

Case Number 04-1540
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OLIVER CASWELL,

Plaintiff – Appellant

v.

CITY OF DETROIT HOUSING COMMISSION;

TAYLOR C. SEGUE, III, Interim Executive Director,

Defendants – Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan, Southern Division
No. 03-71289 – Lawrence P. Zatkoff, District Judge.

PETITION FOR REHEARING

WITH SUGGESTION FOR EN BANC REVIEW

The Court’s panel decision of August 15, 2005, merits a Rehearing, because the opinion misapprehends the reading and analysis of the United States Supreme Court decisions of *Gonzaga University v. Doe*¹, *Alexander v.*

¹ *Gonzaga University v. Doe*, 535 U.S. 273 (2002).

Sandoval,² *Wright v. Roanoke Redevelopment and Housing Authority*,³ *Wilder v. Virginia Hospital Assoc'n*.⁴ Reconsideration and Suggestion for En Banc Review is requested for the two following issues considered by the Panel:

I. Does the statutory language of 42 U.S.C. §1437f, coupled with regulations promulgated by the Agency for Housing and Urban Development (“HUD”), clearly and unambiguously confer upon the Appellant a right to continued payment of his Section 8 Housing Voucher during the landlord’s eviction proceeding and until the landlord has a Judgment for Eviction; and,

II. Were the Appellant’s Due Process Rights violated when the Detroit Housing Authority terminated his Voucher Payment on the day the payment was due (November 1, 2000) and while the Complaint to evict him was pending?

ISSUE I

APPELLANT HAD A CLEAR STATUTORY RIGHT TO HIS HOUSING SUBSIDY

The Panel reviewing the instant appeal concluded that the Appellant had no private right enforceable via 42 U.S.C. §1983, because there is no provision

² *Alexander v. Sandoval*, 523 U.S. 275 (2001).

³ *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987).

⁴ *Wilder v. Virginia Hospital Assoc'*, 496 U.S. 498 (1990).n

under 42 U.S.C. §1437 *et seq.* that, in clear and unambiguous terms, confers a right upon a tenant to receive a Section 8 subsidy after the landlord has initiated eviction proceedings.

However, the Panel acknowledged, at page 4 of their opinion, that the language at issue found at 42 U.S.C. §1437f(0)(2) is analogous to the language in the Housing Act at issue, 42 U.S.C. §1437a. The Panel, however, stated that, even if this [language] could be construed as rights-creating language, as it was in *Roanoke*,⁵ the Appellant's claim is not properly identified as a violation of the amount to his Section 8 subsidy, but as an improper termination of his right to the subsidy.

This distinction upon which the Panel based its conclusion is a distinction without a difference. The effect of terminating the Appellant's housing subsidy was to lower the Housing Authority's payment to zero. The Appellant, under regulations promulgated by the Agency for Housing and Urban Development ("HUD"), continued to remain eligible for the subsidy during the eviction action until the landlord had an order for eviction. Accordingly, eliminating the subsidy prior to that time was a violation of the Appellant's—

- (1) Statutory right to the Housing Subsidy; and,
- (2) A violation of his Due Process rights.

⁵ *Wright v. City of Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 423-430 (1987).

So long as the enabling statute clearly identifies a right to which the Appellant is entitled, the HUD regulations authoritatively construe the statute itself and are also privately enforceable.⁶ Those HUD regulations, as noted by the Panel, require that the Housing Authority withhold a decision as to termination of a subsidy, if an eviction action is pending in court, until the landlord has prevailed in that action and has a judgment for possession.⁷

A similar question was examined by the Supreme Court in the *Wilder*⁸ case. At issue was whether health care providers had a right to reasonable and adequate payment under the Boren Amendment to the Medicaid Act that would be enforceable under §1983.⁹

The *Wilder* Court noted as a model, its determination in *Wright* that the Brooke Amendment to the Housing Act of 1937 and its implementing regulations [which are the rent-ceiling provisions] created rights enforceable under §1983.¹⁰ Based upon that analysis, the Medicaid Act and the Boren Amendment created a right for health care providers to some level of reimbursement and that a cause of action would lie under §1983 if a State failed

⁶ *Sandoval* at 284.

⁷ 42 C.F.R. 982.311(b).

⁸ *Wilder v. Virginia Hospital Assoc'*, 496 U.S. 498, 512-513 (1990).

⁹ *Id.*, citing 42 U.S.C. §1396 *et seq.* (1982 ed. and Supp. V).

¹⁰ *Id.*, citing *Wright* at 420.

to adopt any reimbursement provision whatsoever.¹¹ The Court further stated that the Medicaid statute and its enabling regulations require that such payment be reasonable and adequate.¹²

Similarly, in the case *sub judice*, the voucher subsidy language found at 42 U.S.C. §1437f(0)(2) requires that payment be made for eligible participants. Moreover, 42 C.F.R. 982.311(b) determines the amount of the subsidy payment—i.e., payment of the voucher amount in its entirety. The failure to pay at all is wholly inadequate, entitling the benefited individual enforcement of his right under §1983.

ISSUE II
CASWELL HAD A DUE PROCESS RIGHT
TO HIS HOUSING SUBSIDY

The Appellant's Due Process argument was not fully addressed by the Panel in its decision. Due process, as determined by 42 C.F.R. 982.311(b), required the Housing Authority to continue Petitioner's housing payments until the court rendered a judgment in the landlord's favor. Conversely stated, it constitutes a violation of Petitioner's due process rights to terminate his housing payments before a court adjudicates the landlord's claims. This Court

¹¹ *Id.*

¹² *Id.* at 519-520.

determined that this case was essentially “a dispute over whether the tenant bears the burden of proof of notifying PHA that he intends on residing in the apartment during eviction proceedings in order to continue receiving housing subsidies. *Caswell v. City of Detroit Housing Commission*, No. 04-1540 (6th Cir. Filed August 15, 2005). However, this panel opined that “[b]efore [it could] consider what obligations DHC and Caswell may have each had under the regulations, [it] must first determine whether a §1983 claim can lie against DHC for a violation of a federal regulation.” *Id.* However, a determination on the issue of burden of proof is not dependant on the *Gonzaga/Sandoval* analysis performed by the Court. Thus, this Court was required to determine the appropriate bearer of the burden of proof and, consequently, the merits of Petitioner’s due process claim.

Moreover, the termination of the Appellant’s Section 8 subsidy constituted, for all practical purposes, an eviction from his home. The Appellant’s eligibility for the Section 8 Voucher required that he show financial inability to make minimum housing payments, a requirement the Appellant met annually. Once his eligibility was determined, the subsidy entitled the Appellant to safe, decent housing.

For this reason, the Public Housing Authority's action to terminate the Appellant's housing subsidy was a dispossession from his home for non-payment of rent, within a short time of termination.

Because the termination of a Section 8 subsidy results in dispossession of the tenant for non-payment of rent, the termination process requires the Public Housing Authority to give timely and adequate notice detailing its reasons for proposed termination.¹³

In the case at bar, the Notice of Termination said only, "Non compliance of lease." Such a vaguely-worded Notice does not meet any Due Process standard and so did not allow the Appellant an opportunity to defend himself. In this way, the Appellant was denied an effective opportunity to be heard.¹⁴

The Panel complained in its Opinion that the Appellant was unable to point to additional procedural safeguards that should have been provided to better protect his property interest.

However, the procedural safeguards to protect the Appellant's Due Process rights are set forth in 42 C.F.R. 982.311(b). This regulation, as previously mentioned, requires the court process to be completed in favor of a landlord **before** the Housing Authority can act on a termination. The Housing

¹³ *Thomas v Cohen*, 304 F3d 565, 576 n. 10 (6th Cir, 2002).

¹⁴ *Goldberg v Kelly*, 397 U.S. 254, 268 (1970).

Commission not only disregarded this regulation, but it also ensured the outcome of the termination hearing by—

- (1) Holding it on the day the monthly Voucher Payment was due (November 1, 2000);
- (2) Appointing an employee of the Housing Commission as its unbiased and neutral Hearing Officer; and,
- (3) Requiring the Appellant to carry both the burden of proof and the burden of going forward, as a result of having characterized his Notice of Termination as being an appeal of a decision the Housing Commission had already made.

WHEREFORE, Appellant petitions for Rehearing and for En Banc Review.

Respectfully submitted,

Date

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