IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Christine Bennett	:	
	:	
v.	:	
	:	
Housing Authority of the	:	
City of Pittsburgh,	:	No. 228 C.D. 2012
Appellant	:	Submitted: September 7, 2012

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY FILED: October 2, 2012

The Housing Authority of the City of Pittsburgh (Authority) seeks review of the Allegheny County Court of Common Pleas' (trial court) January 13, 2012 order granting Christine Bennett's (Bennett) statutory appeal, and ordering the Authority to provide Bennett with a larger one-bedroom apartment. The issue for this Court's review is whether the trial court erred as a matter of law and exceeded the scope of its authority in ordering the Authority to provide Bennett a larger apartment unit. We reverse.

Bennett is an eighty-four year old tenant of the Authority. She resides in a one-bedroom apartment in Glen Hazel, a low-income public-housing high-rise apartment building. On or about June 2, 2011, Bennett submitted a request to the Authority for a larger apartment, along with a doctor's verification indicating that the small size of her apartment had created stress that contributed to her poor health. On July 5, 2011, the Authority denied her request. On July 11, 2011, Bennett submitted

a grievance, pro se, seeking review of the Authority's decision. On the grievance form, Bennett claimed that her apartment was too small, and that the lack of space was creating significant stress for her. She noted that she had suffered a stroke in 1993 and two strokes in February 2011, and expressed concern that she might have another stroke due to the stressful living situation. She also stated on the form that she is diabetic, and she bangs her feet and knees while maneuvering through the apartment. She further added that, at some point in the past, she broke an ankle and that due to the residual discomfort, she has difficulty moving around the apartment. Bennett expressed concern that if there was an emergency, responders would not be able to assist her.

On September 14, 2011, a grievance hearing was held before a hearing officer. At the hearing, Authority staff member, Kevin Jordan (Jordan), testified that Bennett requested a transfer to a larger apartment because of her disability and had submitted a doctor's note in support of that request. Bennett's doctor's note stated that "[Bennett] has been placed in a very small unit which does not accommodate even her meager possessions. This has created significant stress that contributed to recent hospitalization." Reproduced Record (R.R.) at 41a. Jordan testified that, based upon the doctor's documentation, the Authority's Reasonable Accommodation office denied Bennett's request. Jordan further stated that the Authority does not recognize differences in unit sizes, and that Bennett's disabilities were insufficient to merit a transfer. In response, Bennett testified, "[w]ell, my doctor has stated I have had three strokes. I had two this year in February. And due to the stress and depression and the smallness of the apartment is just a bit much. . . . I just need space. I really do." R.R. at 21a. When asked how many bedrooms are in her current apartment, Bennett testified, "One. That's all I need is one." R.R. at 21a. Bennett offered no other testimony.

On September 27, 2011, the hearing officer denied Bennett's grievance concluding that "the testimony and evidence presented at the hearing established that [Bennett's] medical condition does not support the reasonable accommodation request for a bigger 1 bedroom unit." R.R. at 26a.

On October 27, 2011, Bennett appealed to the trial court. In her appeal, she claimed that she needed a larger apartment due to medical issues; specifically right-side weakness resulting from her strokes, balance issues due to knee swelling, and ankle pain due to a severe break. On December 19, 2011, after a conference was held in which Bennett advised the trial court that the unit next door to hers was larger and unoccupied, the trial court granted Bennett's statutory appeal and ordered that she be permitted to move to the unit next door or to an Americans with Disabilities Act (ADA)-accessible unit in the Glen Hazel complex. On January 13, 2011, the Authority filed a Motion for Reconsideration asserting that the unit next door to Bennett's was occupied, and that Bennett was not in need of an ADA-accessible unit. On January 13, 2011, the trial court granted the Authority's motion, vacated its December 19, 2011 order and ordered that if or when a larger one-bedroom unit becomes available in the Glen Hazel complex, it should be made available to Bennett. The Authority timely appealed to this Court.[1]

The Authority contends that the trial court exceeded its scope of review and improperly substituted its judgment for that of the hearing officer. We agree. Pursuant to the Administrative Agency Law, where there is a full and complete record, a reviewing court:

> shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the

[1] "We are limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated." *Allegheny Cnty. Hous. Auth. v. Liddell*, 722 A.2d 750, 752 (Pa. Cmwlth. 1998).

> provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence.

2 Pa.C.S. § 754. This provision applies to public housing authorities. *See Cain v. Allegheny Cnty. Hous. Auth.*, 986 A.2d 947 (Pa. Cmwlth. 2009).

In the instant case, the trial court concluded that the decision was not "in accordance with law." R.R. at 59a. Referencing Section 966.56 of Title 24 of the Code of Federal Regulations,[2] the trial court stated that "federal law establishes that in order for a complainant to be 'afforded a fair hearing,' the decision of the hearing officer must be 'based solely and exclusively upon the facts presented at the hearing.'" R.R. at 59a. The trial court then noted that neither the relevant regulations nor the Authority's policy were part of the record, and as such, *the Authority failed to prove that it is against policy or regulations to exercise discretion* when considering a transfer of this type. Accordingly, the trial court concluded that the decision must have been based upon extraneous information, and was not in accordance with law.

Contrary to the trial court's assertion, it was not the Authority's burden to offer the regulations and policy in order to prove that it did not need to exercise discretion. Instead, it was Bennett's burden to establish that she was qualified for a transfer. *See* section 966.56(e) of the Code of Federal Regulations.[3] If consideration of the Authority's policy was necessary to establish that Bennett met the policy requirements, then it was Bennett's burden to introduce it. Until Bennett met her burden of establishing her entitlement to relief, the Authority had no burden.

[2] 24 C.F.R. § 966.56(b)(5).

[3] That section provides, "[a]t the hearing, the complainant must first make a showing of an entitlement to the relief sought and thereafter the [Authority] must sustain the burden of justifying the [Authority] action or failure to act against which the complaint is directed." 24 C.F.R. § 966.56(e).

Nonetheless, the Authority offered testimony regarding the reasons that Bennett's request was refused.

Further, "[a]n agency's interpretive regulations are binding if in accord with the Legislature's intent." *Fed. Kemper Ins. Co. v. Ins. Dep't*, 509 Pa. 1, 8, 500 A.2d 796, 799 (1985). Agency regulations published in the Code of Federal Regulations have the force and effect of law. *See Beemus v. Interstate Nat'l Dealer Svcs., Inc.*, 823 A.2d 979 (Pa. Super. 2003).[4] It is well established that courts will take judicial notice of relevant law. "Such laws need not be pleaded or proved." *Jackson v. Se. Pennsylvania Transp. Auth.*, 566 A.2d 638, 641 (Pa. Cmwlth. 1989) (quotation marks omitted). Thus, the regulations governing the Authority's conduct in the instant matter, particularly Section 960.206(c) of the Code of Federal Regulations (relating to matching tenants to appropriate units),[5] were not required to be offered into evidence. Here, Bennett testified regarding her reasons for requesting the transfer, and Jordan testified concerning the reason that the request was refused. The hearing officer judged Bennett's credibility versus Jordan's, weighed the evidence, and determined that Bennett had not met her burden. Where it appears that

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[4] "[A federal agency's] regulation has the force of law only if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule. . . . The intent to exercise legislative power may be inferred by, *inter alia*, the agency's publication of a rule in the Code of Federal Regulations." *Id.*, 823 A.2d at 982. (citations and quotation marks omitted).

[5] That section grants discretion to the Authority to match tenants to appropriate units. It states:

> In selecting a family to occupy a particular unit, the [Authority] may match characteristics of the family with the type of unit available, for example, number of bedrooms. In selection of families to occupy units with special accessibility features for persons with disabilities, the [Authority] must first offer such units to families which include persons with disabilities who require such accessibility features (see §§ 8.27 and 100.202 of this title).

24 C.F.R. § 960.206(c).

the decision was based upon the relevant legal authority and the testimony of record, we cannot infer that the hearing officer relied upon extraneous information in reaching her decision. Accordingly, it was error for the trial court to infer that the hearing officer's decision was based upon extraneous information.

In addition, the trial court's opinion presumes that the Authority did not exercise its discretion. We conclude, however, that the Authority did, in fact, exercise its discretion and, in its discretion, determined that it was not appropriate to relocate Bennett. The hearing officer found Bennett's medical condition was insufficient to justify approval of her request for a transfer. The record is sufficient to support that determination. Thus, we conclude that Bennett's medical condition and her qualifications for transfer were considered by the hearing officer.

Because we find the Authority exercised its discretion in rendering a decision on Bennett's request, we must determine whether the authority *properly* exercised its discretion, or whether it abused its discretion. "Although the 'abuse of discretion' scope of review is not expressly provided for in the Administrative Agency Law or the Local Agency Law, it is included in the requirement that the agency decision be 'in accordance with law.'" *Leckey v. Lower Southampton Twp. Zoning Hearing Bd.*, 864 A.2d 593, 596 n.4 (Pa. Cmwlth. 2006). In reviewing an agency's exercise of discretion, our Supreme Court has stated:

> [C]ourts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. That the court might have a different opinion or

> judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial* discretion may not be substituted for *administrative* discretion.

Blumenschein v. Housing Auth. of Pittsburgh, 379 Pa. 566, 573, 109 A.2d 331, 335 (1954). Accordingly, the Authority is entitled to deference in its decision so long as that decision was not the result of "a manifest and flagrant abuse of discretion or a purely arbitrary exercise of the [Authority's] duties or functions." *Id*.

Pursuant to Section 960.206(c) of the Code of Federal Regulations, the Authority was authorized to match Bennett, a single, elderly woman, to her current one-bedroom apartment based upon the "characteristics of [her] family." *Id*. Bennett admitted at the hearing that she did not need more than a one-bedroom apartment, but asserted that she is entitled to a *larger* one-bedroom apartment. Jordan testified that Bennett's claimed physical conditions – stress, slow blood circulation, and prior strokes - did not qualify her for a transfer, and that the Authority does not distinguish the sizes of one-bedroom apartments. We agree that, given the instant facts of record, there is nothing that requires the Authority to transfer Bennett or distinguish the sizes of one-bedroom apartments.

The Authority also contends that Bennett did not present evidence of a disability that would otherwise qualify her for accommodation by way of a larger apartment. We agree.

In its opinion, the trial court stated:

> [Bennett] clearly is eligible for the accommodation in the size of the apartment. Plaintiff entered a Verification of Disability & Need for Accommodation signed by her doctor into evidence, and the doctor opined that '[i]n my professional opinion, [Bennett] has a disability. . . . I consider the requested accommodation necessary to afford

> this individual with disabilities [sic] equal opportunity to use and enjoy a dwelling unit . . . .'[6]

R.R. at 61a.

The trial court, however, omitted from the body of its opinion, and instead referenced in a footnote, that the sole impairment identified by Bennett's doctor was "significant stress that contributed to recent hospitalization." Section 100.204 of the Code of Federal Regulations[7] prohibits any person from refusing to make reasonable accommodations when necessary to afford a handicapped person equal opportunity for use and enjoyment of a dwelling unit. The term "handicap" is defined in Section 100.201 of the Code of Federal Regulations as:

> a physical or mental impairment which substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. . . . As used in this definition:
>
> (a) Physical or mental impairment includes:
>
> (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; disgestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

[6] The statement attributed to Bennett's doctor is a pre-printed statement on the Verification of Disability & Need for Accommodation form that the doctor selected when completing the form.

[7] 24 C.F.R. § 100.204.

> (b) Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.
>
> (c) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
>
> (d) Is regarded as having an impairment means:
>
> (1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation;
>
> (2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other toward such impairment; or
>
> (3) Has none of the impairments defined in paragraph (a) of this definition but is treated by another person as having such an impairment.

24 C.F.R. § 100.201.

Considered in the context of the aforementioned definitions, Bennett's limited testimony and evidence offered at the hearing was not sufficient to establish a handicap and a resulting right to reasonable accommodation. Bennett's doctor's note stated only that the small size of the apartment created *stress* which contributed to a recent hospitalization. The doctor's note did not reference Bennett's diabetes or any other specific medical conditions. Even the documents Bennett filed to appeal this matter to the trial court did not reference her diabetes. There was no evidence regarding if and how any of these conditions "substantially limits one or more major life activities." 24 C.F.R. § 100.201. Thus, given the record evidence, we agree that Bennett failed to establish that she required accommodation under Section 100.204 of the Code of Federal Regulations.

Finally, the Authority contends that the trial court erred when it concluded that because Bennett is elderly, she is "eligible for a larger unit." R.R. at 61a. We agree.

The trial court's opinion states:

> Defendant has the legal authority to exercise discretion when matching or relocating tenants of low-income public housing, as '. . . the PHA may match characteristics of the family with the type of unit available. . . .' 24 C.F.R. § 100.201. Further, local Housing Authorities are granted extra discretion when placing elderly persons, in that a Housing Authority is able [to] place a single elderly person in a larger unit than would otherwise be available to a single person. See 24 C.F.R. § 960.206(d). For the purposes of HUD program requirements, 'elderly' is defined as a person who is at least 62 years of age. 24 C.F.R. §5.403. At 84 years of age, [Bennett] is considered 'elderly' and therefore is eligible for a larger unit.

R.R. at 60a-61a.

Although we agree that the Authority "has the legal authority to exercise discretion," the Authority was not required to exercise that discretion in Bennett's favor. Section 960.206(d) of the Code of Federal Regulations[8] provides that "[a] single person who is not an elderly or displaced person, or a person with disabilities, or the remaining member of a resident family may not be provided a housing unit with two or more bedrooms." Contrary to the trial court's conclusion, Section 960.206(d) does not create an affirmative right to "extra discretion" for an elderly person, but instead exempts an elderly person from the prohibition of granting a single individual a unit larger than a one-bedroom apartment. R.R. at 61a. Thus, although a single elderly person is not prohibited by that section from being placed in a two-bedroom apartment, the section does not confer eligibility for a larger unit upon

[8] 24 C.F.R. § 960.206(d)

an elderly person. Accordingly, the Authority was not required to exercise extra discretion based upon Bennett's status as an elderly person.

Based upon the foregoing, we cannot conclude that the Authority's decision was the result of a manifest or flagrant abuse of discretion or arbitrary. We, therefore, find that the trial court erred when it substituted its judgment for that of the hearing officer. Thus, the trial court's order is reversed.

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ANNE E. COVEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Christine Bennett	:	
	:	
v.	:	
	:	
Housing Authority of the	:	
City of Pittsburgh,	:	No. 228 C.D. 2012
Appellant	:	

O R D E R

AND NOW, this 2nd day of October, 2012, the Allegheny County Court of Common Pleas' January 13, 2012 order is reversed.

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ANNE E. COVEY, Judge