CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511

Date: June 10, 2013

MEMORANDUM

TO: CDA Board

FROM: Maureen O'Brien, Assistant City Attorney

RE: Hearsay Standards - Public Housing Applicant Denials

1. Definition

Hearsay is defined by Wisconsin Statute § 908.01(3). In the broadest sense, hearsay is any statement other than in-person testimony. When a witness testifies in a hearing and repeats what someone else told her, that is usually hearsay. If a police report is presented to demonstrate what an officer observed, that report will usually be hearsay. However, if the officer appears at the hearing, he or she will be allowed to explain what happened, and will usually be allowed to look over the report to refresh his or her memory of the event.

Hearsay is usually prohibited from being used as evidence in trial. Generally, this allows clarifying questions to be asked of the person who made the statement at issue. For example, if a witness testifies that she heard Tom say that the blue car ran the red light, it would be difficult to determine from that witness whether Tom had a good view of the red light or not. The hearsay rule prohibits Tom's statement from coming into evidence unless he appears in person to explain it.

However, there are many exceptions to this rule that make understanding it much more complicated. One important exception allows witnesses to testify as to what the

defendant had said. Another allows hearsay if it is a prior inconsistent statement to something a witness said in the trial. The list of exceptions is extensive, and courts have spent years interpreting and clarifying the various ways in which they apply.

2. Applicability of Hearsay Rules to CDA Admissions

Hearsay is not technically relevant when CDA makes an initial admission decision. By definition, the hearsay rule only applies in the context of a trial or hearing. The rules of evidence prevent hearsay from being introduced in a trial, unless it falls into one of the exceptions discussed above. But the rules for administrative hearings are different than for trials. For example, federal regulations specifically declare that hearsay is admissible in hearings for Section 8 terminations. 24 CFR 982.555(e)(5). The same is true for state agency hearings pursuant to Wis. Stat. § 227.45(1).

Even though hearsay is *admissible* in an administrative hearing, that doesn't mean that it is necessarily strong enough to rest an entire case upon. Some hearsay might be as flimsy as gossip or rumor, while other hearsay might be written statements by eyewitnesses, signed under oath. It is this question – the question of the strength or reliability of the evidence – that makes hearsay a problem in an administrative hearing.

The law says that an administrative hearing officer must have "substantial evidence" to support his or her decision. *State ex rel. Harris v. Annuity & Pension Board, Employees' Retirement System,* 87 Wis. 2d 646 (1979). There is a question as to whether hearsay can legally count as "substantial evidence." The United States Supreme Court has held that hearsay may be considered substantial evidence if the evidence itself is reliable. *Richardson vs. Perales* 402 U.S. 389 (1971). This ruling would mean that a hearing officer needn't be a legal expert in hearsay to conduct a

hearing. It would allow a hearing officer to make a rational determination as to whether hearsay evidence is believable and convincing in each individual circumstance.

However, in *Williams*, the Wisconsin Court of Appeals declared that in a Section 8 applicant hearing, uncorroborated double-hearsay, when contradicted by non-hearsay, does not constitute substantial evidence. *Williams v. Housing Authority of City of Milwaukee*, 2010 WI App 14, 323 Wis.2d 179. Some argue that this ruling created a bright-line rule, declaring that hearsay is never reliable on its own, no matter what type of hearsay it is.

3. Conclusion

The implication of the *Williams* ruling on other types of CDA hearings, like any interpretation of hearsay rules and cases, can be very complicated. The ruling doesn't prevent the use of all hearsay evidence, but it does limit the extent to which hearsay evidence may be relied upon. A complete answer to how hearsay may be used in a hearing will depend on the specific facts at hand. The City Attorney's office works closely with CDA to address these questions on a case-by-case basis. If any questions arise regarding the application of the hearsay rules, CDA staff know to contact the City Attorney's office.