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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0939**

Tina Stringer,
Relator,

vs.

Public Housing Agency of the City of Saint Paul,
Respondent.

**Filed April 9, 2018
Affirmed
Kirk, Judge**

St. Paul Public Housing Agency

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

Lyndsey M. Olson, St. Paul City Attorney, Sean D. Whatley, Assistant City Attorney, St.
Paul, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Kirk, Judge; and Klaphake,
Judge.*

UNPUBLISHED OPINION

KIRK, Judge

Relator appeals the St. Paul Public Housing Authority's (PHA) termination of her
Section 8 Housing Choice Voucher Program (Section 8) housing assistance, arguing that

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

(1) there was insufficient evidence of drug related criminal activity by her son and household member, (2) her son's 2009 possession conviction did not occur within a "reasonable time" to support termination of relator's housing assistance in 2016, and (3) the termination hearing officer failed to conduct a sincere inquiry into the mitigating circumstances. We affirm.

FACTS

Relator Tina Stringer became a Section 8 housing assistance participant in 1999. Relator's son was added to her household and became a participant in 2008. On October 26, 2009, relator's son was arrested and charged with marijuana possession following a traffic stop. On October 28, relator's son pleaded guilty to misdemeanor possession of more than 1.4 grams of marijuana in a motor vehicle in violation of Minn. Stat. § 152.027, subd. 3 (2008). After son's 2009 conviction, relator and her son signed annual certifications denying any drug related criminal activity by any household member and affirming that the information they provided was true or accurate and complete.

In 2016, the PHA conducted a random criminal background search and discovered son's 2009 conviction. On September 26, 2016, the PHA issued a notice of termination for relator's Section 8 housing assistance based on violations of the family obligations and voucher agreement, namely relator's and her son's failure to supply true and correct information for several years in their annual certifications, and son's 2009 drug related criminal conviction. Relator requested a hearing, and a hearing was held before a PHA hearing officer on April 19, 2017.

Relator appeared with an advocate at the hearing. A representative from the PHA and the Section 8 program manager also appeared; relator's son did not appear. The hearing officer heard statements from relator, her advocate, the PHA representative, and the Section 8 manager and some of the mitigating circumstances were discussed. The hearing officer also received and reviewed copies of the applicable federal regulations, as well as the PHA's Admissions and Occupancy Policies (AOP), relator's Section 8 voucher, relator's family obligations certifications, and relator's and her son's annual certifications.

The hearing officer found that relator and her son failed to follow the Section 8 program rules based on the length of time that the son's drug-related activity was not reported. The hearing officer concluded that the PHA's termination of relator's housing assistance was authorized by the law and, given the extremely high demand for Section 8 housing assistance, affirmed the PHA's decision. Thereafter, the PHA denied relator's request for reconsideration, and relator petitioned for a writ of certiorari to this court, which we granted.

This 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.’” *Peterson v. Washington Cty. Hous. & Redev. Auth.*, 805 N.W.2d 558, 561 (Minn. App. 2011) (quoting *Carter v. Olmsted Cty. Hous. & Redev. Auth.*, 574 N.W.2d 725, 729 (Minn.

App. 1998)), *review denied* (Minn. Oct. 26, 2011).¹ We review an agency’s findings to determine if they support the decision, but we do not “retry the facts or make credibility determinations.” *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996). An “agency’s conclusions are not arbitrary and capricious so long as a rational connection [is articulated] between the facts found and the choice made.” *In re Review of 2005 Annual Automatic Adjustment of Charges*, 768 N.W.2d 112, 120 (Minn. 2009) (quotation omitted).

A public housing authority may terminate a participant’s Section 8 housing assistance if a family member violates the program’s family obligations, as enumerated in 24 C.F.R. § 982.551 (2016). 24 C.F.R. § 982.552(c)(1)(i) (2016). A “family” includes a person or persons “approved to reside in a unit with [Section 8] assistance.” 24 C.F.R. § 982.4(b) (2016). In relevant part, the family obligations require that a family supply “true and complete” information to the public housing authority as requested and as necessary to recertify eligibility, and prohibit drug related criminal activity by any household member. 24 C.F.R. § 982.551(b), (l).

24 C.F.R. § 5.100 (2016) and the PHA’s AOP further define “drug-related criminal activity” as “the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug.” A public housing

¹ The PHA’s proposed standard of review cites to Minn. Stat. § 14.69 (2016), which is part of the Minnesota Administrative Procedure Act (MAPA), Minn. Stat. §§ 14.001-14.69 (2016). The PHA does not have statewide jurisdiction, and the record is insufficient to determine if the city of Saint Paul has otherwise elected to apply MAPA to its agency decisions. *See State by Archabal v. County of Hennepin*, 495 N.W.2d 416, 420-21 (Minn. 1993) (analyzing the applicability of MAPA). However, MAPA’s “scope of review is similar to the common law scope of review on certiorari . . . , [and] the same standard applies regardless of [MAPA’s] applicability.” *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 304 n.1 (Minn. App. 2007).

authority must develop standards to terminate Section 8 assistance if a household member fails to abstain from drug related criminal activity. 24 C.F.R. § 982.553(b)(1)(iii) (2016). The PHA's AOP, relator's Section 8 voucher, and relator's family obligations and annual certifications reference the same federal regulations as noted above and include nearly identical family obligations and grounds for termination.

I. The record and law support the hearing officer's order affirming the PHA's termination of relator's Section 8 housing assistance based on her son's failure to provide true and complete information.

The PHA's first ground for terminating relator's Section 8 housing assistance was the family's failure to supply true and complete information regarding relator's son's arrest and conviction. The hearing officer acknowledged this ground in affirming the PHA's decision. Relator acknowledges her son's conviction, but challenges the termination of her housing assistance on this basis. The PHA argues that there is substantial evidence to support termination on this basis and that relator is responsible for violations committed by her household members, regardless of her personal knowledge.

At the termination hearing, and in the subsequent written decision, the hearing officer found that relator signed a Section 8 voucher in 2011, which was renewed annually, and signed multiple self and family obligations certifications from 2010 to 2016, in which she affirmed that neither she nor any household member had ever been arrested, charged, or convicted of drug related criminal activity. By signing those documents, relator acknowledged the family obligation to abstain from drug related criminal activity and the obligation to supply true and complete information to the PHA as requested or required.

Those documents also informed relator that failure to provide true and complete information to the PHA was a ground for termination.

The hearing officer found that relator and her son completed false certifications for several years. In the hearing officer's hearing summary, he noted that relator's and her son's false certifications constituted "separate, serious violations of [relator]'s Section 8 voucher agreement, the family obligations certificate, and federal regulations." At the termination hearing, relator explained that she was not aware of her son's conviction when she signed the certifications, that she would have reported it and removed him from the household if she had been aware, and that when she found out she did remove him. The hearing officer accepted relator's explanation as true. The hearing officer also found that relator's son "eventually left the household," but said in his statement of the proceedings that relator did not immediately notify the PHA.

There is sufficient evidence in the record to support the hearing officer's finding that relator was unaware of her son's conviction when she signed the certifications, and we defer to his credibility determination. *See City of Edina*, 547 N.W.2d at 416. However, this does not affect the hearing officer's finding that relator's son also signed false certifications for several years. That finding is also supported by the record.

The record shows that from 2009 to 2015 relator's son signed Section 8 self-certifications in which he affirmed that his responses were true or accurate and complete. The 2010 and 2011 certifications that relator's son signed asked if he had "ever been charged, arrested for, or convicted of any criminal activity related to the use . . . of a controlled substance (illegal drugs)." Relator's son responded "no." In 2012, possession

was added to this question, and from 2012 to 2015, relator's son was asked if he had "ever been arrested for, charged with, or convicted of any criminal activity related to illegal drugs: the possession [or] use . . . of a controlled substance," to which relator's son again responded "no."

The question's plain language asked about any criminal activity related to the possession of illegal drugs ever. It does not explicitly refer to "drug-related criminal activity" as defined under the federal code and the AOP, or specifically ask about possession with an "intent to use." The undisputed record shows that relator's son was convicted of possession of marijuana in a motor vehicle in 2009, and that he denied any such conviction when he signed his annual self-certifications. The hearing officer's decision to affirm the PHA's termination for relator's son's undisputed failure to provide true and complete information is supported by the record and the law. *See* 24 C.F.R. §§ 982.551(b), .552(c)(1)(i).

However, relator maintains that her son's failure to disclose his 2009 simple-possession conviction does not provide the PHA with an indefinite basis to terminate her Section 8 housing assistance. Relator argues that there is a temporal limit on the family obligation to provide true and complete information. Relator relies on the 2016 self-certification form included in the record that requires participants to disclose an illegal-drug possession conviction *in the last five years*, as well as a provision in the AOP limiting termination for illegal controlled-substance use to *within a reasonable time*.

The record does not show that the hearing officer was asked to reach this issue below. Generally, "litigants are bound [on appeal] by the theory or theories, however

erroneous or improvident, upon which the action was actually tried below.” *Annis v. Annis*, 250 Minn. 256, 263, 84 N.W.2d 256, 261 (1957). Further, although relator generally argued that her son’s conviction was stale, in her principal appellate brief, she did not substantively argue that there are temporal limits on the obligation to give true and complete information until her appellate reply brief. Issues not raised or argued in an appellant’s principal brief on appeal generally cannot be raised in the reply brief. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010).

Even if we elected to consider relator’s staleness argument, we would conclude that it is without merit. The federal code does not provide a temporal limit on the underlying activity that can justify a participant’s termination of Section 8 housing assistance, as it does for a participant’s admission to the program. See 24 C.F.R. § 982.553(a)(1)(i), (a)(2)(ii) (2016) (providing that an applicant’s admission to the Section 8 housing program may be prohibited if the applicant has been evicted for, or engaged in, drug related criminal activity within a certain time period before applying for housing assistance). Further, relator’s son’s false certifications about his 2009 conviction predate the 2016 questionnaire that added the five-year temporal limit on termination for past illegal drug use. Relator’s son’s conviction is only beyond the five-year lookback now because he concealed it for years, in violation of his obligation to provide true and complete information.

II. We decline to reach the merits of relator’s drug related criminal activity arguments.

The PHA’s alternative basis for terminating relator’s housing assistance was her son’s conviction for drug related criminal activity. In affirming the PHA’s decision on this separate ground, the hearing officer made general references to portions of 24 C.F.R.

§§ 982.551-.553 (2016) in affirming the PHA's conclusion that relator's son's conviction was a violation of the family obligation to abstain from drug related criminal activity.

Relator argues that the PHA did not establish her son's "intent to use" the marijuana that he possessed, as required to meet the definition of "drug-related criminal activity" under 24 C.F.R. § 5.100 and the AOP. Relator also argues that the only evidence of her son's intent to use is found within the arresting officer's police report, which is hearsay. Because we have concluded that the record and the law support the hearing officer's findings and his decision to affirm the PHA's termination of relator's Section 8 housing assistance based on her son's failure to provide true and complete information, we need not determine whether her son's conviction met the definition of "drug-related criminal activity" under the code and the AOP so as to provide an alternate ground to affirm the PHA's termination.

III. The record shows that the hearing officer's conclusions regarding mitigating circumstances were not arbitrary and capricious.

Finally, relator argues that the hearing officer failed to sincerely consider the mitigating circumstances in this case before affirming the PHA's termination decision.

In determining whether to deny or terminate assistance because of action or failure to act by members of the family . . . [t]he PHA may consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure.

24 C.F.R. § 982.552(c)(2)(i) (2016).

The plain language of code section 982.552(c)(2)(i) makes the hearing officer's consideration of mitigating circumstances permissive. We have previously held that "a hearing officer is not required to consider mitigating factors . . . when deciding whether a relator's violation of a reporting rule is a terminable offense." *Peterson*, 805 N.W.2d at 564. Here, relator argues that because the hearing officer elected to consider mitigating circumstances he had an obligation to do so thoughtfully and sincerely. Relator contends that the hearing officer failed to analyze the seriousness of her case, her alleged disability, or the culpability of, or effects of termination on, her other family members. Relator also argues that she receives SSI and MFIP and that she was trying to obtain custody of her granddaughter.

The hearing officer indicated in his statement of the proceedings that Section 8 hearings are taken "very seriously" and that he considered the testimony and arguments of relator and her advocate, the PHA, and the Section 8 manager in reaching his decision. The hearing officer also noted that he gave relator multiple opportunities to raise further points at the hearing, but that relator did not do so.

The record shows that the hearing officer weighed several mitigating circumstances that he deemed relevant to his decision, as discussed in his written decision, and expanded upon in his statement of the proceedings. Although the hearing officer did not make findings on each mitigating factor listed in code section 982.552(c)(2)(i), he was not required to do so. The hearing officer emphasized the high demand for Section 8 housing assistance and the eight-year waiting list for other families before concluding that the

mitigating circumstances presented by relator did not counter-balance the family's failure to follow the Section 8 program rules.

Our role on appeal is not to replace the PHA hearing officer's findings with our own independent review of the mitigating circumstances. "If there is room for two opinions on a matter, the . . . decision is not arbitrary and capricious, even though the court may believe that an erroneous decision was reached." *In re Review of 2005 Annual Automatic Adjustment*, 768 N.W.2d at 120. Our review of the record shows that the hearing officer elected to and did sufficiently consider mitigating circumstances before reaching his decision. Although the circumstances of relator's case are unfortunate, the federal code, the PHA's policies and procedures, and the record support the hearing officer's findings, as well as his decision to affirm the PHA's termination of relator's Section 8 housing assistance. The hearing officer's decision was not arbitrary or capricious.

Affirmed.