WISCONSIN COURT OF APPEALS
DISTRICT III

BEVERLY A. WILLIAMS,

Case No: 2006AP002795

Petitioner-Appellant,

v.

INTEGRATED COMMUNITY SERVICES, INC.,

Respondent-Respondent.

APPEAL FROM A DENIAL OF SUMMARY JUDGMENT AND A FINAL DECISION OF THE CIRCUIT COURT FOR BROWN COUNTY, THE HONORABLE J.D. MCKAY PRESIDING

REPLY BRIEF OF PETITIONER-APPELLANT

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Argument

1. ICS cannot deny Williams admission to the Section 8 program based on the arrest of a non-household member.

ICS denied Beverly Williams admission to the Section 8 program pursuant to 24 C.F.R. § 982.553(a)(2)(ii)(A), which states it "*may* prohibit admission of a household to the program if [ICS] determines that any household member is currently engaged in, or has engaged in during a reasonable time before the admission: (1) drug-related criminal activity." (Resp't Br. 27) (Emphasis in original) **There is no evidence Williams or any member of her household was involved in drug-related criminal activity.** ICS based its decision on the arrest of Leroy Spinks for allegedly possessing marijuana. (Resp't Br. 7) [1]

ICS does not claim Spinks was a member of Williams' household. ICS argues Spinks was a "guest" and the definition of "guest" at 24 C.F.R. § 5.100, extends of the provisions of § 982 to "guests." (Resp't Br. 27-28) ICS reaches this illogical conclusion because this definition states: "The requirements of parts 966 and 982 apply to a guest as so defined." 24 C.F.R. § 5.100. (Resp't Br. 28) ICS boldly asserts this claim, but cannot plausibly maintain it.

ICS' interpretation overlooks there are three categories § 5.100 separately and specifically defines: "households," "guests" and "other persons under the tenant's

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[1] ICS claims Williams' brief contained "numerous factual distortions" (Resp't Br. 4), but does not cite any specific examples. This court should ignore these assertions. Both parties' briefs cite directly to the record. However one reads the facts of Williams' case, there is absolutely no evidence in the record, nor does ICS claim, Williams had any involvement whatsoever in Spinks' alleged activity.

control." The last sentence of the definition is simply another way of stating the definition of "guest" applies to "guests." ICS asserts it is not arguing "the terms 'household' and 'guest' are synonymous." (Resp't Br. 28) At a minimum, ICS argues the definitions of "household" and "guest" are distinctions without a difference. **The only other way to interpret ICS' argument is for this court to insert the word "guest" into every section of § 982 that uses the word "household."** [2] This would be an absurd result. (Appellant's Br. 10-11)

ICS concedes the ruling in *Dep't of Hous. v. Rucker*, 535 U.S. 125, 122 S.Ct. 1230 (2002), is not applicable to Williams' case, but argues it is still persuasive. (Resp't Br. 31) *Rucker* cannot be persuasive as it concerned a different set of regulations explicitly allowing a housing authority to evict a **public housing** tenant – not a Section 8 applicant or recipient – based on a "guest's" conduct. (Appellant's Br. 12-14)

ICS claims Williams waived the argument Spinks was not a "guest." (Resp't Br. 32-33) ICS misinterprets Williams' argument. Since the March 29, 2005, hearing, Williams has consistently maintained ICS cannot deny her application based on the actions of a non-household member. (R. 23:13, A-Ap. 117, R-Ap. 22; R. 24:7-9, R-Ap 46-48; R. 26:4-6; Appellant's Br. 7-14) She has not waived this argument. Spinks' exact status is irrelevant as ICS has never claimed he was member of Williams' household.

ICS wishes it could deny Williams admission based on the activity of a non-household member, but the regulations

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[2] HUD's *Housing Choice Voucher Program Guidebook* published for housing authorities does not support ICS' position. The *Guidebook* refers only to the actions of "families" not "guests" when discussing reasons for denial. (*Guidebook* at 5-35-5-37; Online at: http://www.hudclips.org/sub_nonhud/html/pdfforms/7420g05.pdf)

do not allow denial for this reason. This court should view ICS' arguments in the context of the **facts** of Williams' case, **not** in light of ICS' hypotheticals. If ICS does not like the results of an unambiguous reading of the regulation, its remedy is to request HUD revise the regulation, not to ask this court to insert language into the regulation. 24 C.F.R. § 982.553(a)(2)(ii)(A) does not include the word "guest." There is nothing in the record suggesting Spinks was a member of Williams' household. ICS cannot deny Williams assistance based on Spinks' alleged actions and this court should reverse.

2. ICS' notice was inadequate.

The March 10, 2005, notice ICS provided Williams' made no reference to "guests." It stated she was denied assistance because she "or a member of [her] household had been involved in drug-related or criminal activity." (R. 23:16; A-Ap. 116; R-Ap. 25) This letter put Williams on notice of four potential reasons why ICS denied her application:

- Williams had been involved in drug-related activity; **or**
- A member of Williams' household had been involved in drug-related activity; **or**
- Williams had been involved in criminal activity; **or**
- A member of Williams' household had been involved in criminal activity.

At her hearing ICS did not argue Williams should be denied assistance for any of these reasons. [3]

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[3] Indeed, in it's decision denying summary judgment, ICS' notice appeared to confuse even the circuit court, who stated: "The 'drug activity' that the ICS notice referred to concerned a guest in Williams' household, Leroy J. Spinks, and the 'criminal activity' concerned a warrant for domestic abuse charges against Williams' adult son, Paris A. Armstrong." (R. 19; A-Ap. 103; R-Ap. 3) ICS has never claimed it denied Williams assistance due to Armstrong's alleged "criminal activity" noted by the circuit court.

ICS argues Williams is not entitled to a notice as specific as the notice *Driver v. Hous. Auth.*, 2006 WI App 42, 289 Wis.2d 727, 713 N.W.2d 670 (Wis. Ct. App. 2006), requires because she does not posses a Constitutionally-protected interest in receiving Section 8 benefits. (Resp't Br. 11-16). ICS attempts to distinguish *Driver* with a simplistic distinction between "applicant" and "recipient." *Id.* There is no rule of law "applicants" are entitled to less due process than are "recipients." All applicants to government programs have a reasonable expectation – and thus a protected property interest – in the eligibility criteria for the program being applied properly to their applications. See *Holbrook v. Pitt*, 643 F.2d 1261, 1278 n. 35 (7th Cir. 1981) (Public housing applicants); *Wright v. Califano*, 587 F.2d 345, 354 (7th Cir. 1978) (Social Security "denials do not necessarily deserve less due process than terminations."); *Ressler v. Pierce,* 692 F.2d 1212 (9th Cir. 1982); *Vandermark v. Housing Authority of City of York*, 663 F.2d 436 (3d Cir. 1981) (Applicant for Section 8 benefits stated due process claim).

ICS fails to distinguish between the property interest in a governmental agency determining someone to be eligible for the Section 8 and the absence of a property interest in a particular unit a private landlord owns. The cases ICS cites: *Hill v. Three Group Housing Dev. Corp.*, 799 F.2d 385 (8th Cir. 1986); *Eidson v. Pierce*, 745 F.2d 453 (7th Cir. 1983) are not applicable to Williams' case. The *Eidson* court distinguished *Vandermark* and *Ressler* based on the private landlord's ability to refuse to rent a specific unit. *Eidson* at 461, n. 6. As the *Eidson* court explained, there is a protected property interest in the "certification" of eligibility, but not in a particular landlord's unit. *Id.*

Williams does not ask this court rule ICS is required to provide a notice with a "detailed statement" or the "specificity of a criminal complaint." (Resp't Br. 17) The regulations only require a "brief statement." 24 C.F.R.

§ 982.554(a). The *Driver* court clearly stated a "brief statement" must include the who, what, why and where of the allegations. *Driver*, at ¶ 25. The regulations in *Driver* and in Williams' case both require a "brief statement" of the reasons for denial or termination. A "brief statement" means the same thing regardless of whether someone is an applicant or a participant. As ICS points out, the Wisconsin Supreme Court and Courts of Appeals have "stressed the importance of reading a legislative provision in context with similar provisions so as to avoid absurd results." (Resp't Br. 28-29, citing *State v. James*, 2005 WI App 188, 285 Wis. 2d 783, 703 N.W.2d 727 at ¶ 4 (Wis. 2005)) ICS argues a "brief statement" in Williams' case does not mean the "brief statement" *Driver* specified. This is an absurd result. Williams had a protected property interest in ICS determining her eligibility based only on reasons the regulations permit. She was entitled to expect a notice which stated "you or a member of your household" actually meant "you or a member of your household," not a guest.

This court need not decide whether a due process right exists and may still rule in Williams' favor. ICS asks this court to ignore *Driver*'s definition of "brief statement" and adopt a standard of "reasonably specificity." (Resp't Br. 18-20) The "reasonably specificity" standard was adopted in the case of *Singleton v. Drew*, 485 F.Supp. 1020 (E.D. Wis. 1980) in which the court certified a class of plaintiffs challenging the Section 8 application procedures of the Housing Authority of the City of Milwaukee. *Id.* at 1021. The notice in *Singleton* stated the plaintiffs were denied admission due to "[c]onduct which would interfere with other tenants and diminish their enjoyment of the premises." [4] *Id.* at 1022. The *Singleton* court

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[4] The basis for this reason for denial of assistance is currently found at 24 C.F.R. § 982.553(a)(2)(ii)(3). It is this regulation ICS incorrectly cities in its discussion of the legislative history of 24 C.F.R. §982. (Resp't Br. 28) ICS has never argued Williams should be denied admission based on this regulation.

found this notice was inadequate and held an adequate notice "must set forth, with reasonable specificity, the reasons for denial of the application." *Id.* at 1024. *Driver*'s definition of a "brief statement" articulated the meaning of a reasonably specific notice. Even if this court adopts *Singleton*'s "reasonable specificity" standard, ICS' notice fails this test. ICS chose to provide a notice that did not specifically tell Williams why she was being denied assistance. At her hearing, ICS claimed she should be denied assistance for an entirely different reason stated in the notice. ICS' notice is as vacuous as the *Driver* and *Singleton* notices and this court should reverse.

3. ICS cannot cure a defective certiorari record.

ICS asks this court to disregard Williams' assertion her counsel was "ambushed" at the hearing because "there is no evidence of such an ambush in the record." [5] (Resp't Br. 25 n. 5) There is no evidence because ICS **destroyed the evidence** when it destroyed the audio recording of Williams' hearing. ICS destroyed the record of the legal arguments presented and destroyed any possibility of meaningful certiorari review.

ICS' destruction of the recording calls for the extraordinary remedy of reversal. ICS attempts to distinguish *State ex rel. Lomax v. Liek*, 154 Wis.2d 735, 454 N.W.2d 18 (Wis. Ct. App. 1990) from Williams' case to support its position an "adequate" record exists upon which this court can base its review. There is one glaring distinction between *Lomax* and Williams' case: in *Lomax*, the agency returned the complete record of the administrative proceedings. As

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[5] The notice ICS provided did not place Williams or her counsel on notice ICS would attempt to deny Williams admission based on the alleged conduct of a guest. To call this an ambush is accurate.

defective as the *Lomax* record was the agency returned the complete record. There was no suggestion in *Lomax* the agency destroyed any part of the record.

ICS' position underscores the need for an extraordinary remedy. ICS claims if one can "reconstruct" what happened at the hearing from the written decision, then the record is sufficient if the hearing was "procedurally proper." (Resp't Br. at 23-24) Given ICS' position, a certiorari petition could never demonstrate an agency changed the reasons for its decision without notice. ICS asserts if the final decision mentions the new reason for denial, then the hearing must be "procedurally proper." According to ICS, the new reason can not be "procedurally improper" for being an ambush because there is no evidence of an ambush.

Whether the remaining portion of the record is "adequate" for this court to conduct a certiorari review is irrelevant. This court is entitled to a review of the complete record, not just an "adequate" record. ICS had the burden of producing the complete record and it failed. The extant record demonstrates ICS **started** with the allegation Williams "or a member of [her] household had been involved in drug-related or criminal activity" and **ended** with a different allegation that a **non**-household member engaged in drug-related criminal activity. When ICS moves the goalposts and then destroys the record of Williams' objection to the goalposts being moved, an extraordinary remedy is appropriate and this court should reverse.

4. ***Gehin*'s substantial evidence rule applies to Williams' case.**

As discussed at length in Williams' brief, in *Gehin v. Wisconsin Group Ins. Bd.,* 2005 WI 16, 278 Wis. 2d 111, 692 N.W.2d 572 (Wis. 2005) the Wisconsin Supreme Court, after undertaking a careful review of the history of the substantial evidence rule held: "We see no reason to deviate in the instant case from the long-standing rule in Wisconsin as announced in *Folding Furniture* and consistently followed for 65 years in subsequent cases that uncorroborated hearsay alone does not constitute substantial evidence in administrative hearings." *Id.* at ¶ 81.

ICS asks this court to ignore the *Gehin* rule because Williams did not dispute the allegations contained in the hearsay police reports ICS submitted. (Resp't Br. 36-40) As this court lacks the recording of the hearing, Williams' testimony is unclear. The hearing officer made no findings on her testimony. Williams could not dispute ICS' allegations because ICS did not notify her it would base its decision on the alleged conduct of a non-household member. Even if ICS properly notified Williams, **she still could not dispute ICS' allegations because she was not involved in Spinks' alleged activity.**

ICS's narrow interpretation of *Gehin*, overlooks the Wisconsin Supreme Court's adherence to the substantial evidence rule. The *Gehin* court repeatedly stated the substantial evidence rule is: **uncorroborated hearsay alone does not constitute substantial evidence in administrative hearings**. *Gehin* at ¶¶ 8, 53, 58, 81. For obvious reasons, ICS would like this court to overturn *Gehin*. ICS argues *Gehin* "explicitly recognized that its holding did not apply to all agency hearings" by offering two quotations to support this position. (Resp't. Br. 36) ICS took this "limiting language" out of context.

In the first quote ICS cites, the *Gehin* court stated the "decision should not be read to require corroboration by non-hearsay evidence in all cases," however, the court was discussing the difficulty claimants face if they are not able to afford expert witnesses to corroborate medical reports. (Resp't Br. 36) The full quote reads:

> We recognize the importance of allowing claimants to present their position as simply and inexpensively as possible, including by means of written medical reports without having to present the testimony of the author of the reports. This decision should not be read to require corroboration by non-hearsay evidence in all instances."

Gehin at ¶ 103. ICS' second quote states*:* "Corroboration of hearsay is not always required in administrative proceedings." (Resp't Br. 36) The full quote makes it clear the *Gehin* court was explaining parties can agree an agency can base its findings of fact solely upon uncorroborated hearsay:

> Corroboration of hearsay is not always required in administrative proceedings. For example, the parties may stipulate to some or all of the facts or to the submission of and reliance upon the contents of written hearsay reports. The parties may also agree that the agency may base its findings of fact solely on uncorroborated hearsay.

Id. at ¶ 104. When the full quotations are read in context, the *Gehin* court did not make the disclaimers ICS suggests. The substantial evidence rule **does** apply to Williams' case.

Contrary to ICS' assertion *Gehin* concerned only hearsay reports which are "inherently" unreliable, (Resp't Br. 40), *Gehin* made no such distinction between types of hearsay. The *Gehin* court pointed out medical reports "arguably have indicia of reliability and therefore seem to have probative force; they are furnished by independent, impartial experts and are arguably admissible as exceptions to the hearsay rule." *Gehin* at ¶ 69. The *Gehin* court noted doctors "are, after all, merely human, and may not be considered wholly free from the frailties that beset the rest of us." *Id.* at ¶ 70.

Presumably the police officers whose hearsay formed the basis for ICS' decision enjoy the same frailties. ICS argues the hearsay police reports are routine and reliable, and they can form the basis for its decision. (Resp't Br. 40-42) ICS's hearing officer, however, specifically found "the incident involving drug activity observed by police was not prosecuted due to procedural improprieties." (R. 23:13, A-Ap. 117, R-Ap. 22) Police reports cannot be routine or reliable when no charges are brought due to "procedural improprieties." Police reports are **not excluded** from the requirement of corroboration under the substantial evidence rule.

ICS is correct this court need not adopt *Richardson v. Perales,* 402 U.S. 389, 91 S.Ct. 1420 (1971) because ICS does not handle more than one million applications as does the Social Security Administration. *Gehin* at ¶ 66. The Gehin court clearly held: "Hearsay that is subject to an exception is still hearsay, and therefore the substantial evidence rule applies even to evidence admitted as an exception to the hearsay rule." *Id.* at ¶ 89. Even though hearsay is allowed under the relaxed standards of administrative proceedings, "[t]he protection for the parties lies in the requirement that hearsay evidence must be corroborated if an agency is to rely on it as the sole evidence." *Id.* at ¶ 90. The substantial evidence rule applies to Williams' case and this court should reverse.

Conclusion

For the reasons outlined in Appellant's Brief and this Reply Brief, this court should reverse the decision of the circuit court, enter judgment in favor of Williams and should remand this matter to the circuit court to determine her damages.

Dated this 22nd day of February, 2007

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Certification

I certify that this brief conforms to the following rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief produced using a proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of pages 1-11 of this brief is 2,976 words.

Dated this 22nd day of February, 2007

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