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NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

DAWN FUENTES vs. REVERE HOUSING AUTHORITY.

↔12-P-1841↔

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

The plaintiff, Dawn Fuentes, appeals from a judgment of the Superior Court affirming the decision of the Revere Housing Authority (RHA) to terminate her 'Section 8' [\[FN1\]](#) rental subsidy voucher. On appeal, the plaintiff asserts that (1) the procedure for terminating her Section 8 benefits did not comport with due process, (2) the RHA could not terminate her benefits because she was the victim of domestic abuse, [\[FN2\]](#) (3) the RHA's decision was not supported by substantial evidence, and (4) the hearing officer failed to exercise his discretionary authority to consider mitigating circumstances. Because we conclude that the last issue requires remand to the hearing officer, we do not address the plaintiff's remaining arguments. *Background.* We recite the pertinent facts, as the hearing officer could have found them. The plaintiff receives Section 8 benefits, which are administered by RHA. On or about December 1, 2009, the plaintiff and her six children moved into an apartment located on 59 Cherry Street in Revere. On February 14, 2011, RHA sent a letter to the plaintiff notifying her that her Section 8 rental subsidy was being terminated because she had violated her lease by failing to make 'proper rental payments' and failing 'to provide documentation requested by the [RHA] to verify [her] household composition and income.' The plaintiff requested an informal hearing, which was held on March 25, 2011. The plaintiff was not represented by counsel at the hearing.

During the informal hearing, RHA presented evidence in the form of letters from RHA staff and the plaintiff's landlord demonstrating that the plaintiff was approximately \$1,500 in arrears on her rental payments and had failed to pay another \$1,500 for a security deposit required under the lease. [\[FN3\]](#) In addition, RHA testified that the plaintiff failed to sign form 5058, which was necessary to complete her recertification of benefits.

The plaintiff did not dispute that she was behind on her rent and security deposit. She explained that she was unable to make rental payments for a period of approximately one year because she was in an abusive relationship with the father of her younger children and he routinely threatened her if she did not give him money. That relationship had since ended, allowing the plaintiff to catch up on her bills. The plaintiff also testified that she was injured in a car accident and had been unable to work since February, 2011. As a result she was relying on child support payments from the father of her older children, in the amount of \$120 per week, as her sole source of income.

On May 18, 2011, the hearing officer issued a written opinion affirming the RHA's decision to terminate the plaintiff's Section 8 housing voucher. The plaintiff appealed to the Superior Court in an action in the nature of certiorari, G. L. c. 249, § 4. [\[FN4\]](#) On cross motions for judgment on the pleadings, a judge of the Superior Court allowed RHA's motion and judgment entered on June 5,

2012, for RHA dismissing the plaintiff's appeal. [\[FN5\]](#)

*Discussion. Hearing officer's discretionary authority.* Our review under G. L. c. 249, § 4, 'is limited to correcting 'substantial errors of law that affect material rights and are apparent on the record.'" *Gloucester v. Civil Serv. Commn.*, 408 Mass. 292, 297 (1990), quoting from *Debnam v. Belmont*, 388 Mass. 632, 635 (1983). The plaintiff argues that the hearing officer failed to exercise proper discretion. We agree.

The regulation governing informal hearings provides: 'The person who conducts the hearing must issue a written decision, stating briefly the reasons for the decision. Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing.' 24 C.F.R. § 982.555(e)(6) (2013). We have interpreted this regulation to require the hearing officer to 'hear evidence and find facts relating to 'all relevant circumstances.'" *Wojcik v. Lynn Hous. Authy.*, 66 Mass. App. Ct. 103, 112 (2006) ('[T]he process of weighing the evidence relating to circumstances is the essence of a discretionary decision').

In this case, the hearing officer's decision merely summarizes the testimony given by the RHA and the plaintiff during the informal hearing, without giving any indication whose testimony he credited or which facts he relied upon in forming his opinion. Critically, the decision also gives no indication that the hearing officer was aware of his discretionary authority to consider such relevant and potentially mitigating factors as the plaintiff's account of domestic violence, [\[FN6\]](#) her inability to work due to her recent injury, or the impact that terminating Section 8 benefits would have on her six minor children. Our case law is clear that a hearing officer must, at a minimum, indicate that he was aware of his discretionary authority and exercise his judgment one way or the other in the case at bar. See *Carter v. Lynn Hous. Authy.*, 450 Mass. 626, 635-637 (2008) ('The hearing officer's failure to make any findings, coupled with his failure to indicate any awareness that he was explicitly authorized by HUD to exercise his discretion to take into account relevant circumstances, is contrary to our jurisprudence and cannot be sanctioned'); *Wojcik v. Lynn Hous. Authy.*, *supra* at 113 ('The hearing officer is expected under the regulations to render a 'decision' that deals with ' individual circumstances' and not simply to make a report of facts'). See also *Commonwealth v. Fredette*, 56 Mass. App. Ct. 253, 259 n.10 (2002) ('Failure to exercise discretion is itself an abuse of discretion'). The hearing officer's written decision falls short of these standards. [\[FN7\]](#)

*Conclusion.* The judgment of the Superior Court is vacated and a new judgment is to enter vacating the decision of the RHA and remanding the case to the RHA for a rehearing before a new hearing officer [\[FN8\]](#) with instructions to provide the plaintiff with the opportunity to produce evidence of any potentially mitigating circumstances relevant to the decision to terminate, and to indicate affirmatively in a new ruling both how and the basis on which the hearing officer chooses to exercise the discretion afforded under 24 C.F.R. § 982.552(c)(2)(i) (2013). See *Carter v. Lynn Hous. Authy.*, *supra* at 638. The hearing officer may consider additional bases for termination so long as proper notice is provided by the RHA.

*So ordered.*

By the Court (Kantrowitz, Grainger & Wolohojian, JJ.),

Entered: November 8, 2013

[FN1.](#) See *Wojcik v. Lynn Housing Authy.*, 66 Mass. App. Ct. 103, 103 n.2 (2006).

[FN2.](#) We acknowledge the amicus brief filed by Jane Doe, Inc., and the National Network to End Domestic Violence.

[FN3.](#) The letters also established that the plaintiff had recently paid \$1,100 of the arrears. The landlord applied this amount toward the security deposit, although the plaintiff testified at the hearing that she intended the money to be applied to the rental arrearage instead.

[FN4.](#) Although the plaintiff pleaded both G. L. c. 249, § 4, and G. L. c. 30A, § 14, the Superior Court treated the appeal as one in the nature of certiorari. We treat the matter as it has been treated below. See *Rivas v. Chelsea Hous. Auth.*, 464 Mass. 329, 334 (2013).

[FN5.](#) A different judge of the Superior Court had previously allowed the plaintiff's emergency motion to reinstate Section 8 benefits, concluding that she had a substantial likelihood of success on the merits.


[FN6.](#) Although the hearing officer noted that the plaintiff reported that she had been unable to pay rent because she was the victim of domestic abuse, he refused to consider this evidence and made

no findings or credibility determinations with regard to the claim.

[FN7.](#) We also note that housing authorities are not required under the law, nor does HUD encourage them, to terminate or deny assistance in every circumstance when a basis for termination or denial exists. See *Carter v. Lynn Hous. Auth.*, *supra* at 638 n.20, citing *Baldwin v. Housing Auth. of Camden*, 278 F. Supp. 2d 365, 371 (D.N.J. 2003).

[FN8.](#) During oral argument counsel for the plaintiff indicated that the original hearing officer is deceased.

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