No. 16-AA-244

DISTRICT OF COLUMBIA COURT OF APPEALS

TAMIKA CARPER,

Petitioner,

v.

DISTRICT OF COLUMBIA HOUSING AUTHORITY,

Respondent.

ON PETITION FOR REVIEW FROM
THE DISTRICT OF COLUMBIA HOUSING AUTHORITY

(Not Scheduled for Oral Argument)

REPLY BRIEF OF PETITIONER

Beth Mellen Harrison (No. 497363)*
Jonathan H. Levy (No. 449274)
Legal Aid Society of the District of Columbia
1331 H Street NW, Suite 350
Washington, DC 20005
Tel: (202) 628-1161
Fax: (202) 727-2132
jlevy@legalaiddc.org
bharrison@legalaiddc.org
Counsel for Petitioner Tamika Carper
*Presenting oral argument

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES AND REGULATIONS

DISTRICT OF COLUMBIA STATUTES AND REGULATIONS

OTHER SOURCES

* Authorities Principally Relied Upon

No. 16-AA-244

DISTRICT OF COLUMBIA COURT OF APPEALS

TAMIKA CARPER,

Petitioner,

v.

DISTRICT OF COLUMBIA HOUSING AUTHORITY,

Respondent.

ON PETITION FOR REVIEW FROM
THE DISTRICT OF COLUMBIA HOUSING AUTHORITY

(Not Scheduled for Oral Argument)

REPLY BRIEF OF PETITIONER

In her opening brief, Ms. Carper explained that DCHA's decision to terminate her participation in the Housing Choice Voucher Program must be reversed because the Hearing Officer who made that decision did not recognize that he had discretion to allow an individual convicted of a violent crime to remain in the Voucher Program and did not actually exercise that discretion or even make the requisite factual findings and legal conclusions necessary to do so. DCHA's brief contains three arguments in response, none of which has merit.

First, DCHA asserts that its hearing officers are not required to expressly consider mitigating evidence in these circumstances, despite acknowledging the District regulation stating that DCHA "will consider" such evidence. This Court should easily reject DCHA's contention that the regulation does not mean what it says, but instead means something more along the lines of "may consider silently or not at all." While DCHA suggests that it is entitled to deference in interpreting the regulation, deference is only given to reasonable interpretations and not to a litigation position that attempts to completely rewrite a regulation that is clear on its face.

Second, DCHA suggests that the Hearing Officer here correctly understood that he had discretion to decline to terminate Ms. Carper from the Voucher Program, despite his repeated statements (noted on pages 12 to 13 of Ms. Carper's opening brief) that he lacked such discretion. But the evidence that DCHA points to simply does not bear weight. The Hearing Officer quotes the applicable law, but then misinterprets that law as not providing discretion. The lynchpin of DCHA's argument is the fact that the Hearing Officer repeatedly stated that DCHA has "authority" to terminate Ms. Carper from the Voucher Program. But "authority" does not mean discretion, and, indeed, there are many circumstances in which a person or entity has authority to do something without also having discretion to

decline to do it. The Hearing Officer here erroneously believed that DCHA's authority to terminate removed any discretion on his part.

Third, DCHA asserts that the Hearing Officer actually made relevant factual findings, drew relevant legal conclusions, and exercised his discretion in determining to terminate Ms. Carper from the Voucher Program. But, again, there is nothing in the record to support this assertion. DCHA points only to statements by the Hearing Officer during the hearing that he *would* consider all the evidence and to similar generic statements. But DCHA ignores the Hearing Officer's specific statements that he could not and would not consider any evidence other than Ms. Carper's conviction, provided it met the minimum legal requirement for termination, an issue that was not contested. Nor does DCHA explain how the Hearing Officer could possibly have exercised his discretion without discussing the applicable legal standard or making any factual findings regarding evidence of mitigation and rehabilitation presented by Ms. Carper. That evidence included testimony that Ms. Carper was the survivor of long-term domestic violence by her assailant, who also assaulted her immediately before she committed an offense against him. That evidence also included testimony regarding Ms. Carper's rehabilitation through mental health treatment, continuing education, and compliance with all Voucher Program rules.

I. The Hearing Officer Was Required by Law to Consider Mitigating Evidence.

DCHA argues at length that the Hearing Officer here did not need to consider mitigating evidence, or at least could do so silently and without any indication in the record, because the applicable federal regulation, 24 C.F.R. § 982.552(c)(2)(i), states that he "may" do so, implying that he "may" also choose not to do so. *See* DCHA Brief 10-11. In the alternative, DCHA argues that the Hearing Officer's consideration of such evidence need not be "explicit[,]" DCHA Brief 19, which apparently means that such consideration can be sufficient if it occurs solely within the Hearing Officer's head and without any discussion of the mitigating evidence, any related findings of fact or conclusions of law, or any explanation of how the evidence was weighed or the basis of the ultimate discretionary decision. This is an incorrect view of federal law, as explained on pages 27 to 40 of Ms. Carper's opening brief.

More importantly, however, DCHA ignores the fact that it is required to comply with *both* federal and District of Columbia law, and even if federal law were unclear on this issue, District law is crystal clear. As DCHA admits, District law requires that, "DCHA *will* consider evidence of or testimony about relevant mitigating circumstances, rehabilitation, and disabilities as enumerated at 24 C.F.R. 982.552(c)(2)." 14 DCMR 5404.8 (emphasis added); *see* DCHA Brief 19 (conceding that "the DC regulation uses the phrase 'will consider' as opposed to

'may consider.'"). "Will" means will; it does not mean "will if it chooses to." And "consider" means more than "silently consider." *See Bernard v. Bernard*, 730 A.2d 663, 666 (D.C. 1999) (noting that, when a judge is required to consider a factor he must do so "expressly, explaining how" because "to assume that he considered it, . . . without any indication of how, is tantamount to saying he could ignore it"). Neither Ms. Carper nor this Court should be required to divine what was in the Hearing Officer's head when he rendered his decision. Rather, a hearing officer "considering" evidence relevant to an exercise of discretion must make related factual findings, state the legal standard that applies to such evidence, and then explain how this evidence factored into his exercise of discretion. *See Negretti v. Negretti*, 621 A.2d 388, 390 (D.C. 1993) (remanding where opinion being reviewed lacked "full reasoning" and therefore this Court could not "fairly assess whether this was an abuse of discretion").

To the extent that this Court deems it appropriate to look beyond the plain language of the regulation to discern its meaning, the history of the regulation supports its plain meaning. This regulation is part of a series of District regulations governing the termination of individuals from the Housing Choice Voucher Program. These District regulations largely track the related federal regulations. But 14 DCMR § 5404.8 departs from its federal counterpart by expressly making consideration of mitigating evidence mandatory. *Compare* 14 DCMR § 5404.8

(DCHA "will consider . . . mitigating circumstances"), *with* 24 C.F.R. § 982.552(C)(2)(i) (public housing agency "may consider . . . mitigating circumstances"); *accord* DCHA Brief 19 (conceding that "the DC regulation uses the phrase 'will consider' as opposed to 'may consider'"). The decision to alter the language of the federal regulation must be given meaning, and the only logical conclusion is that the District regulation was intended to make consideration of mitigating evidence mandatory.

In urging this Court to rule against the plain language and history of the regulation, DCHA invokes the doctrine of deference. *See* DCHA Brief 17, 19-20. But no concept of deference to administrative interpretation could possibly be stretched so far as to encompass DCHA's suggestion that "will" actually means "may," and that silence can be equated with reasoned consideration. *See, e.g.*, *Durant v. District of Columbia Zoning Comm'n*, 139 A.3d 880, 883 (D.C. 2016) (Court does not defer to agency interpretation of regulations "that is unreasonable or contrary to the language of the applicable provisions"); *Grove v. Loomis Sayles & Co.*, 85 A.3d 832, 835 (D.C. 2014) (same).

II. The Hearing Officer Did Not Understand That He Had Discretion to Decline to Terminate Ms. Carper From the Voucher Program, Despite Her Conviction.

DCHA's suggestion that the Hearing Officer correctly understood that he had discretion to decline to terminate Ms. Carper from the Voucher Program, *see*

DCHA Brief 9-14, is not a reasonable reading of the record before this Court. As noted on pages 12 to 13 of Ms. Carper's opening brief, the Hearing Officer repeatedly stated during the hearing that, given Ms. Carper's conviction, he had no discretion to do anything but affirm Ms. Carper's termination. For example, the Hearing Officer specifically stated that there was no discretion for him to exercise if he found that Ms. Carper had been convicted of a crime of violence: "The issue here, the *only* issue here will be whether or not these two violations that she's been charged with fall under the definition of violent criminal activity. If they fall under the definition of violent criminal activity, then the termination will be affirmed." J.A. 45 (emphasis added).[1] Reflecting this fundamental misconception, the Hearing Officer's written decision does not even cite the relevant federal and local regulations on mitigating evidence, much less mention the words "discretion,"

[1] This is just one of several statements by the Hearing Officer reflecting his misunderstanding that being convicted of a crime of violence was a mandatory (rather than a discretionary) basis for termination. For example, the Hearing Officer stated that he had discretion *only* if there was no violent crime:

> If what you were found guilty of is defined as a violent criminal activity, then the Housing Authority has the authority to terminate your voucher. If it is not found as a violent criminal activity, then I have discretion to determine whether or not the Housing Authority can terminate your voucher.

J.A. 46. The best evidence of this misunderstanding is the decision itself, in which the Hearing Officer simply stated that he was affirming the termination because Ms. Carper had committed a crime of violence, and not because of the exercise of any discretion. *See id*. at 70.

"mitigating," "rehabilitation," or "circumstances." *See id*. at 66-71. The decision's Conclusions of Law all focus on a single, uncontested issue: whether Ms. Carper in fact engaged in the type of criminal activity prohibited under the Voucher Program regulations. *See id*.

DCHA does not explain how this record evinces anything other than a misconception of the scope of the Hearing Officer's actual discretion. Instead, DCHA relies primarily on its own misreading of the word "authority." DCHA suggests that when the Hearing Officer stated in his decision that DCHA had "authority to terminate" Ms. Carper from the Voucher Program, *see id*. at 70, what he actually meant was that he had discretion to terminate or not terminate Ms. Carper's voucher. DCHA Brief 11. But that is not what the word "authority" means. "Authority" means "[t]he power to enforce laws, exact obedience, command, determine, or judge," *Am. Heritage Dictionary of the English Language* (5th ed. 2016), and such power can exist either with or without discretion.

For example, it is accurate to say that the President has authority to grant pardons. In this example, the power to grant a pardon is accompanied by discretion to decline to grant a pardon. But it is also accurate to say that the Commerce Department has authority to conduct the census every ten years. In this example, the power to conduct the census is *not* accompanied by discretion; the Commerce Department is required by law to exercise its authority to conduct the census every

ten years. Courts have long recognized that authority may be discretionary or mandatory. *See In Re M.N.T.*, 776 A.2d 1201, 1204 (D.C. 2001) (judicial authority to obtain victim impact statements was previously discretionary but was made mandatory by the District of Columbia Victim Rights Amendment Act); *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 250 (1952) (comparing permissive and mandatory authority); *Selman v. United States*, 941 F.2d 1060, 1064 (10th Cir. 1991) (noting that, in particular statute, "Congress carefully distinguished between discretionary and mandatory authority to abate interest"). The fact that the Hearing Officer recognized his "authority" to terminate Ms. Carper from the Voucher Program therefore does nothing to dispel his (mis)statements that he believed that his authority to do so was mandatory (upon finding that Ms. Carper had committed a crime of violence) rather than discretionary. And his failure to recognize his discretion mandates reversal. *See, e.g., Taylor v. United States*, 601 A.2d 1060, 1068 n.1 (D.C. 1991) (reversal is required "where there is no indication that the trial judge believed he had discretion, and the appellate court would have . . . to supply the missing discretionary reason to uphold the decision").

III. The Hearing Officer Did Not Consider Mitigating Evidence, Make Necessary Factual Determinations, or Provide Any Reasoning Indicating That He Actually Considered and Exercised His Discretion.

Finally, DCHA suggests that the Hearing Officer did consider mitigating evidence, based on his own broad statements at the hearing to the effect that he

would consider "all the evidence" and "all the matters" presented. DCHA Brief 12 (quoting J.A. 49, 55, 56). But a Hearing Officer cannot avoid review of an exercise of discretion merely by inserting the talismanic phrase "I considered all of the evidence" into the record. Instead, this Court must look behind such a conclusory statement and determine whether the Hearing Officer actually did consider the evidence that he was required to consider. *See Joel v. Joel*, 559 A.2d 769, 773 (D.C. 1989) (lower "court's conclusory statement that it considered all the factors" provides "no way of assessing whether the decision is supported by the record" and therefore requires remand). Interestingly, DCHA correctly notes that the Hearing Officer did not actually state that he considered all this evidence, only that he "stated that he *intended* to" do so. DCHA Brief 11-12 (emphasis added).

Here, there is abundant evidence that, regardless of his intentions, the Hearing Officer did not actually consider the mitigating evidence presented by Ms. Carper, most notably the complete absence of findings of fact on any of the issues with respect to mitigation and rehabilitation. Facts bearing on mitigation and rehabilitation are unquestionably relevant to Ms. Carper's case because, as noted above, by regulation, "DCHA *will* consider evidence of or testimony about relevant mitigating circumstances, rehabilitation, and disabilities as enumerated at 24 C.F.R. § 982.552(c)(2)." 14 DCMR § 5404.8 (emphasis added). The federal regulation cited requires consideration of "all relevant circumstances," specifically including

"the seriousness of the case" and "the extent of participation or culpability of individual family members." 24 C.F.R. § 982.552(c)(2)(i).

Ms. Carper presented evidence regarding "the seriousness of the case" and "the extent of participation or culpability." She testified that her offense was directly precipitated by an attack from her former partner, who had repeatedly committed acts of domestic violence against her. *See* J.A. 9-11, 15-16, 26-28. She also presented evidence of her "rehabilitation" by testifying about the treatment she was receiving for her mental health problems, her continuing education, and her ten-year history of compliance with all Voucher Program rules. *See id*. at 16, 29, 32-33, 35-36. Presented with this evidence of specific, relevant mitigation factors, the Hearing Officer made no factual findings whatsoever. Instead, the Hearing Officer simply recited the fact that this testimony had been presented, without making any credibility determinations or factual findings, including on disputed issues such as whether Ms. Carper had been attacked first, whether her attacker had committed multiple acts of domestic violence against her previously, and whether Ms. Carper had complied with all Voucher Program rules. *See id*. at 66-69. To the extent mitigation evidence was uncontested, the Hearing Officer still did not weigh that evidence or explain why it was insufficient to induce him to exercise his discretion to reject termination. The total absence of such findings, or even any discussion or analysis of this evidence, demonstrates that the Hearing Officer did not, in fact,

consider this evidence as required by law and therefore did not actually exercise his discretion to decline to terminate Ms. Carper. *See, e.g., Park v. Sandwich Chef, Inc.*, 651 A.2d 798, 803 (D.C. 1994) (reversing because "[t]here is no indication that the judge ever exercised his discretion with respect to this issue"); *Bussell v. Berkshire Assocs.*, 626 A.2d 22, 22 (D.C. 1993) (reversing because "the trial court failed to furnish any indication that it exercised its discretion").

IV. The Hearing Officer's Errors Require Reversal.

This Court should not simply consider the snippets of the record that each side quotes as being the most favorable to its position but should, instead, read and analyze the entire record as a whole. The Hearing Officer's statements, both at the hearing and in his written decision, demonstrate his erroneous belief that, as a matter of law, he was required to affirm Ms. Carper's termination so long as he agreed with the (uncontested) fact that Ms. Carper committed a violent crime. DCHA concedes that "[i]f the Hearing Officer felt he had no discretion . . . the only issue of importance would have been whether or not Ms. Carper engaged in violent criminal activity," DCHA Brief 12, and a fair reading of the record as a whole is that this was indeed the only issue the Hearing Officer considered important. DCHA attempts to perpetuate this error by describing "whether Ms. Carper's acts constituted violent criminal activity," as "the only material issue of fact for which there was contradictory evidence presented" in the case, *id.* at 18.

The Hearing Officer's misunderstanding regarding his own discretion led to three additional errors. Erroneously believing that he lacked discretion to consider mitigating evidence, the Hearing Officer (1) ignored the substantial mitigating evidence presented by Ms. Carper, (2) failed to make any factual findings based upon that evidence, and (3) failed to make a discretionary choice regarding whether to terminate Ms. Carper from the Voucher Program, or, instead, on the basis of the substantial mitigating evidence presented, to allow Ms. Carper to stay in the Voucher Program. These errors require reversal.

CONCLUSION

For the foregoing reasons, the Final Informal Hearing Decision of the District of Columbia Housing Authority Executive Director affirming Petitioner Tamika Carper's termination from the Housing Choice Voucher Program should be reversed.

Respectfully submitted.

/s/ *Beth Mellen Harrison*
Beth Mellen Harrison (No. 497363)
Jonathan H. Levy (No. 449274)
Legal Aid Society of the District of Columbia
1331 H Street NW, Suite 350
Washington, DC 20005
Tel: (202) 628-1161
Fax: (202) 727-2132
jlevy@legalaiddc.org
bharrison@legalaiddc.org
Counsel for Petitioner Tamika Carper

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Reply Brief of Petitioner to be filed with the District of Columbia Court of Appeals electronically and to be served by first-class mail, postage prepaid, with a courtesy copy by email, this 22nd day of February 2017, to:

Lori Parris
Chelsea J. Johnson
cjjjohnson@dchousing.org
Mario Cuahutle
mcuahutle@dchousing.org
Office of General Counsel
District of Columbia Housing Authority
1133 North Capitol Street, NE, Ste. 210
Washington, DC 20002-7599

/s/ *Beth Mellen Harrison*
Beth Mellen Harrison