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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-0998**

David Paul Nelson,  
Relator,

vs.

City of St. Paul,  
Department of Safety and Inspections,  
Respondent.

**Filed July 16, 2012  
Reversed  
Chutich, Judge**

Department of Safety and Inspections

David Paul Nelson, St. Paul, Minnesota (pro se relator)

Sara R. Grewing, St. Paul City Attorney, Virginia D. Palmer, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Chutich, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

**UNPUBLISHED OPINION**

**CHUTICH**, Judge

Relator David Paul Nelson challenges the declaration of the St. Paul Department of Safety and Inspections (department) that his dog is potentially dangerous, arguing that (1) no legal and substantial basis exists for the declaration; and (2) the hearing process

violated his constitutional due process rights. Because the department's declaration has no legal and substantial basis, we reverse.

## **FACTS**

David Paul Nelson resides in St. Paul and owns a dog named Fang. On February 20, 2011, T.J., a neighbor, claimed that Fang attacked her and her dogs.<sup>1</sup> T.J. alleged that she had her dogs outside when Fang ran after one of her dogs. She claimed that, after she put her dog inside her fence, Fang "nipped her on the thigh." T.J. called the St. Paul Police Department and Officer Kevin Clarkin went to T.J.'s house to take a report. Officer Clarkin observed a four inch mark on T.J.'s thigh that "looked like a pinch mark, like a dog attempted to bite but pinched the skin instead." He did not see any puncture wound. T.J. also told Officer Clarkin that on February 18, Fang ran at her while she was outside of her house.

On February 22, 2011, Animal Control Officer Mike Leroux called T.J. to follow-up on Officer Clarkin's report. During their conversation, T.J. stated that Fang had broken the skin when he bit her on February 20, which she had not realized at the time of her report to Officer Clarkin.

Based on this incident, the department declared Fang to be "potentially dangerous" under section 200.01 (2009) of the Saint Paul Legislative Code. Nelson requested a hearing to contest the department's determination. *See* St. Paul, Minn., Legislative Code § 200.11(b) (2009) (stating that the owner has "fourteen (14) days to appeal the

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<sup>1</sup> The facts regarding this incident and the February 18th incident come solely from T.J., whose oral statement was contained in the reports of Police Officer Clarkin and Animal Control Officer Leroux.

determination . . . by requesting a hearing before the department of safety and inspections hearing officer”). The city gave T.J. written notice of the hearing stating that she was required to attend and that her “[f]ailure to attend may result in the dismissal of the designation of the dog due to lack of evidence supporting the declaration.” At the hearing, Animal Control Supervisor Bill Stephenson, Animal Control Officer Leroux, and Police Officer Clarkin testified. Despite the warnings by the city of the consequences of her failure to attend, T.J. did not appear for the hearing. The only direct evidence submitted by the city was T.J.’s statement as summarized in the officers’ reports. By written order, the hearing officer upheld the declaration, concluding that Fang was a potentially dangerous animal under § 200.01. This appeal followed.

## **D E C I S I O N**

A municipal agency’s action is quasi-judicial and subject to certiorari review “if it is the product or result of discretionary investigation, consideration, and evaluation of evidentiary facts.” *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 303 (Minn. App. 2007) (quotation omitted). “A quasi-judicial decision of an agency that does not have statewide jurisdiction will be reversed if the decision is fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within its jurisdiction, or based on an error of law.” *Axelson v. Minneapolis Teachers’ Ret. Fund Ass’n*, 544 N.W.2d 297, 299 (Minn. 1996) (quotation omitted). On review, we will not retry facts, and we will uphold the agency’s decision “if the lower tribunal furnished any legal and substantial basis for the action taken.” *Staeheli*, 732 N.W.2d at 303 (quotation omitted).

The St. Paul Legislative Code defines a “potentially dangerous animal” as one that

has:

- (1) When unprovoked, bitten a human or a domestic animal on public or private property; or
- (2) When unprovoked, chased or approached a person upon the streets, sidewalks, or any public or private property, other than the animal owner’s property, in an apparent attitude of attack; or
- (3) A known history or propensity, tendency or disposition to attack while unprovoked, causing injury or otherwise threatening the safety of humans or domestic animals.

St. Paul, Minn., Legislative Code § 200.01. The hearing officer found that Nelson’s dog qualified as a potentially dangerous animal under all three criteria. The city concedes that the hearing officer’s determination that the dog was potentially dangerous under the third criterion is not supported by the evidence and is therefore erroneous. Thus, we only address the hearing officer’s conclusions regarding subdivisions (1) and (2) of section 200.01.

Nelson argues that the hearing officer’s determination that his dog was a potentially dangerous animal was without substantial evidentiary support because it was based solely on hearsay evidence. We agree. “[I]n the absence of a special statute, an administrative agency cannot, at least over objection, rest its findings of fact solely upon hearsay evidence which is inadmissible in a judicial proceeding.” *State ex rel. Indep. Sch. Dist. No. 276 v. Dep’t of Educ.*, 256 N.W.2d 619, 627 (Minn. 1977) (quotation omitted); *see also Sabes v. City of Minneapolis*, 265 Minn. 166, 173, 120 N.W.2d 871, 876 (1963) (“[N]either pure hearsay nor hearsay corroborated by a mere scintilla of competent evidence is sufficient. . . . [T]here must be some substantial evidence

introduced to sustain [an administrative body's] findings.”). This rule been applied to a quasi-judicial determination by an agency without statewide jurisdiction. *See In re Expulsion of E.J.W. from Indep. Sch. Dist. No. 500*, 632 N.W.2d 775, 782 (Minn. App. 2001) (holding that “the hearing officer lacked an adequate basis . . . to support the conclusion that [respondent] participated in the bomb threat” because, inter alia, there was no evidence “beyond hearsay”).

Here, the hearing officer's determination was based solely on hearsay evidence. None of the city's witnesses at the hearing had firsthand knowledge that Fang met the criteria for a potentially dangerous animal determination. Officer Clarkin testified that he observed T.J.'s thigh, but had no personal knowledge that Fang caused the pinch mark. Officer Leroux testified that he had previously chased Fang because he was running loose in the neighborhood; such evidence is, however, irrelevant to a potentially dangerous determination. *See* St. Paul, Minn. Legislative Code § 200.11.

T.J.'s oral statement, as summarized in the officers' reports, was the only evidence that Fang bit or chased a person or a domestic animal in an “attitude of attack” as required by § 200.01 for a potentially dangerous animal determination. Such statements are hearsay and are inadmissible in a judicial proceeding.<sup>2</sup> Minn. R. Evid. 801(c) (“Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”); Minn. R.

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<sup>2</sup> The city waived any arguments that the officers' reports and statements within them are not hearsay, or that a hearsay exception applies, by failing to raise these issues on appeal. *See Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn. 2006) (“[F]ailure to address an issue in brief constitutes waiver of that issue.”).

Evid. 802. We note that T.J.’s statement to Officer Leroux that Fang punctured her skin contradicts Officer Clarkin’s observation that her skin was only pinched, highlighting the unreliability of T.J.’s hearsay statement. *See State ex rel. Indep. Sch. Dist. No. 276*, 256 N.W.2d at 627 (“Only where it appears that the [agency] clearly abused its discretion in relying upon inherently unreliable evidence, under the hearsay rule or otherwise, should the courts intervene.”).

Because the hearing officer relied solely on hearsay evidence, the determination that Nelson’s dog was potentially dangerous lacked a legal and substantial basis. Based on this conclusion, we decline to address Nelson’s constitutional arguments. *See Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 732 n.7 (Minn. 2003) (stating that the general appellate practice is to “avoid a constitutional ruling if there is another basis on which a case can be decided”).

**Reversed.**