STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0372

Nicole Fyksen,
Relator,

vs.

Dakota County Community Development Agency,
Respondent.

Filed March 10, 2009
Reversed
Halbrooks, Judge

Dakota County Community Development Agency

Lisa Hollingsworth, Southern Minnesota Regional Legal Services, Inc., 166 East 4th Street, Suite 200, St. Paul, MN 55101 (for relator)

Mary G. Dobbins, Landrum Dobbins LLC, 7400 Metro Boulevard, Suite 100, Edina, MN 55439 (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Relator Nicole Fyksen seeks review of the termination of her Section 8 housing-assistance benefits by respondent Dakota County Community Development Agency

(DCCDA), arguing that (1) the evidence does not support the decision to terminate based on misrepresentation, (2) DCCDA failed to consider mitigating circumstances, and (3) the hearing officer failed to comply with applicable law in making her decision. Because we conclude that the evidence does not support the termination decision, we reverse.

FACTS

Before DCCDA terminated her benefits, relator received housing-assistance benefits for more than two decades, with one interruption around 1991. In April 2001, relator pleaded guilty to misdemeanor fifth-degree assault related to a February 2001 incident for which she served three days in jail.

On October 10, 2001, relator completed a recertification application for her housing-assistance benefits. She marked the "No" answer to the question, "Within the last year, have you . . . participated in a . . . violence related activity . . . ?" She marked "No" to the same question on her July 2002 application. The December 2002 application changed the wording of the question to "Have you . . . ever . . . participated in violent . . . activity . . . ?" Relator again marked the "No" answer. The question remained the same through the next seven applications, and relator marked "No" every time. The July 2006 application again rephrased the query. It first defined "violent activity" as

> any activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage. Violent activity includes *but is not limited to*: disorderly conduct, assault (including domestic assault), malicious punishment of a child, sexual assault,

> murder or attempted murder, [and] assault with a deadly weapon.

The application then asked, among other things, whether relator had ever (1) participated in a violent activity or (2) "[b]een arrested, charged or convicted for a violent . . . activity." She marked the "No" answers to both questions.

The same definition was provided and the same questions were asked on relator's July 2007 recertification application, and she again marked the "No" answers. In August 2007, relator attended her annual recertification appointment and reviewed her application with a DCCDA housing specialist. The housing specialist noted that there was no criminal history in relator's file and asked her to authorize a criminal background check. The background check revealed the 2001 conviction, and DCCDA decided to terminate relator's housing-assistance benefits based on the alleged repeated misrepresentations. On October 31, 2007, DCCDA advised relator that her benefits would be terminated on November 30, 2007. Relator requested an informal hearing, which was held November 28, 2007. The hearing officer upheld the termination. There is no transcript of the hearing, but the hearing officer filed a copy of her decision as a "complete and accurate [record] of the proceedings." This certiorari appeal follows.

D E C I S I O N

Relator argues that the evidence does not support DCCDA's quasi-judicial decision to terminate her housing-assistance benefits. An agency acts in a quasi-judicial manner when it "hears the view[s] of opposing sides presented in the form of written and oral testimony, examines the record and makes findings of fact." *In re Signal Delivery*

Serv., Inc., 288 N.W.2d 707, 710 (Minn. 1980). An agency's quasi-judicial decision is to be upheld unless it is "unconstitutional, outside the agency's jurisdiction, procedurally defective, based on an erroneous legal theory, unsupported by substantial evidence, or arbitrary and capricious." *Carter v. Olmsted County Hous. & Redev. Auth.*, 574 N.W.2d 725, 729 (Minn. App. 1998). Substantial evidence is "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). The burden is on the challenging party to "show that the evidence, considered in its entirety, and drawing inferences in favor of the decision, is not substantial." *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 563 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001).

A. Misrepresentation and violent activity

The Section 8 housing-assistance program provides "rental subsidies so eligible families can afford decent, safe and sanitary housing." 24 C.F.R. § 982.1(a)(1) (2008). In order to participate in the program, families must provide a variety of information, all of which "must be true and complete." 24 C.F.R. § 982.551(b)(4) (2008). If a family violates its obligation to provide true and complete information, the local public-housing agency may terminate the family's participation. *See* 24 C.F.R. § 982.552(c)(1)(i) (2008).

In deciding to terminate relator's housing-assistance benefits, DCCDA alleged that she had misrepresented[1] her criminal past by failing to disclose her fifth-degree assault conviction. The questions that relator purportedly answered untruthfully or incompletely all asked about her involvement in violent activity of a criminal nature. Although a definition was not provided on the application form until July 2006, "violent criminal activity" was defined in the federal regulations at all relevant times as "any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage." 24 C.F.R. § 5.100 (2008); *see also Screening and Eviction for Drug Abuse and Other Criminal Activity*, 66 Fed. Reg. 28,776, 28,792 (May 24, 2001) (to be codified at 24 C.F.R. pt. 5) (adopting definition effective June 25, 2001).

Minnesota's Criminal Code provides for degrees of assault. First-degree assault requires the infliction of "great bodily harm." Minn. Stat. § 609.221, subd. 1 (2008). Third-degree assault requires the infliction of "substantial bodily harm." Minn. Stat. § 609.223, subd. 1 (2008). Fifth-degree assault requires the infliction of "bodily harm," without using any modifier. Minn. Stat. § 609.224, subd. 1(2) (2008).

[1] Relator argues DCCDA is alleging fraud because the term "misrepresentation" does not appear in the federal regulations. Fraud and misrepresentation are distinct concepts; the failure to be true and complete is merely misrepresentation. *Compare The American Heritage Dictionary of the English Language* 1125 (4th ed. 2006) (defining "misrepresent" as giving "an incorrect or misleading representation"), *with* 24 C.F.R. § 792.103 (2008) (setting forth the elements of fraud).

We need not and do not decide whether "substantial" or "great" is our state's equivalent of the federal regulation's adjective "serious." But mere bodily harm, as is required for a conviction of fifth-degree assault, is not serious bodily injury. Because fifth-degree assault does not have as one of its elements the infliction of serious bodily injury, a person could reasonably conclude that a fifth-degree assault conviction is not within the scope of the recertification application's inquiry. DCCDA's decision to terminate relator's housing-assistance benefits is therefore not supported by substantial evidence.

B. Mitigating circumstances

Relator also assigns as error DCCDA's failure to consider mitigating circumstances. Because our decision rests on another ground, we do not decide whether this purported failure is error. But we note that the federal regulations state that a local public-housing agency "may consider all relevant circumstances." 24 C.F.R. § 982.552(c)(2)(i) (2008). We disagree that this language is mandatory. *Cf.* Minn. Stat. § 645.44, subds. 15–16 (2008) (defining "may," "must," and "shall").

C. Adequacy of the hearing officer's decision

Finally, relator challenges the hearing officer's decision on the ground that it is inconsistent with applicable law because it fails to weigh facts, cite law, or apply law to facts. Again, because DCCDA's decision is unsupported by substantial evidence, we do not decide whether the hearing officer's decision complies with the standard we set forth more than ten years ago in *Carter*. *See* 574 N.W.2d at 729–30. But we caution hearing officers—and the agencies that rely on them—to re-examine the requirements we have

articulated. Their decisions must contain sufficient factual findings and credibility determinations to facilitate our review.

Reversed.