COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1217 **Cir. Ct. No. 2013CV8850**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MARIAN ROSS,

PLAINTIFF-APPELLANT,

V.

MILWAUKEE CITY HOUSING AUTHORITY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J. and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Appellant Marian Ross appeals the circuit court's order affirming a decision of the Housing Authority of the City of Milwaukee.[1]

[1] We review the agency's decision, not circuit court's decision. *See* ***Williams v. Housing Authority of the City of Milwaukee***, 2010 WI App 14, ¶9, 323 Wis. 2d 179, 779 N.W.2d 185.

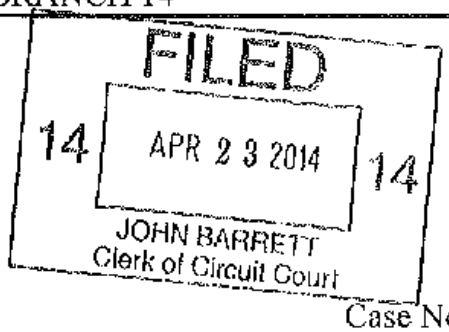
The Housing Authority terminated Ross from the Section Eight Housing Choice Voucher Program because her nephew, a lifetime registered sex offender, was living with her in violation of program rules. Ross contends that: (1) the Housing Authority's decision is not supported by substantial evidence because she testified that her nephew did not live with her and the evidence to the contrary was hearsay; (2) the Housing Authority's decision was arbitrary, unreasonable and represented its will, not its judgment; (3) the Housing Authority improperly switched the burden of proof to her; and (4) the Housing Authority terminated her from the program for an improper reason. We affirm.

¶2 After considering the arguments of the parties on appeal, the transcript of the agency hearing and the record before the agency, we conclude that the circuit court's written decision properly analyzes and disposes of the issues Ross raises on appeal. Therefore, we affirm for the reasons explained in the circuit court's decision. *See* WIS. CT. APP. IOP VI (5)(a) (Nov. 30, 2009) ("When the trial court's decision was based upon a written opinion … that adequately express[es] the panel's view of the law, the panel may … make reference thereto, and affirm on the basis of that opinion.").

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 14



MARIAN ROSS,

Plaintiff,

v.

HOUSING AUTHORITY OF THE CITY OF MILWAUKEE (HACM),

Case No. 13 CV 8850

Defendant.

DECISION AND ORDER

The Plaintiff, Marian Ross ("Ross"), seeks judicial review of a decision of the Housing Authority of the City of Milwaukee ("HACM"). In its decision, HACM found that Ross's Section 8 Program assistance could be terminated based on a finding that an unauthorized resident who was also a lifetime registered sex offender resided with Ross and had given the Sex Offender Registry the address of Ross's federally subsidized unit as his residence. This Court has reviewed the record, and for the reasons stated herein, affirms HACM's decision.

STATEMENT OF FACTS

Ross is a participant in the Section 8 Voucher Program through HACM's rent assistance program. Ross was sent a letter by HACM dated April 23, 2013, titled "Important Notice Regarding Continued Eligibility," which questioned her continued eligibility for rent assistance based upon a belief that Ross's nephew, Charles F. Williams, was residing with her. Charles F. Williams ("Williams") is a lifetime registrant of the Wisconsin Department of Corrections Sex Offender Registration database.

On June 12, 2013, an administrative hearing was held to determine whether the termination of Ross's rent assistance was warranted. In support of its decision to terminate Ross's assistance, HACM submitted a number of documents, including a municipal court traffic citations printout from the Milwaukee "municourt" website; a printout from CCAP showing a traffic forfeiture case, for speeding; a printout from the Wisconsin Department of Corrections

website, entitled "SOR Registrant Information"; an unsigned, typed paragraph dated July 20, 2012, from a previous meeting with HACM staff stating that Ross had an unauthorized household member who also happened to be a lifetime registered sex offender on the Wisconsin Department of Corrections Sex Offender Registry. The sex offender registry indicated that Williams's registration address was 4970 N 38th Pl, Milwaukee, Wisconsin. However, the sex offender registry also indicated that Williams's address was 4970 N 38th St, Milwaukee, Wisconsin, Ross's address. The Department of Corrections printout indicated that Williams's 4970 N 38th St address was verified on April 2, 2013.

Ross testified that Williams did not live with her and that, last she heard, Williams was living in Washington D.C. Ross gave two alternative addresses for Williams. Ross admitted that Williams used her address, but testified that he did not live with her. Ross also testified that she did not know Williams was a sex offender.

Following her informal hearing, Ross submitted two change-of-address forms to the hearing examiner, who subsequently considered those documents. According to the change-of-address forms, on May 7, 2013, Williams requested his mail be forwarded to his new address of 2804 N 37th St, Milwaukee, Wisconsin. The change-of-address documents listed Williams's old address as 4970 N 38th St, Milwaukee, Wisconsin. The documents were received June 13, 2013, and June 19, 2013, respectively. Ross also submitted a letter dated June 14, 2013, in which she requested an informal hearing for the continuation of her rent since she was unaware that allowing Williams to use her address was a violation of her contract and that Williams was a sex offender. In her letter, Ross again wrote that Williams did not reside at her residence. This letter was received June 17, 2013.

In her decision dated August 23, 2013, the hearing examiner found that HACM met its burden to terminate Ross's assistance by showing that Williams, a registered sex offender, had given the Sex Offender Registry the address of a federally subsidized unit as his residence and had resided with Ross. In her decision, the hearing examiner noted that Ross did not submit verification that Williams did not reside at her federally subsidized housing unit and that Ross did admit that she allowed Williams to use the address for mailing purposes. The hearing examiner found Ross to be not credible and untruthful.

Ross now appeals that determination, arguing that HACM improperly based its decision on uncorroborated hearsay evidence; that HACM's decision was arbitrary, unreasonable, and

represented its will instead of its judgment; and that HACM did not proceed under the correct theory of law when it based its termination decision on grounds outside of the applicable rules and regulations.

STANDARD OF REVIEW

Administrative decisions of HACM are appealed by filing an action for certiorari review. The HACM Section 8 Administrative Plan, adopted by the HACM Board of Directors pursuant to 24 CFR § 982, establishes that a party may request review of an adverse decision pursuant to Wis. Stat. § 801.02.

The scope of certiorari review is limited to whether the Housing Authority: (1) kept within its jurisdiction; (2) proceeded on a correct theory of law; (3) was arbitrary, oppressive, or unreasonable; or (4) might reasonably have made the order or finding based on the evidence. *Williams v. Housing Authority of City of Milwaukee*, 2010 WI App 14, ¶ 9, 323 Wis. 2d 179, 779 N.W.2d 185. These inquiries do not include weighing the evidence; that is only within the province of the agency. *Van Ermen v. State Dept. of Health and Social Services*, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978). Instead, the court is limited to determining whether there is substantial evidence to support the agency's decision. *Id.*

Substantial evidence is that evidence which is "relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." *Cornwell Personnel Assoc. v. LIRC*, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993). "The sufficiency of evidence on review by common law certiorari is identical to the substantial evidence test used for the review of administrative determinations under [Wis. Stat.] ch. 227." *Williams*, 2010 WI App 14, ¶ 10. Accordingly, on *certiorari* review, the court evaluates the record to determine whether there is sufficient substantial evidence such that reasonable minds could arrive at the same conclusion as the agency. *George v. Schwarz*, 2001 WI App 72, ¶ 10, 242 Wis. 2d 450, 626 N.W.2d 57. Furthermore, the findings of fact of the agency "are conclusive if supported by 'any reasonable view' of the evidence, and [the court] may not substitute [its] view of the evidence" for that of the agency. *Id.*

However, the Supreme Court of Wisconsin has previously held that "uncorroborated hearsay alone does not constitute substantial evidence." *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶ 56, 278 Wis. 2d 111, 692 N.W.2d 572. This rule, also called the legal residuum rule, has been adopted due to the second hand nature of hearsay. *Id.*, ¶ 58. The purpose of the rule is to

maintain fairness in administrative hearings and to prevent a decision based solely on conjecture. *Id.*, ¶¶ 58-59. In order for an agency to rely solely on hearsay evidence, that evidence must be corroborated. *Id.*, ¶ 90. The comparatively lax evidentiary standard employed by agencies "is not meant to allow the proceedings to degenerate to the point where an administrative agency relies only on unreliable evidence." *Id.*, ¶ 51. Even when the evidence would be otherwise admissible under a hearsay exception, the legal residuum rule still applies. *Id.*, ¶ 89. *Gehin* has been interpreted to stand for the proposition that only controverted uncorroborated hearsay is subject to the legal residuum rule. *See, e.g., Questions, Inc. v. City of Milwaukee*, 2011 WI App 126, ¶ 22, 336 Wis. 2d 654, 807 N.W.2d 131.

ANALYSIS

Ross contends that administrative agencies must have substantial evidence to support factual findings. According to Ross, uncorroborated hearsay is not substantial evidence under Wisconsin case law, even if the hearsay falls within a hearsay exception.

The parties do not appear to dispute that the documents relied upon by HACM were in fact hearsay. Additionally, the hearsay documents do not appear to be corroborated except by other hearsay documents, which *Gehin* instructs is improper. *Gehin*, 2005 WI 16, ¶ 92. In order to trigger the application of the legal residuum rule, however, Ross must show that the uncorroborated hearsay evidence presented by HACM is in fact controverted. *Questions, Inc. v. City of Milwaukee*, 2011 WI App 126, ¶ 22; *Williams*, 2010 WI App 14, ¶ 21. In light of the hearing examiner's credibility determination, this Court cannot say HACM's evidence is controverted. The hearing examiner explicitly notes throughout her opinion that she did not find Ross to be truthful or credible. From the examiner's opinion, it appears that she effectively discounted Ross's testimony based on her credibility determinations. This Court will not disturb an agency's credibility determinations; indeed, it is not the place of a reviewing court do so. *See, e.g., Stein v. State Psychology Examining Bd.*, 2003 WI App 147, ¶ 33, 265 Wis. 2d 781, 668 N.W.2d 112 ("The credibility of witnesses and the persuasiveness of their testimony are for the agency to determine."). Ross has implicitly asked for the weight and credibility of the evidence to be reconsidered; a reviewing court is precluded from passing on questions of credibility and weighing evidence. *State ex rel. Harris v. Annuity and Pension Bd., Emp. Retirement System of City of Milwaukee*, 87 Wis. 2d 646, 652, 275 N.W.2d 668 (1979). As such, the legal residuum rule is not triggered and the documents relied upon by HACM can constitute substantial

evidence. *Cf. Williams*, 2010 WI App 14, ¶ 19 (insufficient evidence to sustain agency decision notwithstanding an implicit finding that applicant lacked credibility).

From the documents presented by HACM, this Court concludes that HACM had substantial evidence upon which to base its decision. The hearing examiner primarily relied upon the fact that Williams had given the Wisconsin Sex Offender Registry Ross's address as his own residence. The printout from the registry indicated that Williams's address was verified as of April 2, 2013. Williams was required to provide the address where he currently was or would be residing and did so under penalty of law. Wis. Stat. § 301.45(2)(a)5; Wis. Stat. § 301.45(6). Additionally, Williams was required to notify the Department of Corrections of his current information once every 90 days. Wis. Stat. § 301.45(3)(b)1m. Ross provided no credible information to rebut HACM's evidence. In fact, she did exactly the opposite. Ross later provided change-of-address forms that clearly support the hearing examiner's finding that Williams lived in Ross's home. These forms indicate that Williams's address was the same as Ross's until *after* Ross received a notice questioning her continued eligibility. Rather than showing that Williams never lived with Ross, the change-of-address forms suggest exactly the opposite. With her submission of these documents, Ross further bolstered the hearing examiner's findings that Williams resided with her.

As stated above, this Court is constrained only to determine if HACM's factual findings can be sustained under any reasonable view of the evidence: an "agency's decision may be set aside by a reviewing court only when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences." *Hamilton v. Department of Industry, Labor & Human Relations*, 94 Wis. 2d 611, 618, 288 N.W.2d 857 (1980). When either position is supported by substantial evidence, the agency, and not the reviewing court, determines which view of the evidence it wishes to accept. *Id.* at 620.

In the case at bar, a reasonable person could find that Williams lived in Ross's home since it was listed as his residence on the sex offender registry. From the record and HACM's decision, it is apparent that the hearing examiner did not believe Ross's position and found it supported by nothing more than Ross's own incredible testimony. On the other hand, HACM presented a printout that showed Williams listed Ross's address as his residence under penalty of law. Moreover, Ross supported the hearing examiner's finding by independently submitting

documents which showed Williams's address to be her own prior to the informal hearing date. Considering the change-of-address forms, the procedural requirements associated with the sex offender registry, and Ross's lack of credibility, it is clear that a reasonable person could conclude that Williams lived at Ross's federally subsidized unit. Accordingly, HACM had substantial evidence upon which to base its finding.

Though Ross contends that HACM's decision was arbitrary, unreasonable, and represented its will instead of its judgment, this Court disagrees. Whether an agency decision is arbitrary, unreasonable, and represented its will instead of its judgment is controlled by whether sufficient evidence existed upon which the agency could base its order or determination. *Harris*, 87 Wis. 2d at 652. Despite Ross's assertions to the contrary, it was reasonable for HACM to conclude that the address Williams provided to the Sex Offender Registry as his residence proved that he was living there, as discussed above. Furthermore, HACM operates under a strong directive to ensure that lifetime registered sex offenders do not receive federal housing subsidies. *See* 42 U.S.C. § 13663. Given this directive, it is entirely rational that HACM would terminate Ross's housing subsidies upon a finding that Williams resided in her home. *See Van Ermen*, 84 Wis. 2d at 64-65 (agency's decision is not arbitrary or unreasonable if the agency acts on a rational basis).

Similarly, Ross's concern that the burden of proof was impermissibly shifted is unfounded. Though it is true that HACM had the initial burden of persuasion and had to make a prima facie case that Williams was an unauthorized resident, it was thereafter incumbent upon Ross to show that Williams was not a resident. *Basco v. Machin*, 514 F.3d 1177, 1182 (11th Cir. 2008). HACM clearly indicates that Ross provided no credible, reliable evidence to refute its initial showing that Williams lived in Ross's federally subsidized unit.

As a final matter, Ross asserts that HACM applied an incorrect theory of law when it based its termination decision on grounds that were outside of the applicable HUD regulations. Though this Court is admittedly troubled by the equivocation and lack of clarity in the hearing examiner's decision, Ross's argument is ultimately unpersuasive. Though unfortunately never

clearly articulated by HACM, it is apparent that the agency found that Williams resided in Ross's federally subsidized housing.[1]

CONCLUSION

Based on the record and briefs submitted by both parties, **IT IS HEREBY ORDERED** that the decision of the Housing Authority of the City of Milwaukee is **AFFIRMED** for the reasons stated in this Decision and Order.

Dated this 23rd day of April, 2014, in Milwaukee, Wisconsin.

BY THE COURT:

Judge Christopher R. Foley
Milwaukee County Circuit Court, Branch 14

THIS IS A FINAL ORDER OF THE COURT FOR THE PURPOSES OF APPEAL

[1] For example, in her decision, the hearing examiner noted that it was apparent from Ross's submission of the change-of-address forms that "[she] clearly kept trying to submit documents to prove he has moved out of the contracted unit." (Record, pg. 33.)