section 8 housing voucher based on a criterion that was not in effect at the time the application was filed, the United States District Court for the District of New Jersey held that the applicant had a protected property interest in having her application considered under the proper criteria. Baldwin, 278 F.Supp.2d at 380, 386. The Court explained that "the fundamental question in deciding whether an applicant for benefits possesses a protectable property interest in those benefits, despite the fact that the applicant is not currently receiving the benefits, is whether or not the particular statute places substantive limits on official discretion in favor of the applicant." Id. at 379. In other words, "the applicant 'must show that particularized standards or criteria guide the [government's] decisionmakers' in order to claim protection under the due process clause." Id. (alterations in original) (quoting Olim v. Wakinekona, 461 U.S. 238, 249 (1983)). Noting that the Third Circuit and other courts had "accorded procedural due process protection to applicants for benefits who did not have present enjoyment of the benefit," the Court held that the "plaintiff possesse[d] a property interest in the Section 8 vouchers" because the Housing Act and its implementing regulations limited the housing authority's "discretion to establish eligibility requirements for participation in the . . . assistance program." Id. at 378-80 (citing, *inter alia*, Vandermark, 663 F.2d 436, 438; Kelly v. Railroad Retirement Board, 625 F.2d 486, 489-90 (3d Cir. 1980);[9] and Ressler, 692 F.2d 1212, 1214-16). Importantly,

[9] Kelly held that an applicant for disabled child's annuity under the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231-231v, had a property interest to which due process attached regardless of the fact that she had not yet received benefits. Kelly, 625 F.2d at 489-90.

the Court in Baldwin observed that the plaintiff sought "review of an *initial determination of ineligibility* to participate in the Section 8 program, not [the] denial of an asserted entitlement to particular housing." Id. at 379 (emphasis added).[10]

Similarly, in Tedder v. Housing Authority of Paducah, 574 F.Supp. 240 (W.D. Ky. 1983), the United States District Court for the Western District of Kentucky held that "[a]pplicants for public housing have a legitimate expectation that their application will be fully considered and not unfairly denied" and was "persuaded that applicants for public housing have a 'property interest' cognizable under the Fourteenth Amendment." Id. at 245. Although in Lancaster v. Scranton Housing Authority, 479 F.Supp. 134 (M.D. Pa. 1979), the United States District Court for the Middle District of Pennsylvania found that the housing authority in that case did not deprive an applicant of a "property interest without due process of the law" because the housing authority provided her with notice of the reason for the denial of her application and an opportunity to challenge those reasons at an informal hearing, the Court cautioned that its holding did "not preclude her from again seeking redress from the Courts should the [h]ousing [a]uthority *fail to consider her application in accordance with the guidelines described herein*." Id. at 137-38 (emphasis added).

[10] See also Everett, __ F.Supp.2d at __, 2014 WL 4411603, at *9 (holding, based on Vandermark and Baldwin, that an applicant for a Section 8 rent subsidy voucher has a property interest in the voucher that is protected by due process as a matter of law).

In Eidson, which the Authority cites as support for its position,[11] the United States Court of Appeals for the Seventh Circuit recognized that an applicant has a property interest in an eligibility determination even though it held in that case that an applicant has no property interest in a particular unit. Eidson, 745 F.2d at 460-61 n.6. The applicants in Eidson challenged the denial of their applications to rent specific Section 8 housing units owned and operated by *private landlords*. Id. at 454. The Seventh Circuit described the issue as "whether these plaintiffs have a constitutionally protected property interest in Section 8 benefits *in these privately-owned projects*" and explained that its inquiry required it to consider "whether the plaintiffs have a 'legitimate claim of entitlement' to those benefits." Id. at 457 (citation omitted) (emphasis added). Noting that "Congress left responsibility for operation and management, including the selection of tenants, with the private owner," which allows those private owners to determine whether the applicants would be responsible tenants, and that "the Section 8 program [did] not constrain the owner's judgment on that question," the Seventh Circuit held that the applicants had no entitlement to the specific housing requested. Id. at 457, 459,

[11] The Authority also cites an unreported opinion from the United States District Court of the Eastern District of Pennsylvania, Coleman v. Philadelphia Housing Authority, No. Civ.A 00 CV 5468, 2001 WL 872790 (E.D. Pa., June 25, 2001), to assert that some federal courts have found that there is no protected property interest in public housing. This Court noted Coleman in McKinley, indicating that the District "Court found no automatic property interest in the federal housing." McKinley, 58 A.3d at 144 n.5. However, Coleman is distinguishable because, in that case, the applicant asserted a property interest in *immediate* public housing assistance and the right to *bypass the usual application process* based either on representations made by a public housing authority official or the fact that she was granted an actual public housing voucher in 1990, which she declined to take at that time because she was not financially eligible for the benefit. Coleman, 2001 WL 872790, at *3-4. Here, Ms. Bray is not seeking to deviate from the normal application procedures or asserting an immediate right to actual housing assistance, she is attempting to ensure that her application "will be fully considered and not unfairly denied." Tedder, 574 F.Supp. at 245.

461. The Court further observed, as additional proof that no entitlement existed, that under the Housing Act, even if the applicants were entitled to a hearing before a neutral hearing officer, that hearing officer would be unable to "order the [private] owner to accept the applicant as a tenant," id. at 461, and also acknowledged that its holding conflicted with Ressler, but it recognized that other federal courts, including the Third Circuit in Vandermark, had "found or assumed the existence of property interests" in the applicants' certification of *eligibility*, which was based on objective criteria under the Housing Act. Id. at 460-61 n.6. Thus, the Seventh Circuit distinguished between a property interest in a certification of *eligibility*, which, once obtained, provided the applicant with an *opportunity to receive benefits*, and an assertion of a property interest in the *actual units* in buildings owned by private landlords. Id. at 461 n.6.

The federal courts in these cases focused on the existence of particularized standards or criteria that limited the housing authority's discretion in favor of the applicant to determine whether a protected property interest existed. Because the Housing Act and its regulations contain particular requirements and criteria which govern an applicant's *eligibility*, the federal courts recognized that applicants have a protected property interest in obtaining a proper eligibility determination. This is separate from the property right which existing residents have in their housing units that Cope and McKinley recognized. The property interest involved in this case is not the right to an actual public housing unit or a voucher, but the right to have the applicant's eligibility determined in accordance with the requirements of the federal law, which can, eventually, result in the receipt of an actual housing unit.

The Authority's argument does not grasp the distinction between these two separate property interests, a distinction that was not appreciated by this Court almost thirty years ago in Cope. However, after carefully examining these federal cases, we recognize today that their rationales are more consistent with this Court's recent precedent recognizing protected property interests.[12] For example, similar to the federal decisions discussed above, this Court concluded that a public employee who meets the required minimum qualifications to sit for a promotional exam as established by the relevant regulations has a protected property interest in sitting for the exam, even if the employee does not have property interest in a promotion itself. Barrett v. Ross Township Civil Service Commission, 55 A.3d 550, 556-57 (Pa. Cmwlth. 2012). We recognized that there is a property interest in having "fair access to a public employment position" and "'be[ing] fairly and objectively examined solely in terms of . . . merit and fitness for [a] job, these being the criteria for promotion.'" Id. at 558 (alterations in original) (quoting Marvel v. Dalrymple, 393 A.2d 494, 497 (Pa. Cmwlth. 1978)). This is consistent with our conclusion that an applicant for public housing benefits has a property interest in a proper eligibility determination, even if the applicant does not have a property interest in the housing itself.

This Court has also, like the federal courts, examined the statutory and regulatory limitations on a government agency's exercise of discretion in

[12] The Authority contends that we should not consider or rely upon these federal cases because they involve Section 8 benefits, while at issue here are Section 6 benefits. However, while many of these federal cases examined eligibility determinations made under Section 8, both Sections 8 and 6 of the Housing Act provide public housing benefits to eligible families and establish mandatory criteria that must be considered when making eligibility determinations. See footnote 8 for a thorough description of their similarities.

determining a property right. See Caba v. Weaknecht, 64 A.3d 39, 63 (Pa. Cmwlth. 2013) (stating that "[i]t is not the existence of discretion that precludes recognition of a property interest, but rather whether that discretion is unfettered and thus unassailable") (citing Town of Castle Rock, Colorado v. Gonzales, 545 U.S. 748, 789-90 (2005)).[13] We explained in Caba that the question of the recognition of a protected property interest

> goes back to the United States Supreme Court's decision in Roth, [408 U.S. at 567], where the Court held that Roth[, a non-tenured professor with only a one-year employment contract,] did not have a legitimate claim of entitlement to his teaching position because the renewal decision was a matter *solely* within the discretion of his employer, there were no standards governing the exercise of that discretion, the employer did not have to provide any reason for exercising that discretion, and the decision of the employer was *final* and unappealable.

Caba, 64 A.3d at 63 (emphasis in original). We found that a statute creating specific eligibility criteria "strongly evidences clear legislative intent to both guide and *limit* the discretion of the licensing authority with respect to the *grant*, *denial*, and revocation of licenses" with which the authority had to comply. Id. at 62 (emphasis added).

[13] Other state appellate courts similarly have recognized the role of limited discretion in establishing a protected property interest. See Madera v. Secretary of Executive Office of Communities and Development, 636 N.E.2d 1326, 1330 (Mass. 1994) (wherein the Supreme Judicial Court of Massachusetts stated that "to the extent the agency or other entity responsible for awarding the benefit possesses discretion to decide whether to grant or withhold the benefit, it becomes less likely that a potential recipient will be found to have a constitutionally protected property interest").

The relevant provisions of the Housing Act and its associated regulations, which apply throughout the country, provide particularized standards and criteria that all public housing authorities must consider and follow when reviewing an application for public housing. These criteria assure that housing authorities will use only those factors deemed permissible for consideration by the Housing Act and its associated regulations when reviewing applications for public housing and limit the discretion that a public housing authority may exercise in deciding whether to deny applications for public housing. Because a public housing authority's decision to grant or deny applications must be in accordance with the statutory and regulatory criteria, the public housing authority's discretion is certainly not "unfettered" and, therefore, should not be "unassailable." Caba, 64 A.3d at 63.

We further observe that Section 6(c)(3) of the Housing Act, 42 U.S.C. § 1437d(c)(3), and the regulation at 24 C.F.R. § 960.208(a), grants aggrieved applicants the right to an informal hearing before a hearing officer appointed by the housing authority. This provides applicants the opportunity to challenge, before the housing authority, the reasons given for the denial of their applications. However, once this informal hearing has been held and a final decision rendered, there is no other administrative forum in which applicants, like Ms. Bray, can assure that the housing authority properly considered their application for public housing. Under Pennsylvania law, "[w]hen an agency's decision or refusal to act leaves a complainant with no other forum in which to assert his or her rights, privileges or immunities, the agency's act is an adjudication." Montessori Regional Charter School v. Millcreek Township School District, 55 A.3d 196, 201

(Pa. Cmwlth. 2012). Although, as pointed out by the Authority, these federal provisions do not expressly set forth a right to further appeal, such is not determinative in deciding whether judicial review is available under the Local Agency Law because that "law was enacted to provide a forum for the enforcement of statutory rights where no procedure otherwise exists." Guthrie, 478 A.2d at 1283 (internal quotation marks omitted). In fact, even if appeals of adjudications expressly were not permitted, the Local Agency Law would nevertheless apply and provide a right to appeal. Sections 751(a) and 752 of the Local Agency Law, 2 Pa. C.S. §§ 751(a), 752; Wortman v. Philadelphia Commission on Human Relations, 591 A.2d 331, 332 (Pa. Cmwlth. 1991). Finally, as pointed out by the trial court, if there is no judicial review of a decision from the informal hearing, there is no method to assure applicants that housing authorities are truly complying with their federal obligations. (Trial Ct. 1925(a) Op. at 2.) Absent judicial review, there is no check on a housing authority's decisionmaking to ensure that the housing authority is complying with all of the requirements, which essentially renders them mere surplusage.

As highlighted by Ressler, Baldwin, and Tedder, regardless of the type of public housing benefits sought, errors and misinterpretations of the federal eligibility requirements do occur and it is this Court's function, as an appellate court, to correct legal errors. This Court's own jurisprudence includes examples of the types of mistakes made in determining an individual's eligibility for public housing. In Romagna v. Housing Authority of Indiana County (Pa. Cmwlth., No. 1648 C.D. 2011, filed July 13, 2012), an application for a Section 8 public housing voucher was denied and the applicant filed a statutory appeal to the court of

common pleas. Noting that there was no record created by the housing authority, the trial court heard the appeal *de novo* pursuant to Section 754(a) of the Local Agency Law, 2 Pa. C.S. § 754(a). The trial court ultimately concluded that the reason offered by the housing authority for denying the application – the applicant's conviction for possession of drug paraphernalia – was not the type of conviction for "drug-related criminal activity" that precluded her receipt of housing. Romagna, slip op. at 4. Thus, *the trial court directed the housing authority to process the applicant's application.* Id. Neither the trial court nor this Court *sua sponte* raised Cope, and this Court affirmed the trial court, holding that the applicant's conviction was not disqualifying under the Housing Act, HUD's regulations, or the housing authority's own regulations. Id., slip op. at 5-8.[14]

[14] Similarly, in Brown v. Housing Authority of the City of Pittsburgh (Pa. Cmwlth., No. 617 C.D. 2014, filed March 25, 2015), a housing authority found Ms. Brown eligible for Section 8 housing benefits, but then notified her that it was terminating those benefits because a background check allegedly showed, *inter alia*, that she had a $1,785 judgment against her for back rent owed to a prior landlord, which the housing authority concluded disqualified her from receiving benefits. Id., slip op. at 1-2. After holding a hearing, the housing authority upheld its decision. The trial court, upon further appeal, granted Ms. Brown's appeal and reinstated her benefits because the judgment for non-payment of rent in this instance was not grounds to terminate her benefits "under the applicable federal regulations." Id., slip op. at 2. The housing authority appealed to this Court, and we affirmed the trial court's order because there was no competent evidence in the record that Ms. Brown "owed an outstanding balance to a prior landlord" and, more importantly, because the federal regulations relating to the non-payment of rent that the housing authority relied upon did not apply in this situation. Id., slip op. at 3-4. Although Brown involved the termination of benefits after an eligibility determination had been made, it provides an example of the type of misinterpretation of the federal regulations that a housing authority can make that would affect an individual's eligibility, whether initial or ongoing, to receive public housing benefits. We see no reason why a housing authority's misinterpretation of the applicable federal law and regulations should go uncorrected when it occurs during the initial eligibility determination, which would be the effect of our holding that a housing authority's decision denying benefits is not an adjudication.

Ms. Bray contends, in this case, that the hearing officer considered evidence that was adverse to Ms. Bray *that had not been submitted into evidence at the informal hearing* and to which Ms. Bray could not respond. The hearing officer then stayed the decision on Ms. Bray's appeal to allow Ms. Bray to pay off the outstanding debt to the Authority, which was the primary basis for the denial of her application. However, after Ms. Bray paid over $1,000 to clear that debt, the hearing officer, nevertheless, upheld the denial of her application. Without review to determine whether the hearing officer considered *ex parte* evidence and otherwise properly considered Ms. Bray's appeal, there can be no assurance that the decision was made in compliance with the regulations.

Romagna was filed before McKinley was decided, but after Cope. Trial courts have apparently been hearing appeals on these matters and continuing to treat denials of applications for public housing as an appealable adjudication. In fact, the Authority Decision sent to Ms. Bray in the case at bar included a statement that the determination *was appealable* to the trial court. (Authority Decision at 2.) Thus, a conclusion here that the Authority Decision is an adjudication would not create new rights to appellate review, but would restore the rights that Cope foreclosed.

For the above reasons, this Court concludes that "[a]pplicants for public housing have a legitimate expectation that their application will be fully considered and not unfairly denied" and, as such, "have a [cognizable] 'property interest,'" Tedder, 574 F.Supp. at 245, in having their "application[s considered] in accordance with the guidelines" in the Housing Act and regulations. Lancaster,

479 F.Supp. at 138. Accordingly, the Authority Decision is a "final . . . decision . . . by an agency affecting [Ms. Bray's] property rights . . . [as a] part[y] to the proceeding in which the adjudication is made." 2 Pa. C.S. § 101. Such housing authority eligibility determinations are, therefore, adjudications under Section 101 of the Administrative Agency Law subject to appellate review pursuant to Section 752 of the Local Agency Law; therefore, Cope and McKinley are overruled.[15]

The trial court's Order denying Ms. Bray's appeal is vacated, and this matter is remanded to the trial court to consider Ms. Bray's appeal.

RENÉE COHN JUBELIRER, Judge

[15] Having resolved this matter on non-constitutional grounds, this Court will not address Ms. Bray's arguments based on the United States and Pennsylvania Constitutions. Ballou v. State Ethics Commission, 436 A.2d 186, 187 (Pa. 1981) (indicating that when a case involves both constitutional and non-constitutional issues, courts should not reach the constitutional issue if the matter can be properly decided on the non-constitutional basis); Mt. Lebanon v. County Board of Elections of the County of Allegheny, 368 A.2d 648, 650 (Pa. 1977) (stating that courts "should not decide a constitutional question unless absolutely required to do so"). Moreover, because we conclude that the Authority Decision is an adjudication based on Ms. Bray's property interest in having her application reviewed in accordance with the federal law and regulations, we do not need to resolve the question of whether an applicant has some other protected interest that would otherwise render the Authority Decision an adjudication under the Administrative Agency Law.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Danella Bray,	:	
	:	
Appellant	:	
	:	
v.	:	No. 1515 C.D. 2013
	:	
McKeesport Housing Authority	:	

O R D E R

NOW, April 21, 2015, the Order of the Court of Common Pleas of Allegheny County (trial court), entered in the above-captioned matter, is hereby **VACATED**, and this matter is **REMANDED** to the trial court to consider Danella Bray's appeal from the decision of the McKeesport Housing Authority denying her application for public housing.

Jurisdiction relinquished.

RENÉE COHN JUBELIRER, Judge