

WISCONSIN COURT OF APPEALS
DISTRICT I

GREGORY MACK,

Appeal No. 2010AP283

Plaintiff-Respondent,

v.

HOUSING AUTHORITY OF THE
CITY OF MILWAUKEE,

Defendant-Appellant.

**BRIEF OF AMICUS CURIAE,
LEGAL ACTION OF WISCONSIN, INC.**

Appeal of the November 2, 2009, final Decision
and Order of the Milwaukee County Circuit Court,
the Honorable William W. Brash III presiding

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Statement on Publication

This appeal will determine what regulations a housing authority must follow when terminating a participant from the Section 8 program based on allegations of drug-related criminal activity. 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 Federal regulations at issue in this case. A decision in this case will clarify for these housing authorities when they can terminate participant in the Section 8 program for drug-related criminal activity. There is no Wisconsin case law on this issue and a published decision will enunciate a new rule of law. Given the statewide impact a published decision will have for both housing authorities and for Section 8 participants, this is a case of substantial and continuing public interest to housing authorities and the communities they serve. Pursuant to [Wis. Stat. §§ 809.23\(1\)\(a\)1 and 809.23\(1\)\(a\)5](#), the decision in this case should be published.

Argument

The Appellant, Housing Authority of the City of Milwaukee (HACM) presents four arguments on appeal: 1) the Section 8 contract allows HACM to terminate Gregory Mack (Mack) from the Section 8 program; 2) Mack had an alleged pattern of drug use which permitted HACM to terminate him from the section 8 program; 3) it is irrelevant when Mack's alleged drug use took place; and 4) it is irrelevant where Mack's alleged drug use took place. Legal Action believes the circuit court correctly interpreted the Federal code and regulations and urges this court to affirm the circuit court. In order for a housing authority to terminate someone for drug-related criminal activity the housing authority needs to demonstrate either: 1) the participant is currently engaged in illegal drug use; or 2) the participant is engaged in a pattern of drug use on or near the premises which interfered with the health, safety, or right to peaceful enjoyment of the premises by other residents. In the present case, Mack was terminated for a single incident of drug-related activity which did not take place on or near his subsidized premises and occurred over three years prior to HACM's attempt to terminate him. The circuit court correctly decided the case and this court should affirm the circuit court's decision which reversed HACM's termination of Mack from the Section 8 program.

HACM focuses their arguments on whether the Section 8 contract or the Federal regulations are controlling on these issues. This brief will primarily focus on HACM's arguments related to the applicable Federal regulations, but a brief digression is first necessary to discuss why this brief will not directly address HACM's arguments regarding the Section 8 contract, and why this court should not consider these arguments.

1. HACM never raised the Section 8 contract with the circuit court and has waived this issue on appeal

Legal Action contends this court should not consider any arguments HACM has made regarding the parties' Section 8 contract. HACM has attached copies of the contract to the Appellant's Appendix. The contract is not contained in the record on appeal. HACM argues the contract is public record, although it has not specifically requested this court take judicial notice of the contract.

Even if this court did take judicial notice of the contract, it would not be appropriate for this court to consider the contract because HACM never raised the issue of the contract with the circuit court. HACM raised this issue for the first time in their brief to this court. This court should therefore consider any arguments HACM makes regarding the contract to be waived.

A complete review of the record on appeal shows no mention of the Section 8 contract at any point in the circuit court proceedings. HACM did not mention the contract in its answer (R.2); HACM did not submit the contract as part of the administrative record to the circuit court (R. 4); HACM's administrative decision makes no reference to the contract; (R. 4, p. 3); HACM did not mention the contract in its brief to the circuit court (R. 7); and the circuit court's decision makes no reference to the contract. (R. 8)

In its brief to this court, HACM focuses on the circuit court never considering the Section 8 contract: "the trial court never considered the terms of the Section 8 contract" ([Appellant's Brief](#) at p. 9) and; "the trial court's failure to consider the terms and conditions of the Section 8 contract runs through each of its subsequent analyses of the underlying federal regulations." ([Appellant's Brief](#) at p. 22)

Since HACM never even mentioned the Section 8 contract to the circuit court – much less raise any arguments concerning the contract – HACM cannot now complain the circuit court failed to take the contract into account in its decision.

HACM’s brief raises – for the very first time – a new issue based on documents which were never submitted to the circuit court. The general rule for appellate courts is to not consider issues raised for the first time on appeal. *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593-94, 218 N.W.2d 884 (Wis. 1974). An appellate court could consider a new issue if: 1) the issue is of statewide importance; 2) the issue is a question of law not dependant on the facts presented below; and 3) the issue is fully briefed and there are no factual disputes. *Estate of Hegarty v. Beauchaine*, 2001 WI App 300, ¶¶ 11-13, 249 Wis. 2d 142, 638 N.W.2d 355 (Wis. App. 2001). None of these exceptions apply to this case.

This court could address the contract issue if it believes the issue would be of statewide importance and could result in judicial economy. *State v. Schmaling*, 198 Wis. 2d 756, 763, 543 N.W.2d 555 (Wis. App. 1995). Legal Action would agree this case presents an important question of statewide importance, but the particular issue HACM’s seeks to advance does not. The waived issue HACM seeks to raise is based on a unique contract. While the issues Legal Action raises in support of the circuit court’s decision are of statewide importance, they are only of statewide importance because they are based on Federal regulations every housing authority in Wisconsin must follow. HACM’s new argument focuses on a unique contract specific to a particular housing authority, and so the court’s decision on this issue will not be of statewide importance.

This court could consider the issue if it was one based on a question of law, not on the facts presented to the circuit court. *In re Graffin v. Hulett*, 6 Wis. 2d 20, 27, 94 N.W.2d 127 (Wis. 1959). HACM's new issue regarding the contract does not meet this possible exception to the general rule of waiver because the contract issue is one based entirely on the facts presented below. The contract at issue was never part of the record before the circuit court and was never even mentioned anywhere in the circuit court record. Mack was never given the opportunity in the circuit court to contest any of the facts regarding the contract and so this issue is not a question of law, but one based on facts which could possibly be contested.

Finally, this court could consider the contract issue if it were fully briefed and there are no factual disputes. *Wirth v. Ebby*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (Wis. 1980). Even if this issue was fully briefed before the circuit court, there could be possible factual disputes concerning the contract, and so HACM's new issue does not meet this exception to the general rule of waiver.

Even if this court were to take judicial notice of the Section 8 contract, by failing to raise the issue of the contract with the circuit court, this court should rule HACM waived this issue. Since the waived contract issue does not meet any of the exceptions to the general rule of waiver, this court should ignore HACM's arguments regarding the contract and focus – as the circuit court did – on the applicable Federal regulations. As set forth below, HACM must follow the applicable Federal regulations when terminating a participant in their Section 8 program. Even if this court took up the issue of the Section 8 contract, HACM's arguments on this point should fail because the contract is contrary to the Federal regulations.

2. Federal regulations do not allow for HACM to terminate Mack's Section 8 assistance

HACM argues Mack should have been terminated from the Section 8 program in 2008 because he plead guilty to two misdemeanor drug offenses in 2005. While HACM may desire to terminate Mack because of this conviction, the applicable Federal regulations do not allow for a housing authority to terminate someone from the Section 8 program for alleged drug-related activity which took place over three years prior to the termination and did not occur on or near the subsidized premises. While HACM may find this "zero tolerance" approach to be desirable, it is not an approach the Federal regulations allow HACM to take.

As the circuit court noted, there is one provision of Federal law and two Federal regulations at issue: [42 U.S.C. § 1437f\(d\)\(1\)\(B\)\(iii\)](#), [24 C.F.R. § 982.553\(b\)\(1\)\(A\)](#), and [24 C.F.R. § 982.553\(b\)\(1\)\(B\)](#). In its brief to the circuit court, HACM argued the US Code required a termination of tenancy of participants convicted of any drug-related crimes. (R. 7, p. 6) This blanket statement overlooks the clear and unambiguous language of the Code, which requires a Section 8 contract between the housing authority and the owner of the rental property being subsidized include the following:

(iii) **during the term of the lease**, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, **or any drug-related criminal activity on or near such premises**, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, **shall be cause for termination of tenancy.** [42 U.S.C. § 1437f\(d\)\(1\)\(B\)\(iii\)](#) (emphasis added)

HACM has not addressed this provision of the US Code in its brief to this court. This provision only applies to a landlord terminating the tenancy of a participant. It does not apply to a housing authority terminating the participant's Section 8 assistance.

Assuming this provision of the Code was extended to cover a housing authority's termination of assistance, the circuit court correctly noted this provision only allows for termination of tenancy if the tenant commits drug-related criminal activity: 1) during the term of the lease; and 2) on or near the subsidized premises. (R. 8, p.5-6) There was no allegation or evidence offered that Mack's drug-related activity took place during the term of his lease in effect when the housing authority terminated him. (R. 8, p. 6) The circuit court also correctly noted the drug-activity took place over a mile away from the subsidized premises. (R. 8, p. 5)

The provisions of Federal law which do set out the guidelines for when a housing authority can terminate a participant's Section 8 assistance are found at [24 C.F.R. § 982.553\(b\)\(1\)\(A\) and \(B\)](#):

(1) 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.

These guidelines provide two mutually exclusive bases for HACM to potentially terminate Mack. The circuit court correctly held neither basis allows for Mack's termination.

HACM has accurately set forth the standard for review for administrative regulations. ([Appellant's Brief](#) at pp. 6-7) The standard of review is de novo, and the same rules of interpretation this court applies to statutes applies to administrative regulations. *Williams v. Integrated Cmty. Servs.*, 2007 WI App 159, ¶ 12, 303 Wis. 2d 697, 736 N.W.2d 226 (Wis. Ct. App. 2007) (citations omitted). The court should look to the plain meaning of the regulation and only needs to turn to extrinsic sources if the regulation is ambiguous. *Id.* at ¶ 12-13. The regulation at issue here is clear and unambiguous.

Under the first provision, HACM could terminate Mack if they demonstrated he was “currently engaged in any illegal use of a drug.” [24 C.F.R. § 982.553\(b\)\(1\)\(A\)](#) As the circuit court found, HACM never alleged Mack was currently engaged in any illegal drug use at the time of his termination, only that he had been arrested three years prior to his termination. (R. 8, p 6) HACM did not specifically address this subsection in its brief to this court or the circuit court. The circuit court, however, did address the provision and held the housing authority did not allege Mack was currently engaged in illegal drug use at the time of his termination. (R. 8, p. 6)

The second provision of the Federal regulations allows for HACM to terminate Mack if they demonstrated he engaged in “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\(b\)\(1\)\(B\)](#) The circuit court held HACM failed to provide any evidence Mack was engaged in a pattern of illegal drug use interfering with the other residents. (R.8, p. 6) HACM has argued it did demonstrate a pattern of drug use, but never made any arguments to the circuit court or this court about whether Mack’s drug use in 2005 interfered with “the health, safety, or peaceful enjoyment of the premises by

the other residents.”

HACM argues it is not required to demonstrate Mack engaged in a pattern of drug use. ([Appellant’s Brief](#) at p. 16) This position is clearly at odds with the Federal regulations which require a “pattern” of drug-use. Mack testified at the informal hearing in 2008 that he no longer used drugs and had successfully completed drug counseling and rehabilitation. (R. 4, p 12) HACM submitted no evidence Mack had engaged in any drug use – much less any pattern of drug use – since 2005. The Federal regulations require a housing authority to demonstrate a pattern and HACM failed to do so.

Even if this court were to accept HACM’s argument that Mack engaged in a pattern of drug-related activity, the Federal regulations also require that in order for HACM to terminate Mack’s Section 8 assistance, HACM must demonstrate the pattern interfered with “the health, safety, or personal enjoyment of the premises by the other residents.” [24 C.F.R. § 982.553\(b\)\(1\)\(B\)](#). HACM never provided any evidence Mack’s drug-use in 2005 interfered with the residents in his apartment complex in 2008. HACM has never argued to the circuit court or this court any such evidence exists, but merely appears to argue this Federal regulation is not controlling or should be ignored. Since HACM failed to follow the Federal regulations, this court should affirm the circuit court’s decision to reverse HACM’s termination of Mack’s Section 8 assistance.

Conclusion

In its brief to this court, HACM focuses its arguments on an issue it never raised with the circuit court. Legal Action urges this court to hold HACM waived any arguments regarding the issue of the parties Section 8 contract. Under the applicable Federal regulations, the circuit court correctly held HACM could not terminate Gregory Mack's Section 8 assistance for one incident of drug-related criminal activity which occurred three years prior to the termination and did not occur at the subsidized premises. Legal Action therefore respectfully requests this court affirm the decision of the circuit court.

Dated this 27th day of May, 2010

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Certifications

I certify this Brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for an amicus brief produced using 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 iv-9 of this Brief is 2,692 words.

I certify I have submitted an electronic copy of this Brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief, excluding the appendix, filed with the court and served on all opposing parties.

Dated this 27th day of May, 2010

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