COURT OF APPEALS DECISION DATED AND FILED

August 23, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1247

Cir. Ct. No. 2013CV8792

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

WENDY GREEN,

PLAINTIFF-APPELLANT,

V.

HOUSING AUTHORITY OF THE CITY OF MILWAUKEE,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

Before Curley, P.J., Brennan and Brash, JJ.

¶1 BRENNAN, J. Wendy Green was a tenant in the rent assistance program (the Program) subsidized by the federal government through Section 8. The Housing Authority of the City of Milwaukee (HACM) administers the Section 8 program in Milwaukee. Green appeals the HACM decision terminating her

from the Program due to non-compliance with the terms of her rent repayment agreement and the circuit court's denial of her writ of certiorari challenging the HACM decision.[1]

¶2 Green admits that she signed a repayment agreement with HACM after it concluded that she let her son reside in her unit without reporting his income and had allowed him to continue to use her address after he moved out and had failed to report his income. And she admits that the agreement clearly advised her that she would be terminated for failure to pay according to the terms of the agreement. She also admits she failed to make the required payments. Nonetheless, she contends that she should not be terminated because of one sentence in the agreement that violates her constitutional substantive and procedural due process rights.

¶3 Additionally, she contends that the repayment plan violates the federal Section 8 lump sum payment statutes and rules. Finally, she claims that HACM's decision was arbitrary and capricious and that she was not given adequate notice that her behavior at the hearing at which she signed the repayment agreement would be considered at the appeal before the examiner.

¶4 HACM counters that the one sentence on which this appeal is principally based did not violate Green's substantive and procedural due process

[1] Green's notice of appeal lists three orders. One is the Final Order for Dismissal of All Claims and Causes of Action, dated March 24, 2015, and it is a final order for purposes of appeal. The other two are a prior nonfinal order and an order denying reconsideration. Because an appeal from a final order brings before the court all prior nonfinal orders adverse to the appellant, the July 15, 2014 nonfinal order affirming HACM's decision is properly before us. *See* WIS. STAT. RULE 809.10(4). Because the June 16, 2015 order denying a motion for reconsideration raised a new issue—the severability of a disputed clause in the repayment agreement—it is properly before us as well. *See* ***Ver Hagen v. Gibbons***, 55 Wis. 2d 21, 26, 197 N.W.2d 752 (1972).

rights, that the lump sum amount complied with the federal rules, and that the HACM decision was not arbitrary and capricious and was based on proper notice. The circuit court agreed with HACM and denied the writ of certiorari, along with Green's second claim for injunctive and declaratory relief under 42 U.S.C. § 1983.[2]

¶5 We agree with the circuit court and with its reasoning and affirm on all issues in this appeal.

BACKGROUND

The first hearing—August 29, 2012

¶6 On February 27, 2012, HACM questioned Green's continued eligibility for rent assistance program benefits, alleging that she did not disclose that her son, Christopher Green (Mr. Green), was living with her in her rent-assisted home as an unauthorized household member and that he earned income that was not reported. An informal hearing was held on August 29, 2012.

¶7 On November 7, 2012, HACM's hearing officer issued a decision concluding that:

> Preponderance of the evidence standard was applied, HACM proved with all the evidence submitted that Mr. Green did reside in the contracted unit and his income was not reported.
>
> The program is owed $2,886.90 which Mr. Christopher Green, son of participant has agreed to pay.

[2] The circuit court dismissed all of Green's other claims—which encompassed the 42 U.S.C. § 1983 claim without specific reference to it. On appeal, Green failed to develop any argument on the § 1983 dismissal, as we briefly discuss in section 4 below (*see* ¶57). We consider it abandoned and will not develop it for her. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (we do not develop parties' arguments for them).

Further, the decision found that the testimony showed Green moved her son out of the household[3] when his income went up, allowed him to continue to use the residence as his address, and failed to report his income:

> Ms. Green violated the above mentioned regulations because she moved out (sic) her son out of the household when his income went up, never moved him back into the household, allowed him to continue using the contracted unit's address as his mailing address and at the end Mr. Green agreed that he did owe the money and was willing to repay the program.

¶8 Notwithstanding the violation, the hearing officer decided to allow Green to continue her eligibility in the Program. The decision directed HACM to draw up a repayment agreement with Green. Green did not appeal the decision.

The repayment agreement

¶9 Following the November 7, 2012 decision, "Green was to contact the Program by November 14, 2012, to sign a repayment [agreement]." Green contacted the Program and updated her monthly adjusted income to $250.

¶10 On February 11, 2013, Green attended the repayment agreement meeting with HACM employee, Ms. Loberg. Green stated at her December 19, 2014 deposition that she understood at that February 11, 2013 meeting that she violated Program rules, owed money, and was being given a second chance to remain in the Program. Green admitted she had no obligation to sign the repayment agreement and was free to leave the Program if she chose to reject the

[3] The hearing officer's statements that Green "moved … her son out of the household" and "never moved him back into the household" appear to refer to actions Green took to change the household information on file with HACM, and not to refer to physically moving him out. The hearing record includes affidavits that support this understanding.

agreement. But she acknowledged that she did sign the agreement. The agreement required a lump sum payment in the amount of $1086.90 by April 5, 2013, and eighteen monthly payments of $100 beginning May 31, 2013.

The under-reporting clause

¶11 At the February 11, 2013 meeting, Green initially objected to signing the form because of the sentence that stated, “Under-reporting of my household income was a knowing, voluntary act by me intended to deceive the Program and reduce my rent obligation.” She requested six months rather than sixty days to pay the lump sum and was told that HACM policy permitted no more than sixty days. HACM staff reported that “Green was extremely aggressive, she altered the repayment agreement, and threw her pen multiple times. Staff reprinted another agreement and told her she could not alter the Program document.” Eventually she signed the unaltered, reprinted agreement and acknowledged that HACM staff did not force her to sign the agreement.

¶12 The repayment agreement form Green signed is the only form used by HACM in administering repayment agreements. In deposition testimony, HACM employee Debra LaRosa explained that the reason for including the “knowing, voluntary act intended to deceive” language on the form was that without it, clients would sign and then file bankruptcy discharging their rent repayment obligation. It became the standard language, she testified, because “[i]t didn’t make sense for us to sign a Repayment Agreement with someone and then never get a penny of it.”

Default and termination

¶13 By April 5, 2013, Green paid $600 of the $1086.90 due that date. On April 10, 2013, HACM sent Green a second notice, this time questioning her

continued eligibility based on her failure to make the $1086.90 payment due April 5, 2013, as required by the agreement. That day she paid an additional $100, bringing her total payment toward the lump sum amount to $700. After receiving the termination notice, Green requested a hearing.

¶14 On August 7, 2013, a hearing was held. At the hearing Green acknowledged that she did not pay the required amount by the date due on the repayment agreement. She brought a $500 check to the hearing to submit a payment, but the hearing officer did not accept the payment on the grounds that after April 5, 2013, she was in default, and further payment could not be accepted until after a decision concerning termination was made.

¶15 On August 26, 2013, the hearing examiner issued a written decision concluding that Green had violated Program rules, federal regulations, and the repayment agreement. In the written decision, the hearing officer stated:

> Ms. Wendy Green did not present any mitigating circumstances documents as to why she had not met the terms of her re-payment agreement.
>
> ….
>
> Preponderance of the evidence standard was applied, Ms. Green has only repaid the program $700.00 out of the full amount of $2,886.90 she owes the program due to unreported income.
>
> The Program met the burden by showing that: Ms. Green was not serious about re-paying the program money owed as a result of not reporting household income. Ms. Wendy Green still owes the program $2,186.90.
>
> Participant did not rebut and was unable to provide evidence to overturn the program's decision.

(Emphasis omitted). The hearing examiner concluded that the Program could "proceed to terminate participant" and stated it was basing its decision "on the

informal hearing held on August 7, 2013; documentation submitted by PHA staff; and testimony of participating family[.]"

Proceedings in the circuit court

¶16 On September 25, 2013, Green filed a complaint in the circuit court alleging two causes of action. She sought certiorari review of the administrative decision terminating her rent assistance and declaratory and injunctive relief under 42 U.S.C. § 1983. The circuit court bifurcated the claims and they proceeded independently.

¶17 In an order dated April 25, 2014, the circuit court affirmed on certiorari review HACM's decision to terminate Green from the Program. Following discovery on the § 1983 claim, both parties moved for summary judgment. On March 9, 2015, the circuit court heard arguments on the cross-motions for summary judgment and in a written order dated March 24, 2015, stated that "all remaining claims and causes of action against the Housing Authority of the City of Milwaukee are dismissed upon the merits …." At the March 9, 2015 hearing, the circuit court invited Green to file a motion to reconsider the severability ruling. Green did so, and on June 9, 2015, the circuit court denied the motion, abiding by its earlier ruling that the contract language at issue does not violate the Due Process Clause and that even if it does, it can be severed without effect on the agreement's enforceability because the language is not integral to the agreement. The written order denying reconsideration for the reasons stated at the hearing was filed June 16, 2015. This appeal follows.

DISCUSSION

¶18 This is an appeal of a denial of a writ of certiorari at the summary judgment stage.[4] There are basically three issues presented, each with subparts. First, the appellant contends that one sentence in the repayment agreement offends both substantive and procedural due process. Second, appellant argues that the initial lump sum payment required in the repayment agreement violates federal statutes and rules. Third, appellant argues that the examiner's decision was arbitrary and capricious, and the hearing was conducted without proper notice.

¶19 It is noteworthy that Green did not appeal the examiner's initial 2012 decision that Green under-reported her own and her son's income. And it is noteworthy and undisputed that Green was offered, but not required to sign, a "second chance" repayment agreement so that she could stay in the Program. Green admits that while she initially objected to one sentence in the agreement, she did not object to the financial terms and she ultimately signed the unedited version. Additionally, Green admits she was warned that if she did not pay according to the terms, she would be terminated. She also acknowledges that she did not pay according to the terms.

STANDARD OF REVIEW

¶20 On certiorari review we analyze the administrative decision, not the lower court's decision. ***Sausen v. Town of Black Creek Bd. of Review***, 2014 WI 9, ¶5, 352 Wis. 2d 576, 843 N.W.2d 39. On review we examine "whether the agency (1) acted within its jurisdiction; (2) proceeded on a correct theory of law;

[4] We do not address Green's second claim before the circuit court for relief under 42 U.S.C. § 1983 relief for the reasons stated in footnote 2 above and section 4 following.

(3) was arbitrary, oppressive, or unreasonable; or (4) might have reasonably made the finding that it made based on the evidence." ***Kraus v. City of Waukesha Police and Fire Comm'n***, 2003 WI 51, ¶10, 261 Wis. 2d 485, 662 N.W.2d 294.

¶21 We do not assess the weight and credibility of the evidence. ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 391, 585 N.W.2d 640 (Ct. App. 1998). The reviewing court must uphold the decision so long as it is supported by substantial evidence, even if there is also substantial evidence to support the opposite conclusion. ***CBS, Inc. v. LIRC***, 219 Wis. 2d 564, 568 n.4, 579 N.W.2d 668 (1998).

¶22 In reviewing summary judgment, an appellate court independently applies the same methodology as the circuit court. ***Burbank Grease Servs. LLC v. Sokolowski***, 2006 WI 103, ¶13, 294 Wis. 2d 274, 717 N.W.2d 781. "[W]hether [a party's] right to due process was violated during administrative proceedings is a question of law subject to independent appellate review." ***Koenig v. Pierce Cty. DHS***, 2016 WI App 23, ¶18, 367 Wis. 2d 633, 877 N.W.2d 632. Similarly, the construction of statutes is reviewed independently of the circuit court. ***Mayo v. Boyd***, 2014 WI App 37, ¶8, 353 Wis. 2d 162, 844 N.W.2d 652.

1. Green's Constitutional Challenges Fail.

¶23 Green's principle challenges are to the substantive and procedural due process validity of one sentence in the repayment agreement:

> Under-reporting of my household income was a knowing, voluntary act by me intended to deceive the Program and reduce my rent obligation.

Green contends that that sentence[5] violates her substantive due process rights because it violates her right against self-incrimination. She argues that it violates her procedural due process rights because it cancelled out an earlier decision by a hearing examiner which she says did *not* find that she had *intentionally defrauded* HACM. As a result of these flaws, she argues, the under-reporting admission clause renders the entire repayment agreement unconstitutional and unenforceable. Finally, without arguing that the clause is integral to the agreement, she contends that it must be found void if it is to be severable. We address each argument in turn.

a. The under-reporting clause does not violate substantive due process guarantees.

¶24 Under the substantive due process application of the Due Process Clause of the Fourteenth Amendment, certain government actions are barred regardless of the fairness of the procedures. ***Daniels v. Williams***, 474 U.S. 327, 331 (1986). The United States Supreme Court has held that the Due Process Clause protects "the specific freedoms protected by the Bill of Rights" as well as others, such as the rights to marry and to have children. *See* ***Washington v. Glucksberg***, 521 U.S. 702, 720 (1997).

¶25 Acknowledging that the U.S. Supreme Court has determined that government assistance is not a fundamental right, *see* ***Belcher v. Norton***, 497 F.3d 742 (7th Cir. 2007), Green instead frames her substantive due process violation as a deprivation of her "fundamental right" to be free from self-incrimination under

[5] We note that the appellant continuously refers to the clause as the "false fraud admission" clause. Given that the clause never mentions the word "fraud," we characterize it more neutrally as is more fitting to professional discourse.

the Fifth Amendment. Green argues that the under-reporting clause in the repayment agreement constitutes a "compelled false fraud confession to a crime" and compares her case to ***Garrity v. New Jersey***, 385 U.S. 493 (1967); ***Gardner v. Broderick***, 392 U.S. 273 (1968); and ***Lefkowitz v. Turley***, 414 U.S. 70 (1973).

¶26 Green's argument fails. Under Fifth Amendment self-incrimination law, the privilege against self incrimination applies: (1) only to a *criminal* prosecution, (2) that is *real* and actual, *not speculative* or theoretical. Green fails to meet either requirement.

¶27 The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. In a plurality opinion, ***Chavez v. Martinez***, 538 U.S. 760 (2003), four justices summarized the state of the case law and reached the conclusion that the privilege protects an individual only from criminal prosecutions and does so by providing immunity from prosecution:

> We have also recognized that governments may penalize public employees and government contractors (with the loss of their jobs or government contracts) to induce them to respond to inquiries, so long as the answers elicited (and their fruits) *are immunized from use in any criminal case against the speaker*.
>
> ….
>
> Our holdings in these cases demonstrate that … mere coercion does not violate the text of the Self–Incrimination Clause absent use of the compelled statements in a criminal case against the witness.

Id. at 768-69 (emphasis added).

¶28 Additionally, the privilege against self-incrimination only protects against *real*, *not speculative*, criminal prosecutions. As the U.S. Supreme Court

has stated: "'The central standard for the privilege's application has been whether the claimant is confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination.'" ***United States v. Apfelbaum***, 445 U.S. 115, 128 (1980) (citations omitted) (*quoting* ***Marchetti v. United States***, 390 U.S. 39, 53 (1968)).

¶29 Green points to no facts in the record showing any actual or planned criminal prosecution. In fact, she fails to even develop an argument as to what the criminal offense might be.[6] She argues that three cases support her argument that the under-reporting clause violated her right against self-incrimination: ***Garrity***, ***Gardner*** and ***Lefkowitz***. We conclude that they are distinguishable because all involved an actual or planned criminal prosecution. We address each in turn.

¶30 In ***Garrity***, in a two-part holding, the U.S. Supreme Court held that where police officers were being criminally investigated for obstruction of justice and were given a choice either to incriminate themselves or to forfeit their jobs, their confessions were (1) not voluntary; and (2) violative of the Fifth Amendment. ***Garrity***, 385 U.S. at 500. The Court found that a grant of immunity was the remedy for the Fifth Amendment violation.

¶31 Similarly, in ***Gardner***, the Court held that the Fifth Amendment was violated by a state statute that required state employees and contractors to answer questions that may be used against them in criminal proceedings. ***Gardner***, 392 U.S. at 279. The Court noted that the answers could be compelled, but only "after a grant of immunity." ***Id.***

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[6] We need not develop her argument for her. *See* ***Gulrud*** at 730.

¶32 And in ***Lefkowitz***, the Supreme Court applied the same rationale to a claim of self-incrimination made by architects under state contract. ***Lefkowitz***, 414 U.S. at 84. The architects were called to testify before the grand jury in a criminal investigation. The Court held that the state can require employees or public contractors to testify but only if it offers them immunity sufficient to supplant their Fifth Amendment privilege. In the absence of immunity, the answers are inadmissible in any subsequent investigation against the employee or public contractor. ***Id.***

¶33 Unlike the three cases on which she relies, Green was not facing any actual, planned, or even possible criminal prosecution. Therefore, she fails to show any substantive due process violation.[7]

b. The under-reporting admission does not violate procedural due process guarantees.

¶34 Green contends that the hearing officer's November 2012 hearing decision not to terminate her participation in the Program, a decision made in compliance with procedural due process, was effectively nullified by the inclusion of the under-reporting clause in the repayment agreement, and that this violates her procedural due process rights. She characterizes the 2012 decision as one that did *not* find that her under-reporting was "voluntary and knowing." Thus, she argues, the under-reporting clause essentially reversed the 2012 decision, without

[7] Green also argues in one sentence that HACM violated substantive due process by requiring "one form and only one form" for the repayment agreement, contending there is no legitimate governmental objective in deliberately perpetuating a falsehood, here referring to the under-reporting clause. As a factual matter, Green's argument is unsupported because the record shows that multiple employees offered testimony concerning modifications to tenant repayment agreements. But further, the legal argument is conclusory and undeveloped. We therefore do not address it further. We do not develop parties' argument for them. *See* ***Gulrud*** at 730.

procedural due process, and thereby "rendered meaningless the entire error correcting mechanism of the 2012 ***Goldberg v. Kelly*** hearing procedure."[8]

¶35 A procedural due process claim requires a showing of a cognizable property interest, a deprivation of that property interest, and a denial of due process. ***Khan v. Bland***, 630 F.3d 519, 527 (7th Cir. 2010).

¶36 We agree with Green that she had a property interest in her existing rent assistance and thus, under procedural due process, was entitled to a hearing before being terminated from the Program. "[P]articipants who have been issued a certification for rent assistance have a property interest in the assistance and must be heard before being expelled from the program." ***Id.*** But Green received a full due process hearing in August 2012 and did not appeal that result. Accordingly, she does not base her procedural due process claim on a claim that she had no hearing prior to the 2012 decision.

¶37 Instead she makes a narrow and attenuated procedural due process argument attempting to link the repayment agreement to the first hearing's results. Green's argument hinges on her characterization of the hearing examiner's words as *not* finding that she knowingly and voluntarily under-reported her household income. However, this is a mischaracterization of the examiner's words and the first flaw in her analysis.

¶38 The examiner may not have said the words "knowing and voluntary," but the words she used lead to no other reasonable interpretation. She

[8] ***Goldberg v. Kelly***, 397 U.S. 254 (1970) (before a governmental entity may terminate welfare benefits, procedural due process must be provided to the affected recipient).

concluded at the end of the November 2012 decision that Green "allowed" her son to use her address and never reported his income:

> Ms. Green violated the above mentioned regulations because she moved out her son out of the household when his income went up, never moved him back into the household, allowed him to continue using the contracted unit's address as his mailing address and at the end Mr. Green agreed that he did owe the money and was willing to repay the program.

The examiner's decision found that Green knew that her son was using her address: "However both he *and his mother* Ms. Green testified that he has used the contracted unit's address and his mail was received there." (Emphasis added.) Green never denied these findings and never appealed that decision. As the circuit court found, "[t]he decision did find a knowing under-reporting of her household income." The hearing officer made findings consistent with a knowing and voluntary violation. Therefore, on this record, there is simply no discrepancy between the first hearing and the clause and no support for a conclusion that signing the agreement "nullified" the hearing findings. Contrary to Green's argument, the hearing officer's decision is consistent with the under-reporting admission.

¶39 The second flaw in Green's procedural due process analysis is she fails to link the offending language, the under-reporting clause, to any protected property interest. *See* ***id.*** The cognizable property interest here is Green's participation in the rent assistance program. The violation she alleges—the inclusion of the under-reporting clause in the repayment agreement—did not ***result in*** deprivation of that property interest. She was not terminated because she admitted the words in the clause. She was terminated for a totally unrelated

reason—non-payment. Thus, she has not established the linkage necessary for her tenuous procedural due process argument.

c. The under-reporting clause is severable, even if found to be unconstitutional.

¶40 Although we conclude that Green has not established that the inclusion of the under-reporting admission clause in the repayment agreement violates her constitutional due process rights, we, like the circuit court, also consider whether the under-reporting admission clause is severable such that the remainder of the agreement is enforceable even if the clause is unlawful.[9]

¶41 "Whether a contract is divisible is a question of mixed fact and law. What the parties agreed to is a question of fact. Whether their agreement is divisible is a question of law." ***Spensley Feeds, Inc. v. Livingston Feed & Lumber, Inc.***, 128 Wis. 2d 279, 286, 381 N.W.2d 601 (Ct. App. 1985). "Wisconsin has long accepted that a portion of a contract may be severable, despite the fact that other portions may be illegal." ***Markwardt v. Zurich Am. Ins. Co.***, 2006 WI App 200, ¶30, 296 Wis. 2d 512, 724 N.W.2d 669. "'[B]efore a court can sever a contractual provision from a contract, it must first determine whether the severed provision is integral to the entire contract.'" ***Riley v. Extendicare Health Facilities, Inc.***, 2013 WI App 9, ¶45, 345 Wis. 2d 804, 826 N.W.2d 398 (citations and one set of quotation marks omitted). If the provision is integral to the agreement, the entire contract will fail. ***Id.*** at ¶46.

[9] On appeal, Green makes no argument on the question of whether the clause is integral to the contract such that it is not subject to severing. She argues instead that before the clause can be severed, it must be found void, citing ***Simenstad v. Hagen***, 22 Wis. 2d 653, 661, 126 N.W.2d 529 (1964). ***Simenstad*** does not require us to find the clause void before performing a severability analysis.

¶42 The circuit court found that the under-reporting admission clause was not integral to the contract because the contract's primary purpose was to "set the terms of repayment." We agree. Green's admission of under-reporting has no bearing on whether she complied with the contract's terms of repayment. In fact, she does not dispute that she failed to comply with the terms. Thus, although we conclude that including the clause in the agreement does not violate constitutional rights, we also conclude if it does, it is severable, and the contract is enforceable without the clause.

2. The agreement's lump sum payment does not violate the law.

¶43 Green argues that HACM erred in terminating her participation in the Program because applicable federal rules and regulations prohibit requiring lump sum payments as a part of a repayment agreement without a determination of ability to pay. She argues that HUD PIH Notice 2010-19 and Executive Order 13520 demonstrate a policy that requires monthly income to be considered. She relies principally on the language below from HUD PIH Notice 2010-19 which expressly limits *monthly* payments to forty percent of the family's monthly income.

> The monthly retroactive rent payment plus the amount of rent the tenant pays at the time the repayment agreement is executed should be affordable and **not exceed 40 percent of the family's monthly adjusted income**. However, PHAs have the discretion to establish thresholds and policies for repayment agreements in addition to HUD required procedures.

HUD PIH Notice 2010-19 (emphasis added).

From that language she argues that *lump sum* payments that are set without consideration of the family's monthly adjusted income are also prohibited. Because the lump sum payment of $1086.90 was required to be paid within sixty

days of signing, she argues it failed to take into consideration her monthly income and therefore violated the federal rules.

¶44 HACM responds that public housing authorities (PHAs) are required to follow HUD rules and regulations[10] and are required to seek reimbursement from tenants who were charged less rent than they were supposed to be charged.[11] PHAs are given discretion as to whether to offer the tenant a repayment agreement

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[10] 24 C.F.R § 982.153 requires that the local PHA must comply with the consolidated ACC, the application, HUD regulations and other requirements, and the PHA administrative plan.

[11] HUD PIH Notice 2010-19 requires:

> 16. **Tenant Repayment Agreement**. **Tenants are required to reimburse the PHA if they were charged less rent than required by HUD's rent formula due to the tenant's underreporting or failure to report income.** The tenant is required to reimburse the PHA for the difference between the tenant rent that should have been paid and the tenant rent that was charged. This rent underpayment is commonly referred to as retroactive rent. If the tenant refuses to enter into a repayment agreement or **fails to make payments on an existing or new repayment agreement, the PHA must terminate the family's tenancy or assistance**, or both. **HUD does not authorize any PHA-sponsored amnesty or debt forgiveness programs.**

All repayment agreements must be in writing, dated, signed by both the tenant and the PHA, include the total retroactive rent amount owed, **amount of lump sum payment made at time of execution, if applicable**, and the monthly repayment amount. At a minimum, repayment agreements must contain the following provisions:

a. Reference to the paragraphs in the Public Housing lease or Section 8 information packet whereby the tenant is in non-compliance and may be subject to termination of tenancy or assistance, or both.

b. The monthly retroactive rent repayment amount is in addition to the family's regular rent contribution and is payable to the PHA.

c. The terms of the agreement may be renegotiated if there is a decrease or increase in the family's income.

d. **Late and missed payments constitute default of the repayment agreement and may result in termination of tenancy and/or assistance.**

(Emphasis added.)

or simply terminate them from the Program, and, if offering the agreement, are given discretion to set the repayment terms.[12] Also PHAs are prohibited from forgiving any debt.[13] They are required to set the *monthly* payments according to a cap of forty percent of the family's monthly adjusted income.[14] But they have no restriction on the amount of the *lump sum* payment. They are required to set up their own local policies,[15] which HACM did here, and its policy is an eighteen month repayment period. The number of months for the repayment agreement period, the monthly amount, and the lump sum were all determined according to HACM's policy for setting repayment plans. Given the restrictions on HACM,

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[12] 24 C.F.R § 982.552(c)(1)(vii) states:

(c) Authority to deny admission or terminate assistance.

(1) Grounds for denial or termination of assistance. The **PHA may at any time** deny program assistance for an applicant, **or terminate program assistance for a participant**, for any of the following grounds:

….

> (vii) **If the family breaches an agreement with the PHA to pay amounts owed to a PHA**, or amounts paid to an owner by a PHA. (**The PHA, at its discretion, may offer a family the opportunity to enter an agreement to pay amounts owed to a PHA or amounts paid to an owner by a PHA. The PHA may prescribe the terms of the agreement**.)

(Emphasis added.)

[13] *See* HUD PIH Notice 2010-19 above.

[14] HUD PIH Notice 2010-19 states: The monthly retroactive rent payment plus the amount of rent the tenant pays at the time the repayment agreement is executed should be affordable and **not exceed 40 percent of the family's monthly adjusted income**.

[15] 24 C.F.R. § 982.54(a) requires public housing authorities such as HACM to adopt a written administrative plan that establishes local policies for administration of the program in accordance with HUD requirements.

they argue, the lump sum payment here had to be $1086.90.[16] And they point out that Green agreed to it, even acknowledging at the time of signing that non-compliance with the agreement would result in termination from the Program. Thus, they argue, the lump sum payment here did not violate any federal rules or regulations. We agree with HACM. We conclude that here the plain language of the federal rules and regulations does not require HACM to set the lump sum payment with consideration to the tenant's monthly adjusted income.

¶45 The federal rules and regulations give the local agency, HACM, discretion to offer a repayment agreement in the first place, and discretion to set its terms, including a lump sum payment and monthly payments, subject to a specific limitation on *monthly* payments only. The rule explicitly states that the local housing authority "may prescribe the terms of the agreement." *See* 24 C.F.R § 982.552(c)(1)(vii)). *See also* HUD Notice PIH 2010-19, p. 14. The rules also explicitly permit lump sum payments: "[a]ll repayment agreements must … include the total retroactive rent amount owed, amount of *lump sum payment* made at the time of execution, if applicable, and the monthly repayment amount."[17] HUD PIH Notice 2010-19. (Emphasis added.)

¶46 There is no dispute by Green that HACM has discretion, is authorized to set lump sum payments, and in all respects complied with the rules in setting Green's repayments—except with regard to the lump sum payment. She

[16] It is undisputed that the total rent due was $2886.90 and that the monthly adjusted income was $250.00, forty percent of which ($100) was the maximum permitted monthly payment. Eighteen monthly payments at this rate would be $1800. That left a balance of $1086.90 to be paid as the lump sum payment, and that amount was due April 5, 2013.

[17] HUD requires payment "at the time of execution." However, HACM permits a sixty-day period following the execution of the repayment agreement.

argues that both the amount and the time frame, which Green argues was sixty days, violated the federal rules requiring consideration of family monthly income.

¶47 Green's argument fails because HACM's discretion with regard to the lump sum payment was unrestricted. Given the amount due, $2886.90, the requirements for repayment and no debt forgiveness, and the numbers of individuals awaiting housing subsidy, HACM's policy of eighteen months repayment is clearly within the federal rules. We also agree with HACM that Green was aware of her debt since February 2012 and actually had longer than sixty days, in fact to the April 5, 2013 due date, to come up with her lump sum payment. We note further that the record shows Green never gave a reason for her non-payment and never asked for an extension or other modification until after she received notice of termination. Whatever her reason for default, Green fails to persuade us that HACM violated any of the federal rules or regulations.

¶48 Green's next assertion, that HACM violated Executive Order 13520 by setting a lump sum payment without considering monthly income, is without merit. Executive Order 13520, Reducing Improper Payments, 74 Fed. Reg. 62201 (Nov. 20, 2009), Section 1 states: "The purpose of this order is to reduce improper payments by intensifying efforts to eliminate payment error, waste, fraud, and abuse in the major programs administered by the Federal Government, while continuing to ensure that Federal programs serve and provide access to their intended beneficiaries." Green argues that the last part of this sentence requires HACM to "ensure" "access" to her housing benefits by setting her lump sum payment after considering her monthly income. We conclude that the plain language does nothing of the sort. Executive Order 13520 merely sets up specific policies to reduce improper payments and eliminate payment error. It does not even implicitly support Green's argument.

¶49 Accordingly, we agree with the circuit court that Green's lump sum payment did not violate the applicable law.

3. <u>HACM's termination decision was proper.</u>

a. HACM did not act arbitrarily or capriciously.

¶50 Green argues that HACM's decision to terminate should be reversed because it was arbitrary and capricious. Under certiorari law, a decision is arbitrary if it is '"an unconsidered, wilful and irrational choice of conduct and not the result of the winnowing and sifting process."' ***Chicago & N.W. Ry. Co. v. Public Serv. Comm'n.***, 43 Wis. 2d 570, 582, 169 N.W.2d 65 (1969) (citation omitted). The administrative body must "address or rebut" the grounds given by the petitioner. *See* ***Donaldson v. Board of Comm'rs of Rock-Koshkonong Lake Dist.***, 2004 WI 67, ¶102, 272 Wis. 2d 146, 680 N.W.2d 762. Green argues that in failing to address her payment efforts, the examiner failed to "address or rebut" her grounds.

¶51 Green argues that the $700 in payments she made toward the $1086.90 lump sum should have been sufficient to avoid termination from the Program. She relies on a non-Wisconsin case, ***Riggins v. Lannert***, 18 A.D.3d 560 (N.Y. App. Div. 2005), for support. In ***Riggins***, the court found that there was not substantial evidence on one ground of termination, but that there was substantial evidence on the other ground—failure to pay rent owed under a repayment agreement. With no mention of "arbitrary and capricious," nor any discussion of the basis for its conclusion, the court directed that since the matter was remanded anyway, a lesser penalty should be imposed because the penalty of termination was too severe. ***Id.*** at 561.

¶52 We find ***Riggins*** unpersuasive to Green's argument. First of all, ***Riggins*** is not controlling. Secondly, there is no detail in the opinion of either the factual basis or legal analysis for the court's conclusion that the penalty was too severe for the non-payment. We are not able to do any meaningful analysis of the comparable or distinguishing features of the case as compared to Green's. But more importantly, we conclude that the record here shows that the examiner did address and rebut her claims that payment efforts should entitle her to remain in the Program. The examiner noted the absence of any requests for extensions based on mitigating factors until after the notice of termination was served. The examiner, like the circuit court and this court, noted that the federal rules compel termination for non-payment.

> If the tenant refuses to enter into a repayment agreement or fails to make payments on an existing or new repayment agreement, the PHA **must** terminate the family's tenancy or assistance, or both. HUD does **not** authorize any PHA-sponsored amnesty or debt forgiveness programs.

HUD PIH Notice 2010-19. Nothing about the examiner's decision here was "unconsidered" and "wilful"; rather, it was a well-reasoned decision, and we affirm.

b. Green received proper notice for her termination hearing.

¶53 Green next argues that HACM's termination decision should be reversed because she was not given notice that her conduct at the February 11, 2013 meeting with HACM staff would be a basis for termination. Green is referring to staff documentation that Green had been uncooperative and had thrown a pen when presented with the repayment agreement and to several comments the hearing officer made in the hearing and in the decision about Green's conduct at the February 11, 2013 meeting.

¶54 Green does not dispute that she received notice of potential termination for defaulting on the payment. However, Green argues that the hearing officer improperly based the termination on other grounds without first giving her notice of them.

¶55 We conclude that the record is clear that Green received proper notice and was terminated for non-payment, not for her perhaps aggressive behavior at the hearing.

c. HACM reached a reasonable decision supported by the evidence.

¶56 For the reasons given herein, we conclude also that the termination decision was reasonable and was supported by the evidence. Given the presumption that the examiner acted according to law and that the official decision is correct, as well as the substantial evidence supporting it, we must uphold the decision. *See* ***CBS, Inc.***, 219 Wis. 2d at 568 n.4. We conclude that HACM acted within its jurisdiction; proceeded on a correct theory of law; did not act arbitrarily, oppressively, or unreasonably; and might reasonably make the decision it did based on the evidence before it. *See* ***Gehin v. Wisconsin Grp. Ins. Bd.***, 2005 WI 16, 278 Wis. 2d 111, 692 N.W.2d 572.

4. Green failed to brief the § 1983 claim on appeal, and we deem it abandoned.

¶57 Finally, Green asserted at oral argument that she believes she properly raised a claim that she is entitled to 42 U.S.C. § 1983 relief. The circuit court dismissed this claim without specific reference to it when dismissing all remaining claims. Although her notice of appeal encompasses the issue, Green

made no mention of it in her Statement of Issues or in her argument in her opening brief.

¶58 HACM did raise and rebut the issue in its responding brief on appeal. HACM argued that precedent established that Green's § 1983 claim was improper under ***National Private Truck Council, Inc. v. Oklahoma Tax Commission***, 515 U.S. 582, 589 (1995), and ***Irby v. Macht***, 184 Wis. 2d 831, 843, 522 N.W.2d 9 (1994), because she had another "adequate" remedy available, namely a Writ of Certiorari.

¶59 In her reply brief, Green failed to develop any responsive argument or legal authority to HACM's argument. Consequently, we conclude that Green abandoned the issue on appeal. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). ("[I]n order for a party to have an issue considered by this court, it must be raised and argued within its brief …. [N]umerous decisions hold[] that an issue raised on appeal, but not briefed or argued, is deemed abandoned.)

¶60 Even if she had not abandoned it, she could not prevail on it because the law is clear that where a party has another adequate remedy available, such as certiorari, no § 1983 claim lies. *See* ***Nat'l Private Truck Council, Inc.***, 515 U.S. at 589, and ***Irby***, 184 Wis. 2d at 843 (holding that certiorari is another adequate remedy). Here, she clearly had a certiorari claim and was able to raise her constitutional arguments within it, as well as her other arguments, and therefore, no § 1983 claim lies.

¶61 For these reasons, we affirm the circuit court.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.