COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP283 **Cir. Ct. No. 2009CV2569**

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

GREGORY MACK,

PLAINTIFF-RESPONDENT,

V.

HOUSING AUTHORITY OF THE CITY OF MILWAUKEE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. The Housing Authority for the City of Milwaukee appeals from a circuit court order, which reversed the Housing Authority's

decision to terminate Gregory Mack's eligibility for federal rent assistance.[1] Because we conclude that the hearing examiner's decision, which includes no legal rationale for its conclusion, is woefully insufficient under the law, we affirm.

BACKGROUND

¶2 In August 2005, Mack was convicted of two counts of misdemeanor drug possession. Three years later, while living in federally subsidized housing, Mack received a letter from the Housing Authority, notifying him that the Housing Authority questioned his continued eligibility for the federal rent assistance program because of his prior drug convictions. It further informed him that he could request an informal hearing if he disagreed with the Housing Authority's findings, and that if he did not request a hearing his eligibility would be terminated.

¶3 Wishing to challenge his termination from the rent assistance program, Mack requested and received an informal hearing before a Housing Authority hearing examiner. At the hearing, the Housing Authority entered into evidence a copy of a 2005 criminal complaint and a corresponding copy of a Circuit Court Access Program (CCAP) printout, demonstrating that Mack pled guilty and was convicted of two misdemeanor drug charges. Mack testified at the hearing, admitting to the 2005 convictions, but stating that he had successfully completed rehabilitation while on probation and was no longer using drugs. He submitted no physical evidence in support of his testimony.

[1] Mack has not filed a respondent's brief, despite our order requiring him to do so. We are appreciative of the amicus curiae brief filed by Legal Action of Wisconsin, Inc., which proved helpful in our resolution of this matter.

¶4 Following the hearing, the hearing examiner issued a written decision terminating Mack's eligibility to the rent assistance program, stating that: (1) the Housing Authority presented evidence that Mack was convicted of "a serious drug-related offense"; (2) Mack admitted that "he used to use drugs"; and (3) Mack presented no evidence that he had successfully completed a rehabilitation program. However, the hearing examiner did not provide any legal basis for its decision. Instead, the hearing examiner merely concluded, without citation to any legal authority, that Mack "cannot prove … that he has been successfully rehabilitated" and that "[t]herefore, [Mack's] eligibility shall terminate."

¶5 Mack filed a petition for *certiorari* review with the circuit court. The circuit court reversed the hearing examiner's decision, concluding that the Housing Authority failed to demonstrate that Mack's drug-related activity violated either the applicable federal statute or federal regulation. The Housing Authority appeals.

DISCUSSION

¶6 "When we review an application for a writ of *certiorari*, we review the agency's decision, not the decision of the circuit court." ***Williams v. Housing Authority of the City of Milwaukee***, 2010 WI App 14, ¶9, 323 Wis. 2d 179, 779 N.W.2d 185 (Ct. App. 2009) (emphasis added). On *certiorari* review we are limited to determining: (1) whether the agency stayed within its jurisdiction; (2) whether the agency acted according to law; (3) whether the action taken by the agency was arbitrary, oppressive, or unreasonable and represented the agency's will and not its judgment; and (4) whether the evidence presented reasonably supported the agency's decision. ***Jackson v. Employe Trust Funds Bd.***, 230

Wis. 2d 677, 682-83, 602 N.W.2d 543 (Ct. App. 1999). We conclude that the Housing Authority failed to act according to law because the written decision issued by the hearing examiner failed to adequately explain the legal rationale behind the termination of Mack's eligibility for rent assistance.

¶7 Due process dictates that prior to termination of federal rent assistance an individual has "'a right to [a] decision based solely on rules of law and the evidence presented at the hearing.'" ***Bratcher v. Housing Authority of the City of Milwaukee***, 2010 WI App 97, ¶16, 327 Wis. 2d 183, 787 N.W.2d 418 (citation omitted). Accordingly, a hearing examiner's decision must include "'the elements of law motivating the court's conclusion.'" ***Id.***, ¶21 (citation omitted). At the very least, the hearing examiner must "'cite [a] policy, regulation, or other authority indicating … how the tenants' acts or omissions fail to meet the pertinent legal requirements.'" ***Id.*** (citation and brackets omitted).

¶8 Here, the hearing examiner's written decision merely set forth the facts giving rise to Mack's termination without providing any legal rationale for its decision. The hearing examiner failed to "'cite [a] policy, regulation, or other authority indicating … how [Mack's prior drug convictions] fail to meet the pertinent legal requirements.'" ***Id.*** (citation omitted). We cannot perform even a cursory review of the hearing examiner's decision when it sets forth no legal authority or rationale for its decision. As it stands now, the hearing examiner's decision "'fall[s] appallingly short of the mark.'" *See* ***id.***, ¶21 (citation omitted).

¶9 In defense of the hearing examiner's decision, the Housing Authority argues that the hearing examiner *implicitly* relied on the parties' 2008 housing program contract, which the Housing Authority states prohibited Mack from engaging in "drug-related activity," without placing any limitations on the

timing, duration, or location of the drug-related activity. Thus, the Housing Authority argues that Mack violated the 2008 housing program contract when he was convicted of drug possession in 2005.[2]

¶10 There are several problems with the Housing Authority's reliance on the contract: (1) the contract was never mentioned by the hearing examiner in her decision, *see* ***id.***, ¶22; (2) the contract was never argued by the Housing Authority in front of the hearing examiner or the circuit court, *see* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52 (2007-08)[3] (We generally will not address arguments raised for the first time on appeal.); and (3) because the contract was never entered into evidence at any proceeding, the contract is not part of the record on appeal, *see* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) ("Assertions of fact that are not part of the record will not be considered.").

¶11 Apparently conceding that the housing program contract is not part of the record, the Housing Authority asks us to *infer* that the hearing examiner's legal basis is a contract that the hearing examiner never even mentions. We

[2] The Housing Authority asserts that "[b]oth the offense and the conviction occurred while Mack was a participant in the … rent assistance program." In support of that assertion the Housing Authority cites to the criminal complaint and the corresponding Circuit Court Access Program (CCAP) entries. However, those citations merely show the fact of Mack's 2005 drug convictions. They provide no evidence whatsoever of his participation in the rent assistance program in 2005. As noted above, the program contract is not part of the record, and therefore, there is nothing in the record to support the Housing Authority's assertion. *See* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) ("Assertions of fact that are not part of the record will not be considered."). The Housing Authority's inclusion of the contract in its appendix does not make the contract part of the record. *See* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989) (stating that "[t]he appendix may not be used to supplement the record").

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

cannot simply speculate as to the hearing examiner's legal reasoning. Because the hearing examiner's decision fails to include "'the elements of the law motivating the court's conclusion,'" we affirm the circuit court. *See* ***Bratcher***, 327 Wis. 2d 183, ¶21 (citation omitted).[4]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[4] We likewise reject the arguments raised before the circuit court that the relevant federal statute or federal regulation formed the basis for the hearing examiner's decision. Because the hearing examiner's decision does not tell us whether it relied on the federal statute, the federal regulation, the contract, or some other authority for its decision, we cannot determine whether the hearing examiner acted according to the law. *See* ***Bratcher v. Housing Authority of the City of Milwaukee***, 2010 WI App 97, ¶¶21-22, 327 Wis. 2d 183, 787 N.W.2d 418.