COURT OF APPEALS
DECISION
DATED AND FILED

December 04, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP166 **Cir. Ct. No. 2006CV4071**

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

DEBORAH MORTLE,

PLAINTIFF-APPELLANT,

V.

MILWAUKEE COUNTY AND MILWAUKEE COUNTY HOUSING CHOICE VOUCHER PROGRAM,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN J. DI MOTTO, Judge. *Reversed and cause remanded.*

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 KESSLER, J. Deborah Mortle appeals from the circuit court's order denying certiorari review of the decision of a hearing examiner which terminated her Milwaukee County Housing Choice Voucher Program rent assistance benefits. Because the record demonstrates that: (1) Mortle was not

advised of her right to an administrative review of the hearing examiner's decision, as required by Milwaukee County ordinances; and (2) the review to which she was entitled could have provided the record that is not available here, thereby making possible a meaningful judicial review, we reverse and remand for a new hearing.

BACKGROUND

¶2 Deborah Mortle lives at 3456 South 46th Street, Milwaukee, with her three minor children. Beginning in 2004, she received rent assistance through the Section 8 Housing Choice Voucher Program administered by Milwaukee County and Milwaukee County Housing Choice Voucher Program (collectively "the County"). Thomas Zingsheim is the father of Mortle's three minor children. Jessica Zingsheim, Zingsheim's adult daughter, lives next door to Mortle at 3446 South 46th Street.

¶3 After the County made an initial determination to terminate Mortle's rent assistance, the program coordinator of the Housing Choice Voucher Program sent Mortle a letter dated March 3, 2006. As material to this appeal, the letter stated:

> Please be advised that the Milwaukee County Housing Choice Voucher Program has scheduled an Informal Hearing for Thursday, March 30, 2006…. The purpose of the Informal Hearing is to determine your continued eligibility for the Program based on the following Program determination.
>
> **You failed to report and disclose all household members for program purposes and any associated household income.**
>
> You have the right to have representation at your Informal Hearing…. In addition you may bring any witnesses or documentation to support your position. An impartial

> decision maker from Milwaukee County will conduct the Informal Hearing. You will be notified in writing of the decision within 10 days after a decision has been rendered in your case.

(Capitalization and bolding in original.)

¶4 At the hearing, the County called no witnesses and submitted only one document in support of the allegation set forth in its March 3 letter. The document is untitled and undated, and appears similar to a computer-generated document, but contains no computer identification. Nothing on the face of the document identifies its origin or source. It is not seriously disputable that this document is hearsay.

¶5 The hearing examiner's findings and the documents submitted by Mortle and the County comprise the record in this case. According to the hearing examiner's findings, Mortle and Zingsheim testified that Zingsheim visited his children at her residence "all the time," that he spent the night at Mortle's home "two or three" nights each week, and that he parked his van in front of her home. Zingsheim did this to discourage further hostile conduct by a neighbor against whom Mortle had made a criminal complaint, which complaint resulted in battery while armed charges pending against the neighbor. Zingsheim, according to the hearing examiner's findings, testified that he used Mortle's address, 3456 South 46th Street, for his vehicle registration because he could obtain a more favorable insurance rate at that address, rather than at the address where he resided, 902 South 25th Street.

¶6 At the March 30, 2006 hearing, to attempt to establish that Zingsheim did not reside with her, Mortle produced several documents

demonstrating Zingsheim's addresses both long before, and after, she received the March 3, 2006 letter from the County. The documents included:

> January 9, 2006 subpoena from the Milwaukee County District Attorney to Zingsheim at the 902 South 25th Street address;
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> November 15, 2005 letter from the Milwaukee County District Attorney to Zingsheim at the 902 South 25th Street address;
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> "Monthly Statement of Account" (regarding child support) "As Of 01/31/2006" by the Milwaukee County Bureau of Child Support for Zingsheim at the 902 South 25th Street address;
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> Copies of three wage statements from Mortle Trucking for Zingsheim:
>
> > Two for pay date December 16, 2005, showing Zingsheim's address as 4406 West Bernard Avenue, Greenfield; and
> >
> > One for Pay Date March 3, 2006, showing Zingsheim's address as 902 South 25th Street;
>
> March 22, 2006 wage statement from Mahler Enterprises for Zingsheim at the 902 South 25th Street address;
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> Wisconsin Driver License, issued as a duplicate on March 28, 2006, showing Zingsheim's address as 902 South 25th Street;
>
> Certificate of Vehicle Registration, expiring January 31, 2007, issued to Zingsheim at the 902 South 25th Street address (certificate contains unidentified hearsay in the form of a handwritten notation "6-05 changed address"); and
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> Police report of an August 3, 2005 incident involving an alleged assault of Mortle by Mortle's neighbor. The interview of Zingsheim shows his address as 2556 South 25th Street.

¶7 The hearing examiner terminated Mortle's benefits based on his conclusion that: (1) "based upon testimony at the hearing that the demeanor of

both the participant and Mr. Zingsheim to be questionable at best"; and (2) "both the participant's and Mr. Zingsheim's testimony to be vague, self-serving, uncorroborated and at times contradictory and wholly not credible." From his stated disbelief of Mortle and Zingsheim, the hearing examiner infers that Zingsheim resided in Mortle's household, that Mortle did not report this to the County, and that, therefore, Mortle must be terminated from the rent assistance program. In support of this inference, and in spite of having found all of Zingsheim and Mortle's testimony "wholly not credible," the hearing examiner relies on portions of Zingsheim's testimony to support the County's initial conclusion.[1]

¶8 The program coordinator wrote to Mortle advising her that her benefits were being terminated, enclosing a copy of the hearing examiner's findings. On certiorari review, the circuit court upheld the County decision. This appeal followed.

STANDARD OF REVIEW

¶9 Our review on certiorari is limited to:

> (1) whether the Board kept within its jurisdiction; (2) whether it proceeded on the correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment;

[1] For example, the examiner dismisses both the November 2005 and January 2006 documents sent by the Milwaukee County District Attorney to Zingsheim at the 902 South 25th Street address, concluding that this address "was used for mailing purposes only" and thus "does not establish residency," although no evidence described in the record supports this conclusion. The examiner, however, came to an opposite conclusion when he considered Zingsheim's statement that he used Mortle's address for mailing purposes for his vehicle registration because of insurance benefits (which is consistent with the language "Mailing Address Exist" on the disputed hearsay document produced by the County), considering this statement as evidence that Zingsheim resided with Mortle.

> and (4) whether the Board might reasonably make the order or determination in question, based on the evidence.

State v. Waushara County Bd. of Adjustment, 2004 WI 56, ¶12, 271 Wis. 2d 547, 679 N.W.2d 514. "The sufficiency of the evidence on certiorari review is identical to the substantial evidence test used for the review of administrative determinations under chapter 227 of the statutes." ***Gehin v. Wisconsin Group Ins. Bd.***, 2005 WI 16, ¶6, 278 Wis. 2d 111, 692 N.W.2d 572.[2]

Applicable statutes and ordinances

¶10 The County exercised its right under WIS. STAT. § 68.16 (2005-06)[3] to opt out of the statutory scheme of administrative procedure and adopted chapter 110 of the Milwaukee County Code of Ordinances (MCCO)[4] as its administrative

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[2] The County argues that federal regulations relevant to the rental assistance program permit a lesser burden when the agency wishes to terminate a participant. *See* 24 C.F.R. § 982.555(e). Although the federal regulations may permit a lesser standard of proof, namely a mere preponderance of the evidence, they do not prohibit a state from requiring a more significant level of proof before its administrative agencies terminate benefits to a program participant. In addition, where the County is bound, as it is here, by the certiorari review procedure of WIS. STAT. § 68.13, and thus the standards of proof incorporated therein (*see* ***Gehin v. Wisconsin Group Ins. Bd.***, 2005 WI 16, ¶6, 278 Wis. 2d 111, 692 N.W.2d 572), the County is also bound to apply the burden of proof applicable to that statute.

[3] WISCONSIN STAT. § 68.16, entitled, "Election not to be governed by this chapter," states: "The governing body of any municipality may elect not to be governed by this chapter in whole or in part by an ordinance or resolution which provides procedures for administrative review of municipal determinations."

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[4] Milwaukee County Code of Ordinances (MCCO) 110.01, entitled, "County election under s. 68.16, Wis. Stats.," states, in pertinent part:

> (a) The county elects not to be governed by the provisions of ch. 68, Wis. Stats., except for s. 68.13, Wis. Stats., regarding judicial review, which shall apply to circuit court certiorari reviews of committee decisions. The common law

(continued)

procedure. Rights to hearings and review attach for a party, such as Mortle, who has "a substantial interest which is adversely affected by an administrative determination.... [Such party] may have such determination reviewed as provided in [MCCO 110]."[5] Here, the County's March 3, 2006 letter to Mortle announced a hearing because "[y]ou failed to report and disclose all household members for program purposes and any associated household income." The plain language of the letter indicates a preliminary determination had been made by the County. The "Informal Hearing"[6] the County described in its letter, and which it subsequently held, was apparently its review of the initial determination under MMCO 110.06.[7]

> rules applicable to certiorari review by a court shall govern such appeals.

[5] *See* MCCO 110.01(b), which states: "Any person having a substantial interest which is adversely affected by an administrative determination, as set forth in section 110.02(b), of a county authority, as defined in section 110.02(a), below, may have such determination reviewed as provided in this chapter."

[6] MCCO ch. 110 has no specific description of an "Informal Hearing." However, in the context of the process used here, it is apparent that an initial determination was made and described in the March 3, 2006 letter. Thus the "Informal Hearing" was the first opportunity Mortle had to present a defense to that initial determination.

[7] MCCO 110.06, entitled "Initial review of determination by authority," states:

> A review under this section may be made by the authority which made the initial determination, or its designee. The reviewing authority shall issue a written decision within ten (10) working days of the filing of the request. The time for review may be extended at the discretion of the authority. The person aggrieved may file with the notice of review, or within the time agreed with the authority, written evidence and argument in support of the person's position with respect to the initial determination. The authority may affirm, reverse or modify the initial determination and shall mail or deliver to the person aggrieved a written decision on review, which shall state the reasons for such decision. The decision shall advise the person aggrieved of the right to appeal the decision, the time within which appeal shall be taken, the county board standing committee responsible for an appeal hearing under section

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This appears to be the County's adaptation of the federal procedures applicable to Section 8 housing assistance, described in 24 C.F.R. pt. 982, to the procedural requirements of MCCO ch. 110 and applicable State law with which the federal regulations require the County to comply. *See* 24 C.F.R. § 982.555(f)(2) ("[The agency administering the rent assistance program] is not bound by a hearing decision" that is "contrary to … State, or local law.").

¶11 MMCO 110.06 describes the substance of the hearing process that was announced in the March 3 letter and provided here. The County announced that review of its decision would be by "Informal Hearing" at which "an impartial decision maker" would preside. *See* ***id.*** ("A review under this section may be made by the authority which made the initial determination, or its designee."). The County told Mortle that she could bring "witnesses and documentation" to the hearing. *See* MCCO 110.06 ("The person aggrieved may file … within the time agreed with the authority, written evidence and argument in support of the person's position with respect to the initial determination."). The County stated that Mortle would be "notified in writing of the decision within 10 days after a decision has been rendered." *See* MCCO 110.06:

> The reviewing authority shall issue a written decision within ten (10) working days…. The decision shall advise the person aggrieved of the right to appeal the decision, the time within which appeal shall be taken, the county board standing committee responsible for an appeal hearing under section 110.07, and the office or person with whom notice of appeal to the standing committee shall be filed.

> 110.07, and the office or person with whom notice of appeal to the standing committee shall be filed.

¶12 On April 7, 2006 (within ten days of the March 30 hearing), the program coordinator, who also signed the March 3 letter, wrote to Mortle advising her that her rent assistance benefits were being terminated. The full text of that letter states:

> This letter is your notice that you are termination [sic] from the Milwaukee County Section 8 Housing Choice Voucher Program effective May 1, 2006 as a result of the decision made at your Informal Hearing held on March 30, 2006. Attached please find a copy of the written decision from the Hearing Officer. If you continue to reside at 3456 S 46th St. after April 30, 2006 you will be responsible for the total rent.
>
> If you have any questions about this matter, you may contact me at (414) 278-4908.

¶13 Contrary to the specific mandate of MCCO 110.06, neither the letter nor the hearing examiner's written decision advised Mortle of her right to administratively appeal the determination. *See* MCCO 110.06:

> The decision *shall* advise the person aggrieved of the right to appeal the decision, the time within which appeal shall be taken, the county board standing committee responsible for an appeal hearing under section 110.07, and the office or person with whom notice of appeal to the standing committee shall be filed.

(Emphasis added.) This requirement, to advise recipients of an adverse decision of their right to appeal, is mandatory. ***Forest County v. Goode***, 219 Wis. 2d 654, 663, 579 N.W.2d 715 (1998) (We have "characterized 'may' as permissive and 'shall' as mandatory unless a different construction is required by the statute to carry out the clear intent of the legislature."). This failure to advise is significant because an appeal under MCCO 110.07[8] is to a body before which, pursuant to

[8] MCCO 110.07, entitled, "Appeal to county board standing committee," states in pertinent part:

(continued)

MCCO 110.08,[9] the aggrieved person may subpoena witnesses, may examine and cross-examine witnesses *on the record*, and may thereby create a record that is subject to meaningful judicial review. *See* MCCO 110.08(a). The County's failure to comply with MCCO 110.06 deprived Mortle of that opportunity.

> (a) Appeal from the authority initial review shall be exclusively to the appropriate county board standing committee.
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> ….
>
> (d) The standing committee or a review committee with members appointed by the committee chairperson and confirmed by the committee shall conduct a hearing on the appeal within ten (10) days of the filing of the notice of appeal….

[9] MCCO 110.08, entitled, "Conduct of hearing before standing committee," states, in pertinent part:

> (a) If the standing committee decides to hold an evidentiary hearing, the appellant and the authority may be represented by an attorney and may present evidence and call and examine witnesses and cross-examine witnesses of the other party. The committee chair, or his or her designee, shall be responsible for the orderly conduct of the proceeding and for evidentiary rulings. The appellant has the burden of proceeding first and the burden of persuasion. Witnesses shall be sworn by the person conducting the hearing. The rules of evidence shall generally apply to the hearing. The committee may permit hearsay evidence, but its decision may not be based solely upon hearsay. The committee may issue subpoenas. Any party or his or her attorney of record may issue subpoenas to compel the attendance of witnesses or the production of documents. A subpoena issued by a party or his or her attorney must be in substantially the same form as provided in s. 805.07(4), Wis. Stats., and must be served in the manner provided in s. 805.07(5), Wis. Stats. A copy of the subpoena shall be filed immediately with the committee clerk. *Any hearings conducted under this chapter shall be recorded in any manner permitted by law and the record, including all exhibits admitted into evidence before the committee, preserved for one (1) year from the date the decision is issued.*

(Emphasis added.)

¶14 Mortle argues that ***State ex rel. Lomax v. Leik***, 154 Wis. 2d 735, 454 N.W.2d 18 (Ct. App. 1990), requires that the concept of due process necessary for a certiorari review means that the administrative agency must make a transcript of the proceedings in order to make available a record from which meaningful judicial review can be had. While a transcript would, of course, be helpful, such is not mandated here.[10] *See, e.g.*, ***State ex rel. L'Minggio v. Gamble***, 2003 WI 82, ¶¶2, 23-24, 263 Wis. 2d 55, 667 N.W.2d 1 (prison disciplinary hearings); ***State v. Goulette***, 65 Wis. 2d 207, 216, 222 N.W.2d 622 (1974) (parole hearings); ***State ex rel. Meeks v. Gagnon***, 95 Wis. 2d 115, 122, 289 N.W.2d 357 (Ct. App. 1980) (prison disciplinary hearings); ***Kindred v. Commissioner of Internal Revenue***, 454 F.3d 688, 691 n.7 (7th Cir. 2006) (tax collection due process hearings). What ***Lomax*** does teach is that an administrative record must be comprehensible and adequate for purposes of review. ***Id.***, 154 Wis. 2d at 740.

¶15 When we review on certiorari, we must determine whether the record supports the decision of the administrative agency—here, that of the hearing examiner. Where the hearing examiner's findings and conclusions are the

[10] Indeed, WIS. STAT. § 68.13(2) provides for such a record for judicial review of an administrative decision. Section (2) specifically states:

> If review is sought of a final determination, the record of the proceedings shall be transcribed at the expense of the person seeking review. A transcript shall be supplied to anyone requesting the same at the requester's expense. If the person seeking review establishes impecuniousness to the satisfaction of the reviewing court, the court may order the proceedings transcribed at the expense of the municipality and the person seeking review shall be furnished a free copy of the transcript.

However, by allowing the County to adopt its own administrative procedure, the legislature has given the County flexibility to develop other means by which a record which permits meaningful judicial review may be provided.

only record of testimony, and where it is obvious from reading the findings that the factual summary is filtered through the lens of one who has already concluded that the witnesses are "wholly not credible," yet chooses to believe these same witnesses as to matters which support the hearing examiner's decision, the record is inadequate for an impartial judicial review.

¶16 The record before us is rife with inconsistencies and inadequacies. For example, a portion of the contents of the document submitted at the hearing by the County as proof that Zingsheim resided with Mortle was corroborated by Zingsheim, who testified that he used her address for insurance purposes for his vehicle, but did not reside with her. The hearing examiner effectively concluded that use of the address was evidence of Zingsheim residing with Mortle, and that it corroborated the hearsay document upon which he also relied. However, elsewhere in his decision, the hearing examiner characterized all of Zingsheim's testimony as "wholly not credible." Reliance on "wholly not credible" testimony as corroboration of a hearsay document defeats the very purpose of requiring corroboration for hearsay because hearsay, by its very nature, is of at least questionable credibility. *See* ***Gehin***, 278 Wis. 2d 111, ¶51 ("Although the admission of hearsay evidence makes administrative agency procedures simpler for both the litigants (who are frequently unrepresented) and the agency personnel, *the relaxed evidentiary standard is not meant to allow the proceedings to degenerate to the point where an administrative agency relies only on unreliable evidence*." (emphasis added)). Further, the hearing examiner's conclusion that a mailing address is the equivalent of living at that address is inconsistent with our holding in ***Driver v. Housing Authority of Racine County***, 2006 WI App 42, ¶27, 289 Wis. 2d 727, 713 N.W.2d 670, a case also involving termination of Section 8 housing assistance based on the agency concluding that an unauthorized person

lived in the participant's household or used her address. In ***Driver***, we remanded, where benefits were terminated based in part on a third party's unauthorized and unknown (to the participant) use of the program participant's address. *See* ***id.***, ¶¶27-28. Here, the hearing examiner refers repeatedly to documents where Zingsheim used Mortle's address as evidence that Zingsheim lived at that address. Specifically, the hearing examiner found:

> [Zingsheim] further stated that he changed his address on his motor vehicle to the participant's address of 3456 S. 46th Street for insurance purposes only.
>
> ….
>
> A document from the State of Wisconsin Department of Workforce Development showed the 902 S 25th Street address but only as of January 31, 2006. Upon verifying this document, records show that Mr. Zingsheim is still using 3456 S 46th Street as his mailing address for child support purposes…. Almost all documents provided at the hearing showed that the address was changed only after the participant received her hearing notice dated March 3, 2006 questioning unreported household members and income.

¶17 Because the inadequate record here makes us unable to meaningfully review the substance of the County's decision, we remand for a new hearing which complies with the procedural requirements the County has adopted in MCCO ch. 110.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.