STATE OF MINNESOTA
IN COURT OF APPEALS
A11-454

Benjamin J. Verjovsky,
Relator,

vs.

Mental Health Resources, Inc.,
Respondent.

Filed December 19, 2011
Affirmed
Stauber, Judge
Klaphake, Judge, dissenting

Mental Health Resources

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

Ruth S. Marcott, Dennis J. Merley, Felhaber, Larson, Fenlon & Vogt, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Stauber, Judge.

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

STAUBER, Judge

Relator challenges the termination of his Section 8 housing benefits, arguing that the findings are not sufficiently specific, given that the hearing officer did not make any

credibility findings, and that the record does not support the termination of relator's benefits. We affirm.

FACTS

Relator Benjamin J. Verjovsky was a participant in a Section 8 Housing Choice Voucher Program, administered by respondent Mental Health Resources, Inc. On November 9, 2010, relator's landlord filed an eviction complaint against relator, alleging that relator "failed to pay rent for the month(s) of Nov. 2010." The district court found that the allegations expressed in the complaint were true, issued a writ of recovery of the premises, and entered judgment on November 16. No appeal was taken from this proceeding.

In a letter dated November 18, respondent terminated relator's participation in the voucher program, effective December 1, 2010. The letter informed relator that the termination was "a result of [the] eviction summons" and noted that respondent was "required to terminate assistance if the family/participant is evicted from housing." The HUD guidelines enclosed in the letter informed relator that housing assistance must be terminated when the participant "is evicted from housing assisted under the program for a serious or repeated violation of the lease."

Relator appealed the termination to a hearing officer, and a hearing occurred on January 5, 2011. In a letter dated January 7, the hearing officer notified relator that "there is no choice but to uphold [the November 18] decision," as termination of Section 8 benefits is required under the HUD guidelines. This certiorari appeal follows.

D E C I S I O N

We will uphold a housing authority's quasi-judicial decision to terminate a participant's housing benefits unless we conclude that the authority's decision 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 Cnty. Hous. & Redev. Auth.*, 574 N.W.2d 725, 729 (Minn. App. 1998). "We examine the findings to determine whether they support the decision but do not retry facts or challenge the credibility determinations of the agency." *Wilhite v. Scott Cnty. Hous. & Redev. Auth.*, 759 N.W.2d 252, 255 (Minn. App. 2009). "The decision is to be upheld if the lower tribunal furnished any legal and substantial basis for the action taken." *Id.* (quotation omitted).

Relator challenges the termination on two primary grounds. He first alleges that the record does not support the hearing officer's determination that relator was evicted, or if he was evicted that the eviction was for a serious violation of the lease. He also contends that the hearing officer failed to state his findings with sufficient specificity to sustain the termination of relator's benefits. We address each in turn.

I.

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*, 759 N.W.2d at 255

(quotation omitted). On appeal, we apply an abuse-of-discretion standard when reviewing an agency's determination. *Carter*, 574 N.W.2d at 730.

Relator first argues that the evidence is insufficient to support a finding that he was evicted, basing this argument on his assertion that "there is no evidence in the record that the Writ [of Recovery] was. . .executed by the sheriff" or a "termination of tenancy by [a] court of law as evidenced by a Judgment for Possession." We disagree.

In an eviction action, the district court must order judgment in the landlord's favor before a writ of recovery may be issued. Minn. Stat. § 504B.345 (2010). Relator does not dispute that his landlord initiated an eviction action against relator by filing an eviction complaint on November 9, 2010. The record also contains a writ of recovery, ordering that relator be removed from the premises and that the premises be returned to the landlord's possession. Based on this evidence—as well as Minnesota law providing that a writ of recovery will not be issued unless a judgment has been entered in the landlord's favor—the hearing officer's decision that relator was evicted is supported by substantial evidence and will not be disturbed on appeal.

Relator next argues that, even if he was evicted, it was not for a *failure* to pay rent, but rather for "the late payment of a $161 portion of [relator's] . . . total monthly rent of $650 that was only nine days late at the time of [the] filing of the action." But this argument ignores the procedural history of the case. The eviction complaint filed by relator's landlord cites failure to pay rent as the grounds for the eviction. The district court found that the allegations expressed in the complaint were true and issued a writ of recovery. Relator did not appeal the eviction judgment. As a result, any challenge to

relator being evicted for failure to pay rent—even in light of a subsequent letter from relator's landlord stating that the rent was later paid—is untimely and impermissibly collateral. *See Dieseth v. Calder Mfg.*, 275 Minn. 365, 370, 147 N.W.2d 100, 103 (1966) (stating that whether or not the decision in an order is correct, it is nonetheless final after the time for appeal has expired). The hearing officer's determination that relator was evicted for a failure to pay rent is therefore supported by substantial evidence.

We next address the issue of whether relator's eviction for failure to pay rent constitutes a "serious" violation of the lease, thereby triggering the required termination of his Section 8 benefits. When a tenant is evicted for a serious violation of the lease, the governing agency is required to terminate the tenant's participation in a Section 8 housing-assistance program. 24 C.F.R. § 982.552(b)(2) (2011); *see also Wilhite*, 759 N.W.2d at 255 (holding that this is a mandatory provision under the canons of construction). While the regulation does not conclusively define a "serious violation of the lease," this court has stated that other federal regulations are instructive on the issue of what constitutes a serious violation. *Wilhite*, 759 N.W.2d at 256 (considering under what circumstances a property owner may terminate a lease for serious or repeated violations of the lease or other good cause). Under these regulations, an owner of Section 8 housing may not terminate a tenancy during the lease term except on "[s]erious violation (including but not limited to *failure to pay rent* or other amounts due under the lease)," repeated violation of the lease, violation of applicable law, or other good cause. 24 C.F.R. § 982.310(a) (2011) (emphasis added).

Failure to pay rent is therefore a serious violation of the lease. And because relator was evicted for failure to pay rent, the agency was required under the applicable regulations to terminate his Section 8 benefits. The agency therefore furnished a legal and substantial basis for the termination, and we will not disturb this holding on appeal.

II.

A hearing officer's determinations must be supported by sufficient findings to permit meaningful appellate review. *Carter*, 574 N.E.2d at 729. In order to be sufficient, the hearing officer "must make an express credibility determination, must set forth the inconsistencies in the record which have led to the rejection of the [relator's] testimony, must demonstrate that all relevant evidence was considered and evaluated, and must detail the reasons for discrediting pertinent testimony." *Id.* (quotation omitted). Relator relies on this language in his argument that the findings are insufficient.

Relator is correct that the hearing officer's findings make neither an express credibility determination nor detail the reasons for discrediting certain testimony. But unlike *Carter*, the relevant facts here are undisputed. Relator argues that the hearing officer's apparent discrediting of a written statement of relator's landlord, dated one month after the eviction hearing, that the rent had been paid and documentary evidence that relator was in the process of seeking expungement of the eviction constitutes a credibility determination requiring *Carter* findings. However, this documentary evidence is not inconsistent with the hearing officer's apparent conclusion that relator was evicted for failure to pay rent and that such an eviction required the termination of relator's benefits. Because findings regarding relator's credibility were unnecessary to the hearing

officer's determination, the lack of *Carter* findings does not require reversal. *Peterson v. Wash. Cnty. Hous. & Redev. Auth.*, ___ N.W.2d ___, ___ 2011 WL 3557818, at *4 (Minn. App. Aug. 15, 2011), *review denied* (Minn. Oct. 26, 2011).

Affirmed.

KLAPHAKE, Judge (dissenting)

I dissent. The majority opinion does not fully illuminate or consider the facts upon which its decision rests and applies the law in a rigid manner to uphold the eviction of a person with a mental disability for non-payment of a small portion of his rent at a time when he was involuntarily hospitalized as part of a civil commitment. I would reverse the decision of the housing authority and reinstate appellant's Section 8 housing.

First, as to the facts: the hearing officer issued a one-paragraph decision that did not make any factual findings supporting its decision. But appellant, whose entitlement to Section 8 housing is premised on his having a mental disability, failed to pay $161 of his $650 rent payment due on November 1, 2010, because he was involuntarily committed to a hospital due to his disability. In this instance, the wheels of justice moved quickly. On November 9, eviction proceedings were initiated against appellant, on November 16, the district court issued an eviction order after a hearing at which appellant did not appear because he remained hospitalized, and on November 18, the public housing authority terminated appellant's Section 8 housing. Although the time for appeal had expired for appellant to challenge the eviction decision of the district court, appellant was in the process of expunging the eviction decision at the time of his public housing appeal, and he so informed the hearing officer during the hearing. He also informed the hearing officer that he had made his late rent payment and offered evidence of that fact in the form of a letter from his landlord. The record submitted to this court by appellant includes the February 8, 2011 district court order granting relator's motion to expunge the record of the eviction proceeding. *See Smisek v. Comm'r of Pub. Safety,* 400 N.W.2d

766, 768 (Minn. App. 1987) ("An appellate court may take judicial notice of a fact for the first time on appeal."); *see Eagan Econ. Dev. Auth. v. U-Haul Co. of Minn.*, 787 N.W.2d 523, 530 (Minn. 2010) (taking judicial notice of public records and stating that supreme court has inherent authority to look beyond the record for orderly administration of justice).

Second, as to the law: "[The Public Housing Authority] must terminate program assistance for a family evicted from housing assisted under the program for a serious violation of the lease." 24 C.F.R. 982.552(b)(2). Although the code does not define "serious violation," public housing may be terminated by the landlord only for a "[s]erious or repeated violation of material terms of the lease," or other "good cause." 24 C.F.R. § 966.3(l)(2). I posit that any decisionmaker who examined the underlying facts of this case would have determined that appellant's violation of the Section 8 housing law was not "serious." Inclusion of the word "serious" in the federal code permits application of a decisionmaker's discretion, as it distinguishes between two types of violations, those that are "serious" and those that are not. Further, the code weighs a "serious" violation in the same manner as a "repeated" violation by including the disjunctive "or" between those words. Here, relator's one-time failure to pay a portion of his rent was not "repeated." As relator had no choice in being hospitalized, he had no opportunity to pre-pay his rent before being involuntarily committed to the hospital, and the record shows that he paid the overdue portion of his rent as soon as he was able to do so. By its decision, the hearing officer effectively removed the rope upon which relator dangled over the abyss of poverty and homelessness. For all of these reasons, appellant's

violation was not "serious," and I would reverse the decision to revoke his Section 8 housing.