

**A10-2053**

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

---

Melissa Peterson,

Relator,

vs.

Washington County Housing and Redevelopment Authority,

Respondent.

---

**RELATOR'S REPLY BRIEF**

---

McGRANN SHEA CARNIVAL  
STRAUGHN & LAMB, CHARTERED

Kathleen M. Brennan, #256870  
800 Nicollet Mall, Suite 2600  
Minneapolis, MN 55402  
(612) 339-2386

*Attorney for Respondent*

SOUTHERN MINNESOTA REGIONAL  
LEGAL SERVICES

Michael Hagedorn, #39287  
450 North Syndicate Street, Suite 285  
Saint Paul, MN 55104  
(651) 894-6903

*Attorney for Relator*

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES.....	1
ARGUMENT.....	2
I.    Respondent HRA’s discretion in terminating Ms. Peterson’s Section 8 Housing Choice Voucher assistance is limited.....	2
II.   Respondent is not excused from its burden of demonstrating that its decision to terminate Ms. Peterson’s Section 8 assistance was supported by substantial evidence, credibility determinations, and Detailed reasons for rejecting her testimony, as required by this Court’s decision in <i>Carter</i> .....	4
III.  Respondent fails to identify any credibility determinations its appointed hearing officer made, or detailed reasons she offered, for rejecting Ms. Peterson’s testimony and submissions.....	6
IV.   Respondent misreads federal regulatory law as authorizing Respondent’s local administrative policy requiring income changes to be reported in writing within 5 days.....	7
V.    Termination of a family’s critically needed assistance for failure to strictly comply with Respondent’s rigid reporting rule, is not necessary for the proper functioning of Respondent’s Section 8 program.....	8
VI.   Respondent’s purported consideration of relevant mitigating factors that were important aspects of the question of the sufficiency of Ms. Peterson’s reporting her income to the HRA was without substance and failed to include certain important factors at all.....	9
CONCLUSION.....	12

## TABLE OF AUTHORITIES

<b>Federal Regulations</b>	<b>Page</b>
<i>24 CFR §982.516(c)</i> .....	2
<i>24 CFR § 982.555</i> .....	2
<i>24 CFR § 982.555(e)(6)</i> .....	2, 3
 <b>Federal Cases</b>	
<i>Basco v. Machin</i> , 514 F. 3d 1177 (11 <sup>th</sup> Cir. 1182).....	2
<i>Department of Housing and Urban Dev. v. Rucker</i> , 535 U.S. 125 (2002).....	3, 4
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970).....	2
<i>Minneapolis Public Housing Authority v. Lor</i> , 591 N.W. 2d 700 (Minn. 1999).....	3, 4
 <b>Minnesota Cases</b>	
<i>Ali v. Dakota County Community Development Agency</i> , 2009 WL 511158 (Minn. App. 2009).....	6
<i>Carter v. Olmsted County HRA</i> , 574 N.W. 2d 725 (Minn. App. 1998).....	2, 3, 4, 5, 6
<i>Hassan v. Dakota County Community Development Agency</i> , 2009 WL 437775 (Minn. App. 2009).....	6
<i>Hicks v. Dakota County Community Development Agency</i> , 2007 WL 2416872 (Minn. App. 2007).....	6
<i>Hinneberg v. Big Stone County HRA</i> , 706 N.W. 2d 220 (Minn. 2005).....	4, 5, 6
<i>Pittman v. Dakota County Community Development Agency</i> , 2009 WL112948 (Minn. App. Jan 20, 2009).....	6

## ARGUMENT

### **I. Respondent HRA's discretion in terminating Ms. Peterson's Section 8 Housing Choice Voucher assistance is limited.**

Respondent argues throughout its brief that it has broad discretion to terminate the rental assistance of a participant such as Ms. Peterson in its Section 8 Housing Choice Voucher program and that this Court must defer to this exercise of discretion. This, however, is a misreading of the law.

Ms. Peterson, as a participant in the Section 8 Housing Choice Voucher program, is entitled to certain fundamental protections before she is deprived of benefits necessary for survival, and the initial burden of proof must fall upon the HRA. *See Carter v. Olmsted County HRA*, 574 N.W. 2d 725, 731 (Minn. App. 1998) (citing to *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970)). A number of these protections are codified at 24 CFR § 982.555. Among the basic protections is the requirement that the hearing officer's decision be supported by a preponderance of the evidence presented at the informal hearing. 24 CFR § 982.555(e)(6). This Court's decision in *Carter*, determining that the initial burden of proof must fall on the HRA, is supported by federal appellate decisional law. In *Basco v. Machin*, 514 F. 3d 1177, 1182 (11<sup>th</sup> Cir. 1182), the court held that the PHA has the burden of persuasion and must initially present sufficient evidence to establish a prima facie case. The court ruled that the PHA in that case did not satisfy its burden of persuasion and that the evidence presented by the PHA was legally insufficient to terminate Ms. Basco's Section 8 assistance. For the reasons set out in Relator's Brief

previously submitted, the HRA in this case also failed to satisfy its initial burden of persuasion. The evidence presented was legally insufficient to prove by a preponderance of the evidence that Ms. Peterson did not report her income to the HRA. Consequently, the Respondent cannot satisfy its burden on review of showing that its decision is supported by substantial evidence.

The “substantial evidence” standard of review, applied by the *Carter* Court in reviewing a decision by a housing authority to terminate Section 8 assistance, is consistent with ensuring that a housing authority has satisfied its burden of persuasion and that its decision is supported by a preponderance of the evidence as required by 24 *CFR* § 982.555 (e)(6).

Respondent has suggested that the “substantial evidence” standard of review, which this Court has consistently applied in reviewing decisions by housing authorities required to support their decisions by a preponderance of the evidence, should no longer be applied. This suggestion is not well advised and should be rejected for the reasons set forth in a subsequent section of this reply brief.

Respondent also attempts to support its argument that it had broad, and seemingly unbridled, discretion “to determine when termination of assistance was the appropriate remedy” by relying on the *Department of Housing and Urban Dev. v. Rucker*, 535 U.S. 125 (2002) and *Minneapolis Public Housing Authority v. Lor*, 591 N.W. 2d 700 (Minn. 1999). Neither of these cases involved the termination of Section 8 assistance or alleged

violations of Section 8 program Family Obligations. In *Rucker*, the Court reviewed the propriety of an eviction of a tenant from public housing for violating a lease provision prohibiting drug related activity. In *Lor*, the Court reviewed the propriety of an eviction from public housing of a tenant who committed a material violation of her lease as a result of her son's involvement in a drive-by shooting. Ms. Peterson is not contesting an eviction action. She did not violate her lease. Neither she nor any member of her family were involved in criminal activity. These decisions simply have no application to a Section 8 Housing Choice Voucher participant alleged to be out of compliance with an unauthorized local reporting requirement.

**II. Respondent is not excused from its burden of demonstrating that its decision to terminate Ms. Peterson's Section 8 assistance was supported by substantial evidence, credibility determinations, and detailed reasons for rejecting her testimony, as required by this Court's decision in *Carter*.**

Respondent attempts to argue that the Minnesota Supreme Court in *Hinneberg v. Big Stone County HRA*, 706 N.W. 2d 220 (Minn. 2005) has excused it from satisfying its burdens of 1) demonstrating that its decision was supported by substantial evidence, 2) making credibility determinations, and 3) providing detailed reasons for rejecting Ms. Peterson's testimony. Respondent suggests that the *Hinneberg* decision, which did not include "substantial evidence" as one of the standards of review to be applied in ruling on the reasonable accommodation request presented, relieves it of any obligation to comply with the requirements of *Carter*. Respondent's reading of *Hinneberg* is wrong for the following reasons.

The *Hinneberg* Court, in reaching its decision, applied only the *de novo* standard of review in interpreting the HRA's obligations under federal anti-discrimination statutes. The Court did not review any factual evidence for its sufficiency. Neither did the Court review a decision of a housing authority to terminate Section 8 assistance. Rather, the Court reviewed a decision by the housing authority to deny a request to port a Section 8 voucher as a reasonable accommodation. It offered no analysis of the circumstances under which evidence was sufficient or insufficient to support a decision to terminate Section 8 assistance. It offered no analysis of the federal regulation requiring that the decision to terminate a Section 8 voucher must be supported by a preponderance of the evidence. The *Hinneberg* Court made no mention of *Carter* or its careful analysis of the protections to be afforded Section 8 participants when a housing authority takes action to terminate the rental assistance necessary for a family's survival. Nor did the *Hinneberg* Court ever mention or suggest that it was overruling the "substantial evidence" standard of review that *Carter* held to be mandatory when such a termination decision was made. Respondent appears to be suggesting that the *Hinneberg* Court in some indirect, covert and backhanded manner, in one unexplained *dicta* sentence, overruled the entire holding in *Carter*. There simply is no basis for assuming that the Minnesota Supreme Court intended to sweep away fundamental safeguards as critical as these without any explanation whatsoever.

This Court, in its decisions subsequent to the *Hinneberg* decision very clearly has

not read into the *Hinneberg* decision a directive to abandon the “substantial evidence” standard of review required by *Carter*. See *Ali v. Dakota County Community Development Agency*, 2009 WL 511158 (Minn. App. 2009); *Hassan v. Dakota County Community Development Agency*, 2009 WL 437775 (Minn. App. 2009); *Pittman v. Dakota County Community Development Agency*, 2009 WL112948 (Minn. App. Jan 20, 2009); and *Hicks v. Dakota County Community Development Agency*, 2007 WL 2416872 (Minn. App. 2007).

**III. Respondent fails to identify any credibility determinations its appointed hearing officer made, or detailed reasons she offered, for rejecting Ms. Peterson’s testimony and submissions.**

Respondent argues that Ms. Peterson’s testimony was unclear and vague, but fails to specifically identify the testimony from the informal hearing or the findings in its hearing officer’s decision that show her testimony to be unclear and vague. The portions of the record referenced in Respondent’s brief together with other portions of the record (AR. 25 at 14; Relator’s Brief at App. 42-43) show that Ms. Peterson was clear and certain that she left voice messages informing Respondent about her MFIP income. She was uncertain only about the precise date that she did so.

Respondent also argues that Ms. Peterson testified inconsistently in that she testified both that she informed Ms. Hoechst that she was going to apply for MFIP and that she left a message with Ms. Hoechst about her MFIP income. There is no inconsistency here. Ms. Peterson testified that she made at least two separate

communications about her MFIP income. In one of these communications she informed Ms. Hoechst that she was going to apply for MFIP assistance. In another subsequent communication she informed Ms. Hoechst that she was receiving MFIP assistance.

Ann Hoechst's testimony that she did not recall receiving a voice mail message and that her file did not contain evidence of a voice mail message does little to cast doubt on Ms. Peterson's testimony in the absence of evidence that Respondent's system of keeping and logging voice mail messages was well-designed to assure that voice messages were preserved and calls returned. The record contains no such evidence. In fact, Ms. Peterson explained that "messages and past faxes haven't made it to Ann in the past." Relator's Brief at App. 42; AR 25 at 14. The absence of a file record of the messages Ms. Peterson testified with certainty she left with Ms. Hoechst does not discredit Ms. Peterson's testimony. Nor does it amount to "substantial evidence" that Ms. Peterson failed to report her MFIP income to Respondent.

**IV. Respondent misreads federal regulatory law as authorizing Respondent's local administrative policy requiring income changes to be reported in writing within 5 days.**

As authority for its strict local administrative policy requiring income changes to be reported in writing within 5 days, Respondent relies on *24 CFR §982.516(c)*, which provides as follows:

Family reporting of change. The PHA must adopt policies prescribing when and under what conditions the family must report a change in family income or composition.

Respondent mistakenly reads the language “when and under what conditions” to grant it discretion to prescribe the “method” and “time limits” for reporting. However, a plain reading of the words “when and under what conditions” does not support such an interpretation. The phrase “when and under what conditions” refers to the event or circumstances that trigger the obligation to report, e.g. *when* the nature or amount of the change in income triggers the obligation to report. This phrase does not give a housing authority discretion to set an unreasonably inflexible deadline for reporting which, if unmet, results in termination of assistance needed for a family’s survival. Neither does this language give a housing authority discretion to prescribe a strict and inflexible “in writing only” method of reporting income.

**V. Termination of a family’s critically needed assistance for failure to strictly comply with Respondent’s rigid reporting rule is not necessary for the proper functioning of Respondent’s Section 8 program.**

A policy that *encourages* a Section 8 participant to report income as soon as possible in writing, if the participant has the capacity to do so, might have its place. However, to impose an absolute rule that critically needed assistance to a family will be terminated if it does not strictly comply with a rule requiring reporting in writing within 5 days is not reasonable when a simple alternative method exists for correcting any overpayment resulting from a communication failure.

Respondent in its brief at page 25 asks, “How would the HRA determine Ms. Peterson’s Section 8 benefits for July and August when the HRA did not learn of the

additional July income until August by a third party?" The answer to Respondent's question is provided in Respondent's own Administrative Plan.

If the family does not report the change as described under Timely Reporting, the family will have caused an unreasonable delay in the interim reexamination processing and the following guidelines will apply:

Increase in Tenant Rent will be effective retroactive to the date it would have been effective had it been reported on a timely basis. The family will be liable for any overpaid housing assistance and may be required to **sign a Repayment Agreement**.

A.R. 2 at 4-5. The HRA's Administrative Plan anticipates circumstances where a family fails to timely report a change in income. It is noteworthy that the HRA's own prescribed remedy for correcting an incident of late reporting was not followed by the HRA. The HRA offers no explanation for why it chose to disregard its own policy. Neither the HRA or its appointed hearing officer explain why this provision was not taken into consideration and applied given the lack of seriousness of Ms. Peterson's failure to strictly comply with Respondent's rigid local reporting policy and lack of consequent harm to the HRA before terminating the assistance needed by Ms. Peterson and her four children.

For the reasons set forth here and in Relator's Brief, the termination of Ms. Peterson's Section 8 rental assistance in reliance on the HRA's strict local reporting policy was improper.

**VI. Respondent's purported consideration of relevant mitigating factors that were important aspects of the question of the sufficiency of Ms. Peterson's reporting her income to the HRA was without substance and failed to include certain important factors at all.**

Instead of giving meaningful consideration to Ms. Peterson's unrefuted and consistent testimony concerning the difficult circumstances affecting her ability to function at 100% capacity, the HRA's hearing officer 1) chose to place great weight on the fact that Ms. Peterson did not provide documentation independently confirming every detail of her testimony and 2) speculated that if Ms. Peterson was able to meet some of her responsibilities during this difficult time, even though it was difficult for her to function at 100% capacity, she should not be excused from strictly complying with the HRA's reporting requirement.

The HRA and its hearing officer failed to give meaningful consideration to the impact the difficult circumstances Ms. Peterson experienced had on her ability to function. Ms. Peterson presented unrefuted testimony of the difficult circumstance she experienced. The hearing officer ignored this testimony, speculating and manufacturing reasons to question Ms. Peterson's credibility. Ms. Peterson's credibility should not have been judged by whether she could meet a burden created and imposed by the hearing officer that she produce documentation confirming every detail of her unrefuted and consistent testimony. And the hearing officer had no basis for speculating that if Ms. Peterson was able to carry out some responsibilities she should have no difficulty in strictly complying with the HRA's reporting requirement. Such a conclusion is not supported by any evidence in the record.

Not only did the HRA's hearing officer fail to give meaningful consideration to the

difficult circumstances Ms. Peterson had experienced, but she failed to give any consideration at all to several other relevant mitigating factors that were important factors to be considered. There is no indication in the record that any consideration was given to 1) the seriousness of Ms. Peterson's failure to strictly comply with the HRA's reporting policy, 2) the harm, or lack thereof, suffered by the HRA as a result of Ms. Peterson's failure to strictly comply with its reporting policy, 3) the lack of any evidence of an intent or motive by Ms. Peterson to conceal her MFIP income from the HRA, 4) the lack of any evidence of non-compliance with Section 8 program rules during the eight years that Ms. Peterson received such assistance, and 5) the impact that termination of assistance would have on Ms. Peterson's four innocent children.

The HRA's own Administrative Plan, referenced above, providing a remedy short of termination of assistance for an overpayment for a failure to strictly comply with the HRA's income reporting requirement, is a strong indicator that such a failure should not be considered a serious offense calling for termination of assistance. And the fact that only one month of overpayment needed to be corrected, and could easily be corrected following the HRA's prescribed administrative procedure, is a strong indicator that the HRA could easily avoid suffering any harm as a result of Ms. Peterson's failure to strictly comply. There is no evidence in the record that the HRA and its hearing officer ever considered the appropriateness of applying this very practical remedy in its own Administrative Plan to Ms. Peterson's circumstances. This was an important aspect of the

case which should have been considered by the HRA and its hearing officer.

Respondent argues that it considered relevant mitigating factors when it responded to the letter from Ms. Peterson's counsel requesting the HRA to reconsider its decision to terminate Ms. Peterson's Section 8 assistance. This response, however, was simply an affirmation of the hearing officer's decision. No new or additional consideration was given to, or assessment made of, the relevant mitigating factors detailed above.

Respondent's failure to meaningfully consider, inquire about, and assess each of the above factors and explain its evaluation process was, in effect, a failure to consider important aspects of the question of the sufficiency of Ms. Peterson's communications about her MFIP income to the HRA.

### CONCLUSION

For the reasons set forth above and in Relator's Brief, Ms. Peterson respectfully requests this Court to reverse the decision of the HRA and its hearing officer terminating her Section 8 assistance and to direct the HRA to reinstate her Section 8 Housing Choice Voucher effective on the date her rental assistance was improperly terminated.

Respectfully submitted.

Dated: 3/18/11

SOUTHERN MINNESOTA REGIONAL  
LEGAL SERVICES



Michael Hagedorn, #39287  
450 North Syndicate Street, Suite 285  
Saint Paul, MN 55104  
(651) 894-6903