STATE OF MINNESOTA
IN COURT OF APPEALS
A10-51

Ted Welke,
Relator,

vs.

Dakota County Community Development Agency,
Respondent.

Filed July 13, 2010
Affirmed
Stoneburner, Judge

Dakota County Community Development Agency

William L. Lucas, William L. Lucas, PA, Edina, Minnesota (for relator)

Mary G. Dobbins, Landrum Dobbins, LLC, Edina, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Stoneburner, Judge; and Connolly, Judge.

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

STONEBURNER, Judge

In this certiorari appeal, relator challenges respondent's termination of his Section 8 housing assistance and determination that he owes respondent $56,910 for Section 8 benefits overpaid on his behalf. Because substantial evidence in the record supports respondent's finding that relator misrepresented the fact that he was living in an owner-

occupied housing unit, thereby making him ineligible for benefits, and respondent did not otherwise abuse its discretion, we affirm.

FACTS

In July 1990, relator Ted Welke began receiving Section 8 housing assistance through a program administered by respondent Dakota County Community Development Agency (CDA).[1] From July 1990, until his benefits were terminated at the end of October 2009, Welke resided at 7785 Glenda Court in Apple Valley (Glenda property). During this time, Welke received additional housing assistance from CDA for a live-in aide,[2] Debra Binder.

In 1989, before Welke began receiving housing assistance, he and Binder were informed by CDA that, under federal regulations, a live-in aide could not own the property for which Welke would be receiving housing assistance.[3] In December 1989 or January 1990, Binder purchased the Glenda property. In February 1990, Welke applied for Section 8 housing assistance through CDA. On the application, Welke identified Binder as a member of Welke's household—specifically, his live-in aide—but did not

[1] CDA administers federal housing assistance programs, including the Section 8 Housing Choice Voucher Program, through which Welke received housing assistance.

[2] The presence of a live-in aide has two significant impacts upon the assistance paid on behalf of a Section 8 housing-assistance beneficiary: (1) the beneficiary receives assistance for an additional bedroom, 24 C.F.R. § 982.402(b)(6) (2009); and (2) the income of the live-in aide is not considered household income for purposes of determining eligibility or the level of benefits to be paid, 24 C.F.R. § 5.609(c)(5) (2009).

[3] The federal regulations governing Section 8 housing assistance provide that "[a] unit occupied by its owner or by a person with any interest in the unit" is ineligible for assistance. 24 C.F.R. § 982.352(a)(6) (2009).

disclose that she also then owned the Glenda property in which Welke would be residing. Welke's application stated that no member of his household owned any real estate.

On June 3, 1990, Binder transferred title of the Glenda property to her parents for no consideration. In July 1990, Welke's application was approved and he began receiving Section 8 housing assistance.

On June 15, 1995, Binder's parents transferred the Glenda property back to Binder, again without consideration. Approximately three weeks later, Binder, transferred the Glenda property, again for no consideration, to Welke's sister and brother-in-law, the Weavers.[4]

On April 18, 2002, Welke called CDA and asked whether his live-in aide could purchase a townhome in which he would also live. He was told that Section 8 regulations prohibit assistance for an owner-occupied unit. On September 10, 2007, Binder organized Wolf Den Housing, LLC. A month and a half later, the Weavers transferred the Glenda property back to Binder for no consideration.

In November 2007, Welke, for the first time since his application for assisatnce had been approved, notified CDA that the Glenda property had a new owner. Binder submitted paperwork to CDA representing that Wolf Den Housing, LLC, was the new

[4] Documents submitted to this court as a purported "supplemental record" include copies of the warranty deeds to Binder, from Binder to her parents, from Binder's parents back to Binder, and from Binder to the Weavers. Because these documents are not a part of the record submitted to respondent below, we do not consider them. *See* Minn. R. Civ. App. P. 130.03 (allowing a party to file "a supplemental record, suitably indexed, containing any relevant portion of *the record* not contained in the appendix" (emphasis added)), 110.01 (stating that "[t]he papers filed in the trial court[or the body whose decision is to be reviewed, Rule 115.04], the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases").

owner of the property. But Binder never transferred the title to the property to Wolf Den Housing, LLC.

On several occasions between 1997 and 2009, Welke reviewed and signed a document entitled "Applicant/Tenant Certification and Statement of Tenant Responsibilities," stating:

> I certify that the unit assisted by [CDA] . . . cannot be owner occupied . . . .
>
> . . . .
>
> I certify that the information given to [CDA] on household composition, income, assets and allowances is accurate and complete to the best of my knowledge and belief . . . . I understand that false statements or information are . . . grounds for termination of housing assistance. . . .

And on several occasions between 2003 and 2009, Welke signed and submitted to CDA live-in aide certifications and verification-releases that state, in relevant part, that "[a] live-in aide is defined in federal regulations as a person who . . . would not be living in the unit except to provide necessary supportive services," and that "[a] live-in aide is . . . an employee, who would not be living in my unit except to provide my care."

In July 2009, CDA notified Welke that his eligibility for housing assistance was being reviewed. A month later, CDA informed Welke that his Section 8 housing assistance would be terminated on September 30, 2009, for his misrepresentation of the ownership of the Glenda property, and that he would be required to repay CDA $56,910 in benefits it overpaid on his behalf. CDA stated:

> The unit you have occupied since the onset of receiving benefits, 7785 Glenda Court in Apple Valley is

> owner occupied and therefore not eligible for participation in the Section 8 Program [24 C.F.R. § 982.352]. We learned that Debra Binder purchased this property in December 1989 and she resides in the property.

Welke requested an informal hearing to challenge the termination of benefits. CDA held an informal hearing in which Welke, his attorney, and Binder participated. The hearing officer concluded that Welke violated federal regulations and CDA policies by misrepresenting the fact that he had obtained and was receiving Section 8 housing assistance while he was living in unit occupied by an individual who was, during some periods, the record owner of the unit and, during all other periods, a person with an ownership interest in the unit, which made Welke ineligible to receive the assistance. The hearing officer also concluded that there was no legal basis upon which to grant Welke's "reasonable accommodation" request to allow him to continue receiving Section 8 housing assistance while living in an owner-occupied unit. Welke's Section 8 housing assistance was terminated and CDA is requiring Welke to repay the agency for Section 8 benefits overpaid on his behalf in the amount of $56,910.[5] This certiorari appeal followed.

D E C I S I O N

I. Standard of Review.

When a public-housing authority receives evidence, hears testimony, and makes a determination denying an individual Section 8 benefits, it acts in a quasi-judicial capacity. *Carter v. Olmsted County Hous. & Redev. Auth.*, 574 N.W.2d 725, 729 (Minn.

[5] According to counsel for CDA, Welke will remain ineligible for assistance until he has repaid the overpayments.

App. 1998). Agencies' quasi-judicial determinations should be upheld unless they are unconstitutional, outside agency jurisdiction, procedurally defective, based on erroneous legal theory, not supported by substantial evidence, or arbitrary and capricious. *Id.*

This court examines the findings to determine whether they support the decision, but does not retry facts or challenge credibility determinations. *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996). This court will not disturb an agency determination as long as it is supported by "substantial evidence." *Carter*, 574 N.W.2d at 730. "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." *Wilhite v. Scott County Hous. and Redev. Auth.*, 759 N.W.2d 252, 255 (Minn. App. 2009) (quotation omitted).

II. CDA's finding of misrepresentation is supported by substantial evidence in the record.

Welke first argues that CDA's finding of misrepresentation is unsupported by the record. The burden is on Welke to demonstrate that the record, in its entirety, does not support the agency's finding of misrepresentation. *See Carter*, 574 N.W.2d. at 730 (stating that, on appeal, the appellant must demonstrate that the administrative agency's findings are not supported by the record when considered in its entirety).

In order to receive federal funding, CDA must adhere to federal regulations governing the Section 8 program. Under those regulations, CDA may terminate the assistance of a program participant "[i]f the family violates *any* family obligations under

the program." 24 C.F.R. § 982.552(c)(1) (2009) (emphasis added). One of the family obligations under the Section 8 program is the duty to provide complete and accurate information to CDA: "any information supplied by the family must be true and correct." 24 C.F.R. § 982.551(b)(4) (2009). CDA has adopted policies consistent with the federal regulations. CDA's Section 8 Housing Voucher Administrative Plan states that "[t]he CDA may at any time terminate program assistance for a participant . . . if the family violates any family obligations under the program." And the Plan further provides that the obligations of the participant family include "supply[ing] any information that [CDA] or [the U.S. Department of Housing and Urban Development] determines is necessary in the administration of the program," and states that the "information supplied by the family must be true and complete."

In this case, the hearing officer determined that Welke violated his legal duty to provide true, correct, and complete information to CDA regarding the ownership of the Glenda property. The ownership of the property was crucial because federal regulations governing the Section 8 program prohibit payment of assistance for a unit that is "occupied by its owner or by a person with any interest in the unit." 24 C.F.R. § 982.352(a)(6) (2009).

Welke does not dispute that, under the Section 8 regulations, he could not receive housing assistance from CDA as long as Binder owned the Glenda property and lived there. Rather, Welke claims that all certifications and representations he made to CDA were, in fact, either true in that Binder did not *have title to* the Glenda property at the

time he made the representations, or that Welke honestly believed that Binder did not own the property at such times.

But Welke's implied assertion that he did not know that Binder could have no "interest in the unit" is refuted by substantial evidence in the record demonstrating that Welke, on several occasions, signed and submitted to CDA live-in aide certifications and verification-releases that state, in relevant part, that "[a] live-in aide is defined in federal regulations as a person who . . . would not be living in the unit *except to provide necessary supportive services*," and that "[a] live-in aide is . . . an employee, who would not be living in my unit *except to provide my care*." (Emphasis added.) *See* 24 C.F.R. § 5.403 (2009) (defining a "live-in aide," in relevant part, as "[a] person who resides with one or more . . . persons with disabilities, and who . . . is not obligated for the support of the persons; and [w]ould not be living in the unit except to provide the necessary supportive services"). Plainly, Welke knew that the *only* reason Binder could live in Welke's residence, under the Section 8 regulations, was to provide care for him—not because she had an interest in the property.

Substantial evidence in the record also demonstrates that that, at all times when Welke was receiving Section 8 housing assistance, Binder either owned the Glenda property or had an interest in the property other than living there exclusively for the purpose of Welke's care. Welke does not dispute that Binder actually owned the property for three weeks during 1990. And the evidence demonstrates that: (1) the property was transferred to Binder's and Welke's relatives, and back to Binder, without consideration, allowing Binder to continuously gain equity in the Glenda property even

when she did not hold title to the property and (2) in 2007, the Glenda property was homesteaded under Binder's name, indicating that as of that date Binder considered herself the true owner of the Glenda property and used it as her main residence. *See* Minn. Stat. § 510.01 (2008) (defining "homestead," in relevant part, as "[t]he house owned and occupied by a debtor as the debtor's dwelling place").

Welke argues that there is no evidence that he ever actually knew or believed that Binder owned or had an interest in the Glenda property while he was receiving Section 8 housing assistance and, therefore, the evidence in the record does not support CDA's finding of misrepresentation. But there is substantial evidence that Welke did, in fact, know that Binder owned or retained an interest in the Glenda property while Welke was living there. Welke stated at the hearing that there were some questions in 1989, when Welke was investigating his Section 8 options, about "mak[ing] it work"—meaning finding a way for Welke to obtain Section 8 housing assistance while living with Binder, who owned the property, as his live-in aide. According to Welke, Binder was "stuck in a spot . . . specifically going to family members [would solve the problem], but an outright sale would have put [Welke] on the street." Welke admitted at the hearing that Binder had some interest in the property, aside from her interest as Welke's live-in aide, even when family members owned the property: Welke conceded that the Glenda property was not sold to family members in "outright sale[s]."

There is also substantial evidence in the record that Welke knew, after the property was transferred from his relatives back to Binder, that she owned or continued to have an interest in the property which was never transferred to Wolf Den Housing, LLC. All of

the circumstances lead to the logical conclusion that Welke knew of Binder's continued interest in the Glenda property. *See State v. Mauer*, 741 N.W.2d 107, 115 (Minn. 2007) (stating that proof of knowledge may be made by circumstantial evidence).

Welke argues briefly, citing Minn. Stat. § 507.07 (2008) (explaining the legal effect of a warranty deed), that CDA made an incorrect assumption that the transfers of the property between family members were not "qualified sale[s]" and, therefore, not effective to transfer ownership. Welke's argument is meritless. It is clear from the findings that the hearing officer considered the issue of whether the Glenda property was continuously titled in Binder irrelevant because, as the hearing officer found, Binder "clearly retained an ownership interest in the property throughout the entire period of the occupancy of the unit."

III. CDA did not abuse its discretion by denying Welke's reasonable-accommodation request.

We agree with Welke that the hearing officer erroneously concluded that there is "no federal regulation containing language that permits the CDA to waive or otherwise accommodate a [Section 8] program participant wishing to receive assistance in an owner-occupied unit." 24 C.F.R. § 982.615 (2009) provides:

> (a) *Sharing a unit.* An assisted family may reside in shared housing. In shared housing, an assisted family shares a unit with the other resident or residents of the unit. . . .
> (b) *Who may share a dwelling unit with assisted family?* (1) If approved by the [housing authority, or CDA in this case,] a live-in aide may reside with the family to care for a person with disabilities. The [public housing authority] must approve a live-in aide if needed as a reasonable accommodation so that the program is readily accessible to and usable by persons with disabilities . . . .

. . . .

(3) *The owner of a shared housing unit may reside in the unit*.

. . .

(Emphasis added.)

But the hearing officer's decision that there was no basis to grant Welke's reasonable-accommodation request was, nevertheless, not an abuse of discretion because Welke never provided a factual basis on which the request could be granted. 24 C.F.R. § 982.615(b)(1) provides that the public housing authority only has the obligation to approve a live-in aide—who, under section 982.612(b)(3) (2009), could also be the owner of the assisted housing unit—"if needed as a reasonable accommodation so that the program is readily accessible and usable by persons with disabilities." And Welke presented no evidence or argument that CDA's Section 8 program will not be readily accessible and usable by him if he is not allowed to live in a residence owned by Binder with Binder as his live-in aide. Welke's reasonable-accommodation request actually appears to have been based upon accommodating Binder, not Welke. In requesting an accommodation, Welke's counsel stated to CDA that the Glenda property is Binder's "only place of residence" and that Binder "would be unable to move from her home and live with [Welke] elsewhere."

Because the decision not to grant Welke's reasonable-accommodation request was not an abuse of discretion, the hearing officer's misstatement of the Section 8 regulations constitutes harmless error, which, under Minn. R. Civ. P. 61, must be ignored. *See Katz*

v. Katz, 408 N.W.2d 835, 839 (Minn. 1987) ("[W]e will not reverse a correct decision simply because it is based on incorrect reasons.").

IV. CDA did not abuse its discretion by not considering mitigating circumstances.

Welke argues that CDA abused its discretion by failing to consider mitigating circumstances in making its decision to terminate his Section 8 housing assistance. 24 C.F.R. § 982.552(c)(2) (2009) provides:

> [i]n determining whether to deny or terminate assistance because of action or failure to act by members of the [assisted] family: (i) The [public housing authority] may consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, [and] mitigating circumstances relating to the disability of a family member.

The plain language of 24 C.F.R. § 982.552(c)(2) states that CDA "*may* consider all relevant circumstances" (emphasis added), giving CDA the discretion to determine whether *or not* to consider whether mitigating circumstances excused Welke's obligation to provide true, complete, and accurate information to CDA. Because consideration of mitigating circumstances was permissive—not mandatory—under 24 C.F.R. § 982.552(c)(2), a failure to consider such circumstances does not constitute an abuse of discretion.

Moreover, there was little, if any, evidence of mitigating circumstances presented in this case. Welke's misrepresentations to CDA were substantial and of significant duration. CDA did not abuse its discretion by determining that Welke participated in and was culpable for the misrepresentations to CDA. And even if CDA failed to verify the information Welke provided and failed to inform him about 24 C.F.R. § 982.615, as

Welke asserts, CDA's failure does not make Welke less culpable or his case less serious, and it does not constitute a mitigating circumstance related to his disability or that of a family member. We conclude that CDA did not abuse its discretion by not considering mitigating circumstances in this case.

Affirmed.