STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1160

Jessica Pittman,
Relator,

vs.

Dakota County Community Development Agency,
Respondent.

Filed June 15, 2010
Affirmed in part, reversed in part, and remanded
Ross, Judge

Dakota County Community Development Agency

Lisa Hollingsworth, Southern Minnesota Regional Legal Services, Inc., St. Paul, Minnesota (for relator)

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

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

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

ROSS, Judge

This case concerns the Dakota County Community Development Agency's decision to terminate housing assistance after a renter allowed her boyfriend to stay unreported in her unit. Jessica Pittman appeals the agency's decision, arguing that the

evidence was insufficient to establish that she violated program rules. Because substantial evidence supports a finding that Pittman allowed her boyfriend to stay with her unreported beyond the allowable temporary period, we affirm the decision to terminate her housing assistance. But the agency lacked a sufficient factual basis to require Pittman to repay a year's worth of benefits, and we therefore remand for the agency to recalculate her repayment obligation based on the single violation supported by the evidence.

FACTS

Jessica Pittman received rental subsidies from September 2006 until August 2007, when the Dakota County Community Development Agency (CDA) terminated her benefits. Pittman moved from Crystal to Apple Valley in September 2006. She had applied for federally funded Section 8 housing assistance with the CDA in August 2006 before the move, and she applied to renew her assistance in April 2007. On her August 2006 application, Pittman listed herself and her four children as the household residents. She also noted that she was expecting a fifth child in September. Pittman named Rahsaan Kemp as the absent father for the fifth child but indicated that she had not seen Kemp and was "unaware of [his] current information." In her April 2007 assistance application, she again listed herself as the only adult in the household. She wrote, "I do not know where [he is]," in the space provided for listing Kemp's address.

With both applications, Pittman also submitted a signed "Statement of Tenant Responsibilities." This document confirms the applicant's duty to list all members of the household on the application and to prohibit anyone else from living at the assisted unit:

> I certify that the members in my household, that I have listed on my application, are the only people that live/stay in my housing unit.
>
> I understand that I must obtain prior approval from the CDA and my landlord before adding an additional member to my household.

It also confirms the recipient's understanding that visitors may stay at the unit for no more than ten days in any 30-day period:

> I understand that I can have visitors stay with me on a "temporary" basis, and I understand that "temporary" is considered to be no more than a total of ten days during any 30 day period. I must obtain prior approval from the CDA if I plan to have someone stay with me for more than ten days.
>
> I understand that failure to report any additional household member or visitors to the CDA or obtain prior approval to add a member as required above, will result in termination of my housing assistance.

Pittman twice signed this document, acknowledging that a violation would cause the termination of her assistance.

Concern about Pittman violating the unreported-resident rule arose soon after she moved into her Apple Valley residence in September 2006. A CDA employee making a routine inspection observed evidence that an unreported adult male was living there. The record does not reveal what this evidence was. The CDA asked the Dakota County Sheriff's Department to investigate. The sheriff did not act on the request until May 2007. On May 23, the sheriff obtained a warrant to search Pittman's home for "[a]ny and/or all evidence including clothing, personal items, toiletries, furniture, bank records, and documents, which would establish that Rahsaan Dajuan Kemp is residing at [the residence]."

Deputies executed the search warrant on May 31 at approximately 8:30 a.m. They found Kemp asleep in the master bedroom. Officers found some of Kemp's belongings in the house, including "clothing and personal hygiene items." The police report does not specify the number or location of Kemp's belongings in the house. But a recorded conversation between Pittman and a deputy suggests that some of Kemp's dirty clothes were in Pittman's bedroom and that "a fair amount" of his dress clothes were hanging in her closet.

Pittman insisted that Kemp did not live with her, telling deputies that he stayed overnight only once or twice weekly. She claimed that Kemp had arrived around six on that particular morning for her to wash his clothes and that he had gone to bed intending later to look for a job. She claimed that Kemp's clothes were in her closet because she had permitted him to keep them there to prepare for job interviews. And she claimed that men's toiletries at the house belonged to her son.

Officers seized two items: a "Notice and Order of License Plate Impoundment" and Pittman's personal diary. The license plate impoundment notice was given to Kemp after he was stopped for drunk driving. Dated May 2, 2007, it shows that Kemp was driving Pittman's car at the time of the stop, and it lists her Apple Valley residence as his address. Pittman's diary contains two handwritten entries suggesting that Kemp was living with her in late May 2007. In an entry dated May 27, 2007, Pittman wrote,

> I had a fun but real talk with [Kemp], he needs to get a job or go to school full-time. I don't need him here eating and drinking up my food with no help. I have 5 kids to take care of. Last night we had sex . . . this was the third time we have had sex since he got out of jail. . . . I can't take him sitting

> around on his [a]ss and playing the game all day long. I mean he wants me to be supportive of him, but, you can't carry your own weight in this relationship. . . . Anyway, I hope things work-out. [Kemp] has a good heart, but, [i]f he can't treat me with respect, I will call the police to get him away from me, because, he is not leaving peacefully.

And in an entry dated May 28, Pittman wrote, "We are all here at my house, and his family is having a barb[e]que later today."

In July, Pittman received a letter from the CDA notifying her that it was terminating her Section 8 assistance because she had failed to report the additional adult living in her household. Pittman requested an informal hearing to challenge this decision.

A hearing officer received conflicting evidence. In addition to the evidence obtained from the search of Pittman's residence, the CDA offered several police reports to show that Kemp had been living with Pittman before and during her Apple Valley tenancy. A domestic-abuse incident report from the Crystal police department indicated that in February 2006 Pittman told police that she and Kemp were living together in Crystal. Three traffic incident reports, dated May 5, October 3, and December 5, 2006, show that Kemp was pulled over driving Pittman's car and may have told police that he lived at Pittman's address. The first traffic incident report, dated before Pittman's move to Apple Valley, indicates that Kemp was stopped in Crystal driving a car registered to Pittman. The last two reports are dated after Pittman's move to Apple Valley and also indicate that Kemp was stopped driving Pittman's car. Although Kemp's driver's license bore a Minneapolis address, these reports designate Pittman's Apple Valley address as Kemp's.

Pittman testified that Kemp never resided at her home. She also presented documentary evidence to establish that he had not been residing with her in Apple Valley. She provided envelopes addressed to Kemp in Minneapolis dated from April 6 to May 14, 2007. Pittman also presented a Dakota County paternity complaint filed against Kemp on Pittman's behalf, which Pittman suggested would not have been filed if the county thought Kemp was living with her. And a corresponding paternity judgment dated June 28, 2007, states a Minneapolis address for Kemp.

Finally, Erin Lundberg, a volunteer with the Salvation Army, testified that she had regularly been in Pittman's house. Lundberg visited Pittman's home at least twice a month, sometimes unannounced, and had never seen Kemp or any signs of him there.

The hearing officer found that Pittman had allowed Kemp to reside with her in Apple Valley for more than ten days in a 30-day period, violating the duties listed in the Statement of Tenant Responsibilities. She upheld the agency's decision to terminate Pittman's assistance and ordered her to return $10,943 in benefits. Pittman appealed to this court by writ of certiorari. *See Pittman v. Dakota County Cmty. Dev. Agency*, No. A07-2063, 2009 WL 112948 (Minn. App. Jan. 20, 2009). We reversed and remanded because, among other reasons, the record did not provide the legal basis for the termination. *Id.* at *3−4.

A hearing officer conducted a second informal hearing on remand, gathering more details about Kemp's contact with Pittman. The CDA offered the same evidence presented in the first hearing.

Pittman testified in detail. She testified that she began dating Kemp at the end of 2004. He left her in early 2006 when he learned that she was pregnant. In May 2006, he took her car without her permission. Pittman saw Kemp again in late May or early June 2006 when he visited overnight. She was surprised when he was picked up in her car in October. Police pulled Kemp over in her car again in December. Pittman next saw Kemp in April 2007. She testified that from then until the end of May, she saw him only two or three times a week. He would stay only between 11 p.m. and 3 a.m. During this time Kemp also went to jail for "a domestic or DUI," and he was released May 21. Pittman claims she saw him three times between May 21 and 31. She let him keep clothes at her home so he could dress there before job interviews. Pittman became pregnant with Kemp's child again in May 2007.

Erin Lundberg testified, also adding detail to her prior testimony. She stated that she worked with Pittman from September 2004 to October 2007 and that although she usually called Pittman weekly, Kemp never answered the phone. Lundberg could tell when Kemp was around when she spoke with Pittman by phone, but she believed that he never actually lived with Pittman. Lundberg could access all of the rooms in Pittman's house, and she never observed any of Kemp's belongings.

The hearing officer determined that Pittman violated her Section 8 obligations by failing to report that Kemp had been living with her in Apple Valley for more than ten days in a 30-day period. She explained that she did not find Pittman's testimony credible, and she discounted Lundberg's testimony because it established only that Kemp

was not present at the house when she visited. The hearing officer upheld the termination of Pittman's assistance and ordered Pittman to repay $10,943 in benefits.

Pittman again appeals by writ of certiorari.

D E C I S I O N

Pittman asks this court to reverse the CDA's decision terminating her Section 8 benefits. The CDA acted in a quasi-judicial capacity when it terminated Pittman's benefits. *See Carter v. Olmsted County Hous. & Redev. Auth.*, 574 N.W.2d 725, 729 (Minn. App. 1998). "An agency's quasi-judicial determinations will be upheld unless they are unconstitutional, outside the agency's jurisdiction, procedurally defective, based on an erroneous legal theory, unsupported by substantial evidence, or arbitrary and capricious." *Id.*

Pittman argues that the record lacks substantial evidence that she violated program rules. Federal regulations provide that a public housing agency (PHA) may terminate a Section 8 participant's housing assistance "[i]f the family violates any family obligations under the program." 24 C.F.R. § 982.552(c)(1) (2008). One of these obligations is the duty to have the household composition approved by the PHA: "The composition of the assisted family residing in the unit must be approved by the PHA. . . . The family must request PHA approval to add any other family member as an occupant of the unit. No other person . . . may reside in the unit . . . ." 24 C.F.R. § 982.551(h)(2) (2008).

Federal regulations also allow local housing agencies to develop their own policies in implementing the regulations:

> The PHA must adopt a written administrative plan that establishes local policies for administration of the program in accordance with HUD requirements. The administrative plan and any revisions of the plan must be formally adopted by the PHA Board of Commissioners or other authorized PHA officials. The administrative plan states PHA policy on matters for which the PHA has discretion to establish local policies.

24 C.F.R. § 982.54(a) (2008). Dakota CDA imposes restrictions, which applicants acknowledge through the "Statement of Tenant Responsibilities." The statement indicates that the agency must approve any additions to the household and that visitors may stay no more than ten days in any 30-day period. Pittman signed this statement both times she applied for assistance.

There is substantial evidence in the record to support the finding that Kemp stayed in Pittman's home for a span of at least ten consecutive days. This court accepts an agency's decision if it is supported by substantial evidence. *Carter*, 574 N.W.2d at 730. "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quotation omitted). It means "more than a scintilla of evidence, some evidence, or any evidence." *Id.* (quotation marks omitted). "On appeal, the appellant must demonstrate that the administrative agency's findings are not supported by the record when considered in its entirety, and this court applies an abuse of discretion standard." *Id.*

The record includes evidence that Kemp resided with Pittman in May 2007, during the 11 days between his release from jail and the execution of the search warrant on May 31. Pittman testified that Kemp was in jail for part of May and got out on May 21.

Officers discovered Kemp in Pittman's residence on May 31. Pittman's diary entries strongly suggest that Kemp resided with her beginning with his release from jail, and the deputies' discovery of Kemp sleeping in the master bedroom on May 31 extends the period of his stay beyond the requisite ten days. Pittman's May 27 dairy entry states that she and Kemp had sex on May 26 and on two previous occasions "since [Kemp] got out of jail." She complained that Kemp had been "eating and drinking up my food with no help" and "sitting around on his [a]ss and playing the game all day long." She then wrote, "[Kemp] has a good heart, but, [i]f he can't treat me with respect, I will call the police to get him away from me, because, he is not leaving peacefully." In context, Pittman's May 27 statement that Kemp was "not leaving peacefully" could reasonably be interpreted to indicate that the two were cohabitating since Kemp's release. The discovery of Kemp sleeping at the home on May 31 solidifies the CDA's case. Pittman's explanation—that Kemp had merely dropped by early that day with laundry—is implausible in light of the diary evidence that Kemp had been with Pittman consistently for more than a week before the search.

Pittman argues that the CDA's evidence is unreliable hearsay because the CDA failed to call either the housing inspector who initiated the investigation or the deputy who found Kemp in the home. But the diary is not hearsay. "The general rule is that . . . 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). Pittman herself discussed the diary during her testimony. But even

if the CDA alone had offered it and Pittman had objected, the diary would not constitute hearsay because it is a statement against a party opponent. *See* Minn. R. Evid. 801(d)(2). The hearing officer's implicit finding that Pittman allowed Kemp to live with her for more than ten days in May 2007 does not rest solely on hearsay evidence.

While the police report stating that Kemp was present in the home when police executed the search warrant is hearsay, the CDA was not required to strictly comply with the rules of evidence: "Only where it appears that [an agency] clearly abused its discretion in relying upon inherently unreliable evidence, under the hearsay rule or otherwise, should the courts intervene." *Id.*; *see also* 24 C.F.R. § 982.555(e)(5) (2008) (providing that a housing agency may consider evidence "without regard to admissibility under the rules of evidence applicable to judicial proceedings"). The written statement that Kemp was present in Pittman's home on May 31 was not inherently unreliable. That statement, together with the diary admissions, constitute substantial evidence supporting the finding that Pittman violated program rules.

Although the CDA carried its burden to prove that Pittman violated program rules in May 2007 by allowing Kemp to stay with her for more than ten days, the evidence does not substantiate a violation at any other time during Pittman's Apple Valley tenancy. There is overwhelming evidence to support the hearing officer's finding that Pittman and Kemp had an ongoing romantic relationship throughout Pittman's time in Apple Valley. But evidence of an on-and-off relationship during Pittman's tenancy at the assisted unit alone does not prove that the couple *was residing* together during the relationship. The

CDA failed to offer evidence to contradict Pittman and Lundberg's testimony that Kemp was no more than an occasional visitor at Pittman's unit.

The CDA asserts that "[o]n multiple occasions, Mr. Kemp reported to law enforcement agencies that he resided in [Pittman's] unit." The CDA cites to the two traffic reports from the second half of 2006 and the May 2007 license plate impoundment notice, which list Pittman's Apple Valley address as Kemp's. But neither Kemp nor any arresting officers were called to testify about how Pittman's address came to be on the documents. Consistent with the other evidence, the documents establish at most that Kemp was intermittently present at Pittman's residence and that, when stopped by police while driving her car, he told them that he resided with her.

Although we generally defer to an agency's witness credibility determinations, *State by Cooper v. Moorhead State Univ.*, 455 N.W.2d 79, 83−84 (Minn. App. 1990), the reasons offered by the hearing officer in this case cannot support her conclusion that Pittman's testimony was incredible in all respects. The hearing officer had ample reason not to credit Pittman's explanation that Kemp was at her house on May 31 merely for his laundry. But the hearing officer's primary reason for discrediting Pittman's other testimony appears to have been her belief that Pittman's August 2006 and May 2007 applications for assistance falsely stated that she did not know Kemp's location. This belief rested on the hearing officer's finding that Pittman and Kemp had an ongoing intimate relationship. But the evidence supports Pittman's explanation that the relationship, though intimate, was also sporadic. Pittman specifically testified that she and Kemp were uninvolved when she submitted her housing assistance applications. No

evidence indicates that the on-and-off relationship was on when Pittman signed the first or second application representing that she did not *then* know where Kemp was. The hearing officer's implicit finding that Pittman knew Kemp's location when she submitted her applications, making her contrary statement on the applications false, is not supported by any evidence in the record.

The hearing officer pointed out several other perceived inconsistencies in Pittman's testimony. She explained that Pittman testified that she did not see Kemp from October 2006 until April or May 2007 and concluded that this testimony was inconsistent with her testimony that Kemp was pulled over in her driveway in December 2006. The explanation is inaccurate. Pittman testified that Kemp took her car in October and again in December. She testified that at one of these times he had been pulled over in her driveway, but she could not remember which occasion. She testified that, after these two incidents, she did not see him again until sometime after April 12. There is no inconsistency in Pittman's actual testimony in this regard.

The hearing officer also found that Pittman gave conflicting statements and testimony about the frequency and length of Kemp's visits. On the day of the search, Pittman told investigators that Kemp lived with his brother in Minneapolis and stayed with her less than seven days a month, while at the same time acknowledging that Kemp had used her address when pulled over by police. At the first agency hearing, Pittman testified that Kemp would spend "three or four days" before leaving. And at the second hearing, Pittman testified that Kemp went back and forth between his mother's Minneapolis residence and a residence in St. Paul where other relatives lived and that he

came to Pittman's house for nighttime visits only. She also testified that when Kemp was not in jail, he would come see her two or three times a week. Though differing in the details, Pittman's various statements consistently affirm that Kemp was an intermittent visitor at her house, and the minor differences do not support a broad discrediting of Pittman's entire testimony.

In sum, the hearing officer relied on substantial evidence to determine that Pittman housed Kemp for the requisite ten-day period just before May 31, 2007, to establish her violation. The CDA failed to present evidence that Kemp resided with Pittman during other ten-day periods.

We therefore must address the hearing officer's requirement that Pittman repay $10,943 in overpaid benefits. The hearing officer stated that she "reviewed and concurs with the Dakota County CDA's overpayment calculation and has concluded that Jessica Pittman should be held responsible for repaying the CDA for Section 8 benefits overpaid on her behalf in the total amount of $10,943." The CDA's overpayment calculation is set forth in a June 2007 memo. The memo states,

> The Dakota County CDA has paid benefits in the amount of $10,943 since Jessica ported to Dakota County. I believe she should be responsible for paying these benefits back based on evidence she has had an unreported adult in her unit.
>
> Payments made: September pro-rate HAP $666
> Oct '06 thru Feb '07 HAP $1051 x 6 = $5255
> March '07 HAP $812
> April '07 thru Aug '07 HAP $842 x 5 = $4210

Total payments made on her behalf = $10,943

The agency's reimbursement calculation apparently hinges on Kemp's living with Pittman for the entire rental year. But as we have already concluded, the record lacks evidence to support a finding that Kemp lived with Pittman for more than ten days in any month other than May 2007. And neither the agency's brief nor the hearing officer's decision cites any authority that would support requiring Pittman to repay a year's worth of benefits based on a single violation proven only at the end of the period. We remand for the CDA to recalculate Pittman's benefit repayment amount based on a violation that was limited to the violation that occurred in May 2007.

Affirmed in part, reversed in part, and remanded.