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

BRIEF OF PETITIONER-APPELLANT

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Statement of the Issues

1. Did Integrated Community Services, Inc. apply the correct legal standards when it denied Beverly A. Williams admission to the Section 8 program based upon the arrest of a non-household member?

   Answer of the circuit court: Yes.

2. Did Integrated Community Services, Inc. provide Beverly A. Williams with an adequate notice of the reasons for its denial of her application to the Section 8 program that satisfied the requirement of due process?

   Answer of the circuit court: Yes.

3. Did Integrated Community Services, Inc. maintain a sufficient record for certiorari review when it destroyed the audio recording of Beverly A. Williams' informal hearing?

   Answer of the circuit court: Yes.

4. Did Integrated Community Services, Inc. properly rely entirely on uncorroborated hearsay for the essential findings of fact?

   Answer of the circuit court: Yes.

Statement on Oral Argument and Publication

Williams does not request oral argument. The issues are not complicated and it is expected that both parties will be able to fully develop the issues in their briefs.

This appeal concerns the procedures a public housing authority uses when it denies an applicant admission to the federal Section 8 rent assistance program. The Section 8 program subsidizes the rent payments of low-income and elderly tenants to their private landlords. Public housing authorities throughout Wisconsin administer Section 8 programs under the same regulations at issue in this case. A decision in this case will clarify for these housing authorities what procedures they can use to deny applications to the Section 8 program. This is a case of substantial and continuing public interest to the housing authorities and the communities they serve. Pursuant to Wis. Stat. § 809.23(1)(a)5, the decision in this case should be published.

Statement of the Case

This case is a certiorari proceeding seeking to review the decision of Integrated Community Services, Inc. (ICS) denying Beverly Williams (Williams) admission to the Housing Choice Voucher Program (HCVP). (R. 23:13-14; A-Ap. 117-118) Commonly referred to as the "Section 8 program," the HCVP allows for an eligible applicant to receive a voucher from ICS to cover a portion of the person's rent. ICS is a non-profit corporation which administers the Section 8 program in the Green Bay area with funds from the United States Department of Housing and Urban Development (HUD) pursuant to a contract with the Brown County Housing Authority. (R. 8:1)

Beverly Williams applied to ICS for admission into its HCVP. (R. 23:13; A-Ap. 117) In January, 2005, a representative of ICS verbally informed Williams it would be denying her application. On January 26, 2005, Williams filed with ICS a "Request for an Informal Review or Informal Hearing." (R. 23:9, A-Ap. 114) Her request reads: "I was terminated from my case without any notice or anything. Others will be discussed at the hearing." (R. 23:9, A-Ap. 114) On the form, a box is checked to indicate Williams had "discussed this matter with an ICS staff member." The record contains no other statement of the reasons Williams believed she was "terminated from [her] case."

On February 24, 2005, ICS sent Williams written acknowledgment it had received her request and had scheduled an informal hearing for March 29, 2005. (R. 23:12; A-Ap. 115) The notice of hearing contains no reference to the basis of ICS' action.

Two weeks later, on March 10, 2005, ICS provided Williams with a written notice stating she was not eligible to participate in the Section 8 program because she "or a member of [her] household has been involved in a drug related or criminal activity." (R. 23:16; A-Ap. 116) This letter is the only written statement ICS provided to Beverly Williams prior to the March 29, 2005, hearing stating the reason for denial.

Williams appeared at the March 29, 2005, hearing with counsel. Christina Hermsen, an HCVP Specialist, appeared on ICS' behalf. ICS made an audio recording of this hearing. At the hearing, ICS argued that Williams should be denied assistance because of an incident which occurred on November 22, 2004. According to the documents ICS presented at the hearing, on the evening in question, officers from the Green Bay Police Department came to Williams' residence to locate Paris Armstrong, Williams' adult son, who had an outstanding warrant for his arrest. (R. 23:4, 5; A-Ap. 110, 111) ICS submitted documents which alleged the officers could not locate Armstrong, but they did arrest a man named Leroy Spinks for possession of approximately one-half ounce of marijuana. (R. 23:7; A-Ap. 113) Also present in the home was Jennifer Williams, Beverly Williams' adult daughter. (R. 23:4, 5; A-Ap. 110, 111) Beverly Williams cooperated with the police officers and allowed them to search her home for Armstrong. (R. 23:4; A-Ap. 110) Beverly Williams was not arrested. (R. 23:4; A-Ap. 110) No charges were ever brought against Beverly Williams, Leroy Spinks, Jennifer Williams or anybody else as a result of Spinks' arrest. (R. 23:13; A-Ap. 117) The only evidence ICS presented at Williams' informal hearing in support of these allegations was the written reports of the police officers.

The hearing officer issued a decision on April 12, 2005, upholding "the decision of the HCVP administrator denying Ms. William's application for participation in the HCVP." (R. 23:13-14; A-Ap. 117-118) The hearing officer found the following:

1. Williams and her attorney "objected to Ms. Williams being terminated from the program due to the police actions which occurred at her residence." (R. 23:13, A-Ap. 117, ¶ 2)

2. Spinks "was observed by police to be in possession of THC." (R. 23:13, A-Ap. 117, ¶ 2)

3. Spinks was Williams' guest but "the fact that Mr. Spinks was a guest and not a family member does not absolve Ms. Williams from responsibility for his actions." (R. 23:13, A-Ap. 117, ¶ 2; R. 23:14, A-Ap. 118, #3, ¶ 1)

4. "Police initially arrived at the Williams residence to conduct a search for one Paris Armstrong, the son of Ms. Williams." (R. 23:13, A-Ap. 117, ¶ 2)

5. "the incident involving drug activity observed by police was not prosecuted due to procedural improprieties. However, in the eyes of the HCVP, the actions taken by police at the Williams' residence were the result of observed illegal acts and their entering the residence was based on the probability that a crime was taking place."[1] (R. 23:13, A-Ap. 117, # 2, ¶ 7)

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[1] No findings were made as to what alleged drug activity the police observed. (R. 23:7, A-Ap 113)

6. "I believe the HCVP administrator acted within the parameters governing the program as stated in the HCVP Administrative Plan. The administrative plan has been submitted to and approved by HUD." (R. 23:14, A-Ap 118, #4, ¶ 2)

There are no findings that Beverly Williams, **any member of her family or any member of her household** possessed marijuana, used marijuana, supplied the marijuana to Spinks, or participated in Spinks' "activity." There are no findings as to what are, if any, the "parameters governing the program as stated in the HCVP Administrative Plan." There are no findings whether Paris Armstrong is or is not a member of Williams' household.[2]

The hearing officer made the following statement of law:

> The method in which the HCVP administrator applied the HUD regulations seems to be in accordance with a ruling of the United State Supreme Court in HUD vs. Rucker [sic] (March 26, 2002).[3] That ruling provides public housing authorities the right to evict households for drug related or other criminal activity committed by household members or household guests.

(R. 23:14, A-Ap 118, # 3, ¶ 1) The decision "upheld the decision of the HCVP administrator denying Ms. William's [sic] application for participation in the HCVP." (R. 23:13-14; A-A-Ap. 117-118)

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[2] The hearing officer found "the issue of whether Mr. Armstrong is or is not an authorized member of the Williams' household is not relevant to this hearing." (R. 23:14, A-Ap 118, # 5, ¶ 3)

[3] *Dep't of Hous. v. Rucker*, 535 U.S. 125, 122 S.Ct. 1230 (2002).

On May 17, 2005, Beverly Williams filed the present action against ICS seeking certiorari review of ICS' decision. (R. 1-3) Following the filing of this action, ICS' counsel discovered ICS had destroyed the audio recording of the March 29, 2005, hearing.[4] (R. 10) Williams sought summary judgment due to the failure of ICS to preserve an adequate record of the hearing for certiorari review and the parties briefed the circuit court on this issue. (R. 15, 16, 18, 20) The Honorable J.D. McKay denied Williams motion for summary judgment on March 28, 2006, finding there existed a sufficient record for the purpose of certiorari review. (R. 19; A-Ap. 103-109)

After the denial of the motion for summary judgment, the parties subsequently stipulated to a record for certiorari review. (R. 23) The parties' then briefed the circuit court on merits of the certiorari review. (R. 24, 25, 26) On September 29, 2006, Judge McKay issued a written decision upholding ICS' decision to deny Williams admission to the Section 8 program. (R. 27; A-Ap 101-102)

The Notice of Appeal was timely filed on November 9, 2006, appealing from the circuit court's denial of Williams' motion for summary judgment and the circuit court's final judgment upholding ICS' decision. (R. 28)

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[4] ICS' counsel, Randall L. Gast, promptly disclosed ICS' destruction of the audio recording to the circuit court and Williams' counsel. (R. 10) Undersigned counsel do not suggest or imply Attorney Gast had any prior knowledge of ICS's destruction of the audio recording.

Standard of Review

At common law, the well-established scope of review for a petition for a writ of certiorari is whether the administrative agency: "(1) kept within its jurisdiction; (2) proceeded on the correct theory of law; (3) was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; or (4) might reasonably have made the order or finding based on the evidence." *Kraus v. City of Waukesha Police & Fire Comm'n*, 2003 WI 51, ¶ 10, 261 Wis. 2d 485, 492, 662 N.W.2d 294, 297 (Wis. 2003). The application of a Constitutional provision to undisputed facts is a question of law reviewed *de novo*. *Driver v. Hous. Auth.*, 2006 WI App 42, ¶ 12, 289 Wis.2d 727, 737, 713 N.W.2d 670, 675 (Wis. Ct. App. 2006). Whether uncorroborated hearsay is the sole basis of an essential finding of fact is reviewed *de novo*. *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶ 6, 278 Wis. 2d 111, 116-117, 692 N.W.2d 572, 575 (Wis. 2005). The meaning of a federal regulation is a question of law, and is reviewed *de novo*. *Honthaners Restaurants, Inc. v. LIRC*, 2000 WI App 273, ¶ 10, 240 Wis. 2d 234, 241, 621N.W.2d 660, 663 (Wis. Ct. App. 2000).

Argument

1. ICS applied the wrong legal standards when it denied Williams admission to the Section 8 program based on a non-household member's arrest.

The admission criteria for the Section 8 program are found at 24 C.F.R. § 982 and allow an eligible person to rent a unit from a private landlord anywhere in the jurisdiction of the housing authority administering the voucher. The person selects a suitable unit in the community and once the housing authority approves the unit, the private landlord and the housing authority enter into a contract to make payments to the landlord on behalf of the tenant. 24 C.F.R. §§982.1(b)(1) and (2) (2004). The housing authority does not own the unit and the unit is not considered "public housing."

Williams applied to the ICS administered Section 8 program in Brown County. ICS denied Williams admission to the program, alleging in its' March 10, 2005, letter that she "or a member of [her] household have been involved in a drug related or criminal activity." (R. 23:16, A-Ap. 116) This letter did not state the name of the household member alleged to have been involved in drug related or criminal activity, nor did it articulate the nature of this alleged activity. At the informal hearing, ICS told Williams it was not her or a household member alleged to have engaged in drug-related criminal activity, but an individual named Leroy Spinks. Leroy Spinks happened to be present in her home the previous November. The hearing officer concluded Spinks was a "guest" of Williams. (R. 23:13-14, A-Ap. 117-118)

ICS can only deny admission to the Section 8 program for the reasons set forth in 24 C.F.R. §§ 982.552 and 982.553. These regulations permit denial based on the actions only of the applicant or the members of the applicant's household. It is clear the actions of "guests" or "other persons" are not included in the permitted reasons for denial. ICS' denial of Williams' admission to the Section 8 program was not based on any action of Williams or a member of her household, but based on the alleged actions of Spinks, a non-household member. The decision from Williams' informal hearing stated the case of *Dep't of Hous. v. Rucker*, 535 U.S. 125, 122 S.Ct. 1230 (2002) was appropriately applied to deny Williams admission to the Section 8 program based on Spinks' alleged conduct. (R. 23:13-14, A-Ap. 117-118) The HUD regulations which apply to the Section 8 program do not support this conclusion. There are different regulations for public housing and the Section 8 program. *Rucker* involved public housing, a different HUD program than the Section 8 program and the decision is inapplicable to this case. ICS applied the wrong legal standards when it denied Beverly Williams admission to the Section 8 program and the court should reverse the decision.

A. ICS applied the wrong legal standard when it adopted an expanded reading of the applicable regulations to allow for denial of admission to the Section 8 program based on the actions of a non-household member.

There is no dispute the controlling federal regulation governing this case is 24 C.F.R. §982.553(a)(2)(ii)(A). (R. 24:7-8, 25:14; A-Ap. 123) This regulation states a housing authority such as ICS "*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." *Id.* (emphasis in original). There is no dispute that ICS' notice to Williams alleged she "or a member of [her] household have been involved in a drug related or criminal activity." (R. 23:16, A-Ap. 116) There is no dispute the hearing officer concluded Spinks was a "guest" of Williams. (R. 23:13-14, A-Ap. 117-118)

The controlling regulation is explicitly permissive and does not mandate ICS to deny admission to the program. If ICS chooses to deny admission based on this permissive prohibition, all elements of the regulation must be met: 1) A member of the household seeking admission is 2) currently engaged in, or has engaged in drug-related criminal activity 3) during a reasonable time before the admission. In the current case none of these elements are present. No evidence was presented and ICS does not maintain that Williams herself was currently engaged or had engaged in drug-related criminal activity. Rather, it was the non-household member Spinks whom ICS alleged to have engaged in drug-related criminal activity. The hearing officer determined he was a "guest." (R. 23:13-14, A-Ap. 117-118)

A "household" is defined at 24 C.F.R. §5.100 as follows: "*Household*, for purposes of 24 CFR part 5, subpart I, and parts 960, 966, 882 and 982, means the family and PHA-approved live-in aide." (A-Ap. 122) Spinks was not a member of Williams' family or a PHA-approved live-in aide. ICS has not alleged he was a member of Williams' family or a PHA-approved live-in aide. Under this definition, he is not a member of Williams' household. In spite of the March 10, 2005 letter sent to Williams, at the subsequent informal hearing ICS did not allege or present any evidence that Spinks was a member of the Williams household. (R. 23:13-14, A-Ap. 117-118)

The word "guest" is not found in the definition of "household" found at 24 C.F.R. §5.100. The word "guest" appears nowhere in 24 C.F.R. § 982.553(a)(2)(ii)(A). Even if Spinks was a guest, he was not a member of Williams' household. The clear and unambiguous regulations do not permit ICS to deny admission to the Section 8 program based on the action of a "guest." The definition of "guest" is found at 24 C.F.R. §5.100:

> *Guest*, only for purposes of 24 C.F.R. part 5, subparts A and I, and parts 882, 960, 966, and 982, means a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. The requirements of parts 966 and 982 apply to a guest as so defined.

24 C.F.R. §5.100. There is no evidence in the record Spinks was a person temporarily staying in the unit, therefore his status does not even rise to the level of a guest. Spinks may not even fall within the definition of "other person under the tenant's control" at 24 C.F.R. §5.100:

> *Other person under the tenant's control*, for the purposes of the definition of *covered person* and for parts 5, 882, 966, and 982 means that the person, although not staying as a guest (as defined in this section) in the unit, is, or was at the time of the activity in question, on the premises (as *premises* is defined in this section) because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant.

24 C.F.R. §5.100 (emphasis in original). The record contains no evidence whether Spinks was an invitee or a trespasser on the day in question.

ICS not only asserted Spinks was a guest, but every provision in 24 C.F.R. §§ 966 and 982 apply to a guest. (R. 25:14-15) This position requires a ludicrously strained reading of the regulations. For example, 24 C.F.R. §982.402 sets forth the criteria for determining the appropriate unit size, including number of appropriate bedrooms. Using the

ICS' interpretation, the presence of the "guest" would require ICS to re-determine the appropriate unit size while the "guest" was present. 24 C.F.R. §982.404 sets forth the responsibilities for maintenance of the unit. Under ICS' strained reading of the regulations, the "guest" would be responsible for maintaining the unit. Following ICS' interpretation, the "guest" would be responsible for making payments for the unit under 24 C.F.R. § 982.451. In short, ICS' interpretation would lead to extending to a "guest" the same rights and responsibilities as the members of the household applying for the Section 8 program.

The word "guest" is found in 24 C.F.R. §§ 966 and 982. In fact, the words "guest," "household member" and "other person under the tenant's control" are all used in the same sentences in 24 C.F.R. §§ 982.310(c)(1) and (2)(i)(C). If ICS's interpretation was correct there would be no need for the regulations to use the word "guest" in 24 C.F.R. §§ 966 or 982, as according to ICS, "guest" and "household" can be used interchangeably.

The correct interpretation of "guest" as found in 24 C.F.R. §§ 966 and 982, refers to "a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant." A person meeting that definition would be a "guest" and therefore subject to the terms set forth in that particular regulation. A person not falling within that definition would not be a guest and therefore not subject to the regulation. The person could be an "other person under the tenant's control" or just a person who happened to be on the premises. The person could be an invitee or even a trespasser.

Clearly, Spinks was not a guest. He was not temporarily staying in the unit, which is required under the definition of guest. Even if he were a guest or an other person under the tenant's control, the correct regulation in this case does not permit denial based on the actions of a guest or an other person under the tenant's control. Only the actions of the applicant or a member of her household can be considered. ICS and the hearing officer applied the wrong standard. The only household member seeking admission to the program was Williams. There is not one shred of evidence, nor did ICS attempt to argue Beverly Williams was currently, or had in the past, been involved in drug related criminal activity. ICS relied on an erroneous reading of the regulations when it denied Williams admission to the Section 8 program and the court should reverse.

B. In relying on *Dep't of Hous. v. Rucker*, ICS applied the wrong legal standard.

Williams takes no issue with ICS' conclusion that the United States Supreme Court's holding in *Dep't of Hous. v. Rucker* allows a housing authority to evict a tenant from a public housing unit based on the conduct of the tenant's guest. *Dep't of Hous. v. Rucker*, 535 U.S. 125, 122 S.Ct. 1230 (2002). The issue before the court is *Rucker*'s applicability to Williams' case. The case before the court involves the Section 8 program; *Rucker* involved the public housing program. These are separate HUD subsidized housing programs which have different rules. ICS incorrectly relied on *Rucker* when it denied Williams admission to the Section 8 program.

Rucker involved an interpretation of 24 C.F.R. § 966.4(f)(12)(i). This public housing regulation requires a housing authority to provide in its' lease "that the tenant shall be obligated:. . . to assure that no tenant, no member of a tenant's household, or guest engages in: (B) [a]ny drug related

criminal activity on or off the premises." 24 C.F.R. § 966.4(f)(12)(i). This regulation also requires the tenant assure that "no other person under the tenant's control" engage in "any drug related criminal activity on the premises." *Id.* A housing authority can evict a public housing tenant for a violation of these provisions. *Rucker* interprets the public housing regulations. *Rucker* does not interpret the Section 8 regulations.

Compare the public housing eviction regulation at issue in *Rucker* to 24 C.F.R. § 982.553(b) which is the regulation for termination applicable to Section 8:

> The PHA *must* establish standards that allow the PHA to terminate assistance for a family under the program if the PHA determines that: (A) Any household member is currently engaged in any illegal use of a drug; or (B) A pattern of illegal use of a drug by any household member interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

24 C.F.R. § 982.553(b) (emphasis in original). HUD has carefully selected, for purposes of termination, specific classes of individuals to be included in each of these regulations. In the public housing arena, the regulations place more responsibility on the tenant for the conduct of additional classes of individuals: the tenants, the tenant's household, guests, and other persons under the tenant's control. In the case of the tenant, the tenant's household and guests it includes conduct "on or off the premises." In the case of other persons under the tenant's control it only includes conduct "on the premises." 24 C.F.R. § 966.4(f)(12).

The regulations for the Section 8 program are less restrictive. They only apply to household members, and if based on "a pattern of illegal use of a drug" the drug use must interfere with the "health, safety, or right to peaceful enjoyment of the premises by other residents." 24 C.F.R. §

982.553(b) Although these are the regulations pertinent to termination from the Section 8 program and not admission to the program, the comparison of these two regulations clearly shows there is a significant difference between the standards applicable to the public housing program and a Section 8 program.

ICS improperly relied on *Rucker* in the decision that denied Williams admission to the Section 8 program. The *Rucker* decision does not extend the public housing regulations to the Section 8 program. *Rucker* addressed termination of public housing not admission to a Section 8 program and is clearly not controlling or applicable to the facts of this case. ICS improperly relied on *Rucker* when it denied Beverly Williams admission to the Section 8 program and the court should reverse.

2. ICS failed to provide Williams with an adequate notice of its reasons for denying her application to the Section 8 program.

The federal regulations which govern the application process for the Section 8 program require a housing authority to provide prompt notice to an applicant it denies assistance. 24 C.F.R. § 982.554(a). (A-Ap. 124) This notice "must contain a brief statement of the reasons for the P[ublic] H[ousing] A[uthority] decision." *Id.* ICS first provided Williams with a notice on March 10, 2005. The letter ICS provided simply stated Williams was not eligible for the Section 8 program because she "or a member of [her] household [had] been involved in a drug related or criminal activity." (R. 23:16; A-Ap. 115) This notice failed to meet the requirements of the federal regulations because it did not contain a "brief statement" of the reasons ICS denied Williams assistance.

HUD enacted these regulations in the wake of the United States Supreme Court's decision in *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970). *Goldberg* held a person receiving welfare benefits has the safeguards of procedural due process in continuing to receive the benefits. *Id.* The Wisconsin Court of Appeals recently held *Goldberg* applies to the termination of Section 8 benefits and thus due process requires the following safeguards:

> (1) *timely and adequate notice detailing the reasons for termination*; (2) an opportunity to appear personally at the hearing, present evidence and oral arguments and confront and cross-examine adverse witnesses; (3) the right to be represented by counsel; (4) a right to a decision rendered by an impartial decisionmaker; (5) a right to have that decision based solely on rules of law and the evidence presented at the hearing; and (6) a right to a statement by the decisionmaker setting forth the reasons for the decision and the evidence upon which it was based.

Driver v. Hous. Auth., 2006 WI App 42, ¶ 13, 289 Wis.2d 727, 713 N.W.2d 670 (Ct. App. 2006), citing *Ferguson v. Metropolitan Dev. & Hous. Agency*, 485 F. Supp. 517, 522 (M.D. Tenn. 1980) (emphasis in original). ICS has argued Section 8 applicants are not entitled to the due process requirements of *Goldberg*. (R25: 1, 4-7) The Seventh Circuit has declined to extend the *Goldberg* protections to a case involving private landlords who refused to rent to Section 8 applicants based on the applicants' poor rental history. *Eidson v. Pierce*, 745 F.2d 453 at 459-464 (7th Cir. 1984). In making this determination, the *Eidson* court held "a legitimate claim of entitlement is created only when the statutes or regulations in question establish a framework of factual conditions delimiting entitlements which are capable of being explored at a due process hearing." *Eidson*, at 459-460.

The *Eidson* decision, however, only applied to private landlords who denied the rental applications of Section 8 applicants. The Seventh Circuit has not clearly ruled on whether the *Goldberg* protections apply to a housing authority which denies an applicant admission to the Section 8 program. The Seventh Circuit has not answered the question of whether an applicant to the Section 8 program, such as Williams, has an entitlement to benefits, and thus the due process protections required by *Goldberg*.

Williams' rights to due process as a Section 8 applicant may be less than an individual who has been terminated from the Section 8 program. It is not necessary for the court to answer this question as HUD has already provided corollaries to the *Goldberg* protections in the federal regulations. In addition to the requirements of the notice, the regulations entitle Williams to an informal review that is not conducted by a subordinate of the person who made the initial determination to deny Section 8 assistance. 24 C.F.R. § 982.554(b)(1). Williams is entitled to present objections to ICS' decision. 24 C.F.R. § 982.554(b)(2). ICS' decision must contain a "brief statement of the reasons for the final decision." 24 C.F.R. § 982.554(b)(3).

While these protections are not as substantial as the procedural protections for someone being terminated from the Section 8 program, they do contain one important similarity. ICS is required to provide an applicant with a "prompt notice of a decision denying assistance to the applicant. The notice must contain a brief statement of the reasons for the PHA decision." 24 C.F.R. § 982.554(a). This language is almost identical to the notice requirements when ICS terminates an individual from the Section 8 program. These regulations require ICS to "give the family prompt notice that the family may request a hearing. The notice must: (1) Contain a brief statement of reasons for the decision." 24 C.F.R. § 982.555(c)(2). In both cases, the

regulations require the notice to contain a "brief statement" of the reasons for ICS' decision.

Reviewing the cases of two individuals terminated from a Section 8 program, the Wisconsin Court of Appeals held that in order for the "brief statement" in a notice to be adequate:

> the housing authority would have to inform the tenant *who* committed the violation, based on *what conduct*, *when* the incident occurred, *what* policies or rules the conduct violates, *how* the conduct fails to comply with section 8 rules or policies, and *what evidence* the housing authority has that leads it to believe that the described violation occurred. Again, due process requires such information in order for the tenant to adequately prepare for the hearing and to understand what factors motivated the final decision, particularly where more than one potential ground for termination exists.

Driver, at ¶ 25 (emphasis in original). The *Driver* court reviewed the cases of Andrea Driver and Dorothy Bizzle, who the Housing Authority of Racine County terminated from the Section 8 program. The notices the Housing Authority of Racine County provided to Driver and Bizzle were identical. The "brief statement" of the reason for their termination was "you violated your family obligation under the Section 8 Rental Assistance Program." *Id.* at ¶ 3, 7.

Driver contains a thorough discussion of the requirements of the "brief statement" and concluded the purpose of the notice is "to inform the tenant of the allegations so that he can prepare a defense." *Id.* at ¶ 15, citing *Edgecomb v. Housing Auth.*, 824 F. Supp. 312, 314 (D. Conn. 1993). In *Edgecomb*, a similar case involving termination of Section 8 benefits relied on by the *Driver* court, the housing authority provided Tammy Edgecomb with a notice terminating her benefits for "having engaged in drug-related criminal activity or violent criminal activity, including criminal activity by any family member." *Edgecomb*,

at 315. The *Edgecomb* court found this language failed to meet the due process requirements of *Goldberg* because it failed to detail the particulars or contain a brief factual statement of the allegations the housing authority made. *Id.* In the *Driver* decision, the Wisconsin Court of Appeals held the notices Driver and Bizzle received did "not come within a country mile of the degree of specificity that *Edgecomb* described." *Driver*, at ¶ 16.

In *Driver*, the Housing Authority of Racine County argued if Driver and Bizzle had "actual notice" of the reasons for their termination this would constitute adequate notice. The *Driver* court flatly rejected this argument, holding if such an "actual notice" exception would be allowed "it would invite housing authorities to disobey the regulations whenever they deemed a tenant to have actual knowledge of what he or she did wrong and would effectively shift the burden of ascertaining the basis of the termination decision to the tenant." *Id.* at ¶ 30.

The notice ICS sent Beverly Williams simply stated she "or a member of [her] household [had] been involved in a drug related or criminal activity." (R. 23:16; A-Ap. 115) Prior to her informal hearing, Williams could not determine whether ICS was alleging she had been involved in drug related or criminal activity or whether a household member had been involved in drug related or criminal activity. Was ICS' notice telling Williams she was denied assistance because of Spinks' actions, or was it because of the police searching her apartment for Armstrong, an individual with an outstanding warrant? Until her informal hearing, Williams was left to guess the nature of the alleged drug related or criminal activity. The notice ICS provided to Williams did not answer this question. It did not put Williams on notice of ICS' allegations. An inadequate notice such as the one ICS provided to Williams does not allow an applicant to adequately prepare for the informal hearing.

The court does not need to reach a decision on whether the *Goldberg* protections extend to Williams. *Driver* clearly stands for the proposition that "brief statement" means providing adequate notice to inform the person of the reasons for the termination or denial of Section 8 benefits. Although *Driver* dealt with a termination of Section 8 benefits rather than a denial, in both situations the regulations require ICS to give a "brief statement" of the reasons for its' actions. To conclude that a "brief statement" in a termination of Section 8 benefits does not mean the same thing as a "brief statement" in a denial of Section 8 benefits would lead to an illogical result. The language in the regulations is identical and the adequacy of the notices should be identical. ICS could have provided Williams with an adequate notice by adding one sentence stating she was denied because of the November 22, 2004, arrest of Leroy Spinks for possession of marijuana. Instead ICS chose not to provide Beverly Williams with adequate notice prior to her informal hearing. The court should reverse the decision.

3. ICS failed to maintain a sufficient record for certiorari review when it destroyed the audio recording of Williams' informal hearing.

A review of the complete record is an essential characteristic of certiorari. "In reviewing an agency's decision, the courts are limited to the record and any additional facts that can be judicially noticed." *Franklin v. Housing Authority of the City of Milwaukee*, 155 Wis.2d 419, 425, 455 N.W.2d 668 (Wis. Ct. App. 1990). ICS' decision should be reversed because it failed to maintain a sufficient record for certiorari review. ICS destroyed the audio recording of Williams' informal hearing and thus the record that does exist is fundamentally flawed.

The standard of review for the court of appeals of a certiorari review is *de novo*. *Franklin*, at 425, n.18, *citing State ex rel. Hippler v. City of Baraboo,* 47 Wis.2d 603, 616, 178 N.W.2d 1, 5 (Wis. 1970). In this sense, certiorari is much like summary judgment, where the state of the record is reviewed by the appellate court *de novo*, applying the same standard and methodology as the trial court. *See*, *e.g.*, *Holzbauer v. Safeway Steel Products, Inc.*, 2005 WI App 240, ¶ 16, 288 Wis.2d 250, 708 N.W.2d 36 (Wis. Ct. App. 2005) The state of the record is most critical on this ground for certiorari review: whether the agency "might reasonably have made the order or finding based on the evidence." *Kraus v. City of Waukesha Police & Fire Comm'n,* 2003 WI 51, ¶10, 261 Wis. 2d 485, 492, 662 N.W.2d 294, 297 (2003). If the record does not preserve the evidence, the entire purpose of certiorari review can be defeated. The agency can immunize its findings simply by destroying the evidence and then invoking some presumption of "regularity." *Id.*

The holding in *State ex rel. Lomax v. Leik*, 154 Wis. 2d 735, 454 N.W.2d 18 (Ct. App. 1990) reads as if it were written specifically for Williams' case:

> When used in conjunction with certiorari review, the phrase "acted according to law" includes the common law concepts of due process and fair play. *[State v.] Goulette* [65 Wis.2d 207] at 215, 222 N.W.2d at 626-27 (Wis. 1974). This means not only that a hearing applying minimal due process or fair play standards must be provided but also "that some form of comprehensible and adequate record should be kept and provided for purposes of review." *Id.* at 216, 222 N.W.2d at 627.
>
> For that reason, if an agency on certiorari fails to return a record sufficient to demonstrate that the proceedings before it were procedurally proper, we may vacate the agency's decision. We would otherwise invite an agency subject to certiorari review to evade judicial review of their procedural violations. Evasion would be simple. The agency could hide its procedural

> violations by failing to develop the record regarding them.

Lomax, at 740. In this case there is no record of the testimony received at the hearing. It is undisputed that the proceedings were tape recorded and the audio recording was destroyed by ICS. There are no notes of the testimony, objections or arguments raised.

Some of the arguments can be reconstructed from the hearing officer's decision. For example, there is no dispute Beverly Williams and her attorney, Gary R. Hassel, "voiced their objections to Ms. Williams being terminated from the program due to police actions which occurred at her residence." (R. 23:13, A-Ap. 117, ¶ 2) Similarly, there is no dispute Attorney Hassel argued "the entire hearing procedure was flawed because Ms. Williams was not afforded ample opportunity to view case documents and examine charges leveled against her by the HCVP administrator." (R. 23:13, A-Ap. 117, ¶ 2) Attorney Hassel was "ambushed" by new allegations and new evidence.

The extent of the ambush is not apparent because there is no audio recording and no meaningful notes permitting review. The March 10, 2005, letter Williams received stated "you or a member of your household have been involved in drug related or criminal activity" (R. 23:16; A-Ap. 116) At the hearing, the "member of your household" became known as Spinks. Since there is no audio recording and no notes of the hearing, it is impossible to determine if ICS argued Spinks was a member of Williams household or if it argued he was a guest. (R. 23:13, A-Ap. 117, ¶ 2; R. 23:14, A-Ap. 118, ¶ 1) The March 10, 2005, notice referred to a member of Williams' household, but the hearing officer found Spinks was a guest. The court cannot review Spinks' relationship to Williams. Indeed, it is impossible for the court to review whether there was any evidence Spinks was a "guest" as defined at 24 C.F.R. § 5.100.

It is also impossible for any court to determine whether ICS "might reasonably have made the order or finding based on the evidence." *Kraus*, at ¶10. The hearing officer made the following finding: "the incident involving drug activity observed by police was not prosecuted due to procedural improprieties." (R. 23:14, A-Ap. 118, #3, ¶ 1) There is nothing in the record that supports this finding. There is nothing in the record to support a finding other than no crime was prosecuted because no crime occurred. ICS destroyed any argument Attorney Hassel made regarding this issue when it destroyed the audio recording of the informal hearing.

Utilizing the existing record, the court cannot reconstruct what grounds ICS claimed at the hearing to deny Williams' assistance. The decision recites that ICS representative, Christina Hermsen, "stated that the HCVP rules, as listed in the administrative plan, provide for denial of benefit assistance under the circumstances that exist in the Williams case." (R. 23:13, A-Ap. 117, ¶ 4) Perhaps ICS was claiming Spinks was a household member and engaging in drug activity. This would at least be consistent with the March 10, 2005, notice which stated Williams or a member of her household had "been involved in drug related or criminal activity." (R. 23:16; A-Ap. 116) Perhaps ICS was claiming Paris Armstrong was an unauthorized household member and engaged in criminal activity. The findings indicate ICS' representative raised the issue of Armstrong's status as a household member. (R. 23:14, A-Ap. 118, #5, ¶ 3) Perhaps ICS argued Jennifer Williams was a member of the household and engaged in some illegal activity.[5] There is no evidence in the record for either claim. Perhaps ICS is claiming Beverly Williams had knowledge of Leroy Spinks', Paris Armstrong's or Jennifer Williams' conduct and that knowledge of the

[5] Nothing in the record supports a finding Jennifer Williams was a member of Beverly Williams household.

alleged conduct, whatever this alleged conduct may be, is sufficient to deny Williams' assistance.[6]

What cannot be reconstructed, through no fault of Beverly Williams or her counsel, is her testimony: (1) whether she was even present at the unit at the time the police arrived and Spinks supposedly lit a marijuana cigar in view of Officer Stone, (2) whether she had knowledge or reason to know that Spinks even possessed drugs on her premises, (3) whether Armstrong was a member of her household, (4) whether anyone other than Beverly Williams had the authority to consent to any other adult being on the premises, and (5) when informed of the purpose of the police presence at her residence, she consented to the search for Armstrong.

ICS failed to maintain a sufficient record for certiorari review when it destroyed the audio recording of Williams' informal hearing. Since the existing record for certiorari review is fundamentally flawed, the decision to deny Beverly Williams admission to the Section 8 program should be reversed.

4. ICS relied entirely on uncorroborated hearsay for the essential findings of fact.

Further compounding the problem ICS caused when it destroyed the audio recording of the informal hearing is that the decision was based entirely on uncorroborated hearsay. ICS based the decision to deny Beverly Williams' admission to the Section 8 program on the written reports of

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[6] There is no evidence Beverly Williams was present in the unit until after Spinks had been handcuffed. The first time Officer Stone refers to Beverly Williams in his report is when he is explaining, "why Officers were there and why Officers came into the house without consent." (R. 23:6; A-Ap. 112, ¶ 4)

the police officers involved in the November 22, 2004 incident. (R. 23: 3-8; A-Ap. 110-113) The police officers did not appear at the hearing and no one testified that he or she observed any drug related or criminal activity. The only witness to actually testify at the hearing was Beverly Williams. ICS' evidence was solely uncorroborated hearsay.

The Wisconsin Supreme Court dealt extensively with the issues of substantial evidence and uncorroborated hearsay in the recent decision of *Gehin v. Wis. Group Ins. Bd.*, 2005 WI 16 (Wis. 2005). After exploring the history and rationale of the substantial evidence rule, or, as it is sometimes called, the legal residuum rule, the Court concluded: "We see no reason to deviate in the instant case from the long-standing rule in Wisconsin as announced in *Folding Furniture* [*Works, Inc. v. Wis. Labor Relations Bd.*, 232 Wis. 170, 285 N.W. 851 (1939)] and consistently followed for 65 years in subsequent cases that *uncorroborated hearsay alone does not constitute substantial evidence in administrative hearings.*" *Gehin*, at ¶ 81 (emphasis added).

Like the present case, *Gehin* involved a certiorari review. In a certiorari review the Court is required to review the sufficiency of the evidence relied on by the administrative agency. *Gehin*, at ¶ 6. The sufficiency of the evidence on certiorari review is identical to the substantial evidence test used for the review of administrative determinations under Wis. Stat. § 227. *Id.* (citations omitted).

The *Gehin* court referred to Wis. Stat. § 227.57(6) for the role of the reviewing court. This section provides:

> the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

Gehin, at ¶ 7 & n.7, citing Wis. Stat. § 227.57(6). "Substantial evidence" has been defined in the case law as "that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion." *Id.* at ¶ 48. Cases state that substantial evidence is more than "a mere scintilla" of evidence and more than "conjecture and speculation." *Id.*

In order to determine whether substantial evidence supported the administrative agency's factual findings and the decision to terminate the claimant's benefits, the Wisconsin Supreme Court in *Gehin* undertook the following analysis: 1) the Court examined the administrative agency's findings of fact; 2) the Court reviewed the evidence upon which the agency relied in its findings of fact; and 3) the Court explored the legal basis for the long-standing rule that uncorroborated hearsay evidence alone does not constitute substantial evidence. After analyzing the hearsay evidence and live testimony the Court ruled it should not deviate from the long-standing rule in Wisconsin that uncorroborated hearsay alone does not constitute substantial evidence. *Id.* at ¶ 8.

The hearsay at issue in *Gehin* consisted of medical reports. The court addressed the issue of whether uncorroborated hearsay medical reports constitute "substantial evidence" as the phrase is used in both certiorari review and Wis. Stat. § 227.57(6). The court stated: "In defining substantial evidence more than 65 years ago, the Wisconsin Supreme Court declared in *Folding Furniture Works, Inc. v. Wisconsin Labor Relations Board* that 'mere uncorroborated hearsay . . . does not constitute substantial evidence.'" *Gehin,* at ¶ 53, citing *Folding Furniture.* at 189. In a footnote, the *Gehin* court stated:

> Indeed, it appears that the concept that hearsay, standing alone, cannot support a factual finding in an administrative setting has even earlier roots in Wisconsin. See *A. Breslauer Co. v. Indus. Comm'n*, 167 Wis. 202, 204, [167 N.W. 256] (1918). This rule can be traced to the New York case, *Carroll v. Knickerbocker Ice*

Co., [218 N.Y. 435,] 113 N.E. 507 (1916).

Gehin, at n.60.

Gehin explained that *Folding Furniture* recognized the need to free administrative agencies from technical evidentiary rules, but the Court, in *Folding Furniture*, cautioned "...this flexibility does not go so far as to justify administrative findings that are not based on evidence having rational probative force." *Gehin,* at ¶ 54, citing *Folding Furniture*, at 189. The *Folding Furniture* court adopted the language from the U.S. Supreme Court case *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 59 S. Ct. 206 (1938). *Consolidated Edison* held mere uncorroborated hearsay or rumor does not constitute substantial evidence. *Id. Gehin* held:

> The rule that uncorroborated hearsay alone does not constitute substantial evidence allows an agency to utilize hearsay evidence while not nullifying the relaxed rules of evidence in administrative hearings. The rule prohibits an administrative agency from relying *solely* on uncorroborated hearsay in reaching its decision. This rule defining substantial evidence has been followed in Wisconsin since *Folding Furniture* was decided in 1939. There has been no suggestion that this rule has hindered the operation of state administrative agencies.

Gehin, at ¶ 56 (emphasis in original).

The substantial evidence rule prohibits an administrative agency from relying solely on uncorroborated hearsay. This is based in part on the reasoning that "since hearsay, due to its second hand nature, is inherently suspect, a determination based solely on hearsay can never be more than conjecture." *Id.* at ¶ 58 & n.68, citing Leonard M. Simon, *The Weight To Be Given Hearsay Evidence By Administrative Agencies: The "Legal Residuum" Rule*, 26 Brook. L. Rev. 265, 267 (1959-60). The rule supports the concept the courts should act as a check on the agencies when they review a decision for fundamental fairness. *Id.* at ¶ 59 &

n.69. The rule "gives to the reviewing court as the natural guardian of the public's legal rights, an additional device to retain control over administrative determinations, which due to the informalities of proceeding may easily go astray." *Id.* at ¶ 59 & n.70.

In *Gehin*, the Wisconsin Supreme Court distinguished the case on which the Court of Appeals had relied, *Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420, 28 L. Ed. 2d 842 (1971), and determined that *Perales* was not applicable. *Gehin,* at ¶ 66. As the *Gehin* court noted, *Perales* concerned a denial of social security benefits, but: "The evidence in *Perales* consisted of written medical reports harmful to Perales' claim, two witnesses' testimony that controverted the written reports, and a government-paid doctor's testimony that corroborated the substance of the written hearsay reports." *Gehin,* at ¶ 67 & n.83.

ICS relied on the hearsay written reports of Officers Stone and Brann to prove Spinks possessed marijuana. They did not appear at the informal hearing and thus Beverly Williams could not challenge the credibility of the officers or the accuracy of their reports. It was impossible to cross-examine them at the hearing. In contrast, as the *Gehin* court pointed out, "[m]edical 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." *Id.* at ¶ 69. Despite medical reports having this indica of reliability, the *Gehin* court held that they did not constitute substantial evidence. *Gehin*, at ¶ 81.

The *Gehin* court also recognized the need for cross-examination of the authors of hearsay reports in order to ensure the fairness of the agency's actions in terminating benefits:

> Fairness requires that in the face of contrary in-person testimony, if the Group Insurance Board seeks to terminate a claimant's benefits, it should be required to corroborate hearsay evidence if that evidence is to form the sole basis for its decision. The harm to claimants in having their income continuation insurance benefits terminated on the basis of controverted written hearsay medical reports, without an opportunity to cross-examine the authors of the reports, exceeds the burden on the Group Insurance Board to call a witness to corroborate those hearsay medical reports. Accordingly we do not adopt the *Perales* rule in the present case.

Id. at ¶ 82. Under the guidelines carefully laid down in *Gehin*, the undeniable conclusion is ICS did not have substantial evidence to deny Beverly Williams admission to the Section 8 program. Substantial evidence, as that phrase is used in certiorari cases, is: "that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion...[It] is more than 'a mere scintilla' of evidence and more than 'conjecture and speculation.'" *Gehin,* at ¶ 48 & n. 57, 58. In Williams' case, all ICS had was conjecture and speculation.

ICS relied solely upon hearsay statements to support the decision to deny Beverly Williams Section 8 benefits. As these essential findings are based solely on uncorroborated hearsay the decision to deny Williams admission to the Section 8 program should be reversed.

Conclusion

ICS relied on an erroneous reading of the federal regulations when it denied Beverly Williams admission to the Section 8 program due to the arrest of a person who was not a member of her household. ICS improperly relied on *Rucker* in making this decision. The inadequate notice ICS provided to Williams failed to meet the clear requirements of the federal regulations. ICS failed to properly maintain the record for certiorari review when it destroyed the audio recording of Williams' informal hearing. The decision of the hearing officer relied entirely on uncorroborated hearsay evidence.

For these reasons, the court should reverse the decision of the circuit court, enter judgment in favor of Beverly Williams and should remand this matter to the circuit court to determine her damages.

Dated this 9th day of January, 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 1-29 of this brief is 8,478 words.

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