Tenant-Based Section 8 Terminating Participants and Informal Hearings

Kelly A. Casillas
Legal Counsel
Montana Department of Commerce
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Training Agenda Outline

I. Relevant Laws
II. Standard of Review
III. Due Process Requirements
IV. Evidentiary Requirements
V. Issues of Concern
VI. Questions

I. RELEVANT LAWS

A. Federal Statute

- United States Housing Act of 1937 (42 U.S.C. §1437, *et seq*.)
- **http://www.gpoaccess.gov/uscode/index.html**
  - Provides for housing assistance payment to aid low-income families obtain a decent place to live and promote economically mixed housing
  - Places restrictions on rent amounts and lease terms for Section 8 contracts
  - Definitions, including "Eligible Families"
  - Requires annual reviews of family income, annual inspections of units
  - Allows PHA to establish preferences for waiting list based on local housing needs and priorities
  - Bulk of Section 8 federal statutory requirements found in §1437f

Relevant Laws, cont.

B. Code of Federal Regulations (CFRs)

- **24 C.F.R. Part 5 - General HUD program requirements**
- **http://www.gpoaccess.gov/cfr/index.html**
  - Privacy requirements
  - Audits
  - Use of EIV system
  - Non-discrimination provisions
  - Additional lease provisions
  - Pet rules
  - Immigration status
  - Students
  - Tenant payments
  - Other FAQs

Relevant Laws, cont.

B. CFRs

- **24 C.F.R. Part 982 – Tenant-Based Section 8 Program**
  - Definitions
  - Selection of applicants; waiting lists
  - Issuance of voucher
  - Lease and tenancy
  - HQS and other unit standards
  - Family responsibilities
  - Denial of admission
  - Termination of tenancy
  - Special housing: SRO, congregate, group, shared, co-op, manufactured, homeownership

Relevant Laws, cont.

B. Other CFRs….

- 24 C.F.R. Part 792 – Section 8 Fraud Recovery
- 24 C.F.R. Part 888 – Fair Market Rent and Annual Adjustments
- 24 C.F.R. Part 903 – PHA Plans
- 24 C.F.R. Part 984 – Family Self Sufficiency Program (FSS)
- 24 C.F.R. Part 985 – Section 8 Management Assessment Program (SEMAP)

Relevant Laws, cont.

C. Public and Indian Housing (PIH) Notices

- PIH Notices provide "guidance, extensions, instructions, clarifications, announcements, and other policy information"
- http://www.hud.gov/offices/pih/publications/notices/
- Updated binder of PIHs

D. State Statute

- Provisions applicable to County and Municipal Housing Authorities (§7-15-2101, MCA, *et seq*.)
- http://data.opi.state.mt.us/bills/mca_toc/index.htm

Relevant Laws, Cont.

E. ARMs

- Contested case proceedings – see informal requirements

F. Attorney General Decisions

- 44 Mont. Op. Atty. General No. 23 (1992) – the Department has jurisdiction for administering the Section 8 voucher program in any area of the state, including areas currently served by an existing municipal authority

G. Administrative Manual

- http://housing.mt.gov/Hous_S8_Apps.asp
- Sets forth detail on grounds for termination, process for all Section 8 requirements, informal hearings

H. Local Policies/Internal Policies

II. STANDARD OF REVIEW

A. Burden of Proof/Persuasion

- Burden of Proof: burden of proving some aspect of a case falls on one of the parties (ex: beyond a reasonable doubt)

- In civil cases, the burden of proof takes two forms: burden of persuasion and burden of production.

- Burden of persuasion – HUD has proscribed for informal hearings that the burden of persuasion is the "preponderance of the evidence."

- Preponderance of the evidence standard
  - Definition: "a greater weight of evidence, or evidence which is more credible and convincing to the mind; that which best accords with reason and probability; it rests with that evidence which, when fairly considered, produces the stronger impression, and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition"
  - If the evidence is so evenly balanced that the hearing officer is unable to say that the evidence on either side is more convincing, the finding on the issue must be against the party with the burden proving it.

- Case law – "the PHA bears the burden of persuasion at an informal administrative hearing held pursuant to HUD regulations to determine whether a Section 8 participant's housing subsidy should be terminated."

- The PHA must meet this burden as to each required element (and the facts that establish each element).

- Example: Unreported change in family composition. Section II-R of the Admin Manual requires participants to:

  1) report changes

  2) in family composition and income

  3) in writing

  4) within 30 days of the change

  5) on MDOC form.

  Section II-F, Occupancy Policy, provides that:

  6) an adult visitor

  7) will be considered a member of the family

  8) if he/she stays in a rental unit

  9) for more than 30 days/year.

- PHA must prove all nine elements by preponderance of the evidence to terminate this participant on these grounds.

Standard of Review, cont.

- **Burden of production** – finding and presenting the evidence to meet the burden of persuasion.

- Example: Unreported guest in unit for more than 30 days per year.

- Must find the witness(es), interview witness(es), and have witness(es) available for cross-examination during the informal termination hearing. If evidence is in writing, who wrote it? Is it hearsay? If so, must have witness(es) available for cross-examination.

III. DUE PROCESS REQUIREMENTS

- Constitutional Right to Due Process
- U.S. Constitution, 5th Amendment – "No person shall be … deprived of life, liberty, or property, without due process of law…"
- Montana Constitution, Art. II, Section 17 – same

- WHEN is process "due"? Must have legitimate claim of entitlement to a protected property interest.

- 1970 – Goldberg v. Kelly, 397 U.S. 254 – U.S. Supreme Court held public welfare benefits are protected property interests.

- When does a Section 8 tenant have a legitimate claim of entitlement to the voucher?

- Claim of entitlement arises from the federal statute: both a claim of eligibility (new voucher recipient) and continued benefits so long as one meets the statutory criteria (existing voucher recipient).

Due Process Requirements, cont.

- WHAT process is due? Five requirements to meet Goldberg:
  - timely notice from the PHA, stating the basis for the proposed termination;
  - an opportunity for the tenant to cross-examine each witness relied on by the PHA;
  - the right of the tenant to be represented by counsel;
  - a decision, based solely on evidence adduced at the hearing, setting for the reasons for the decision; and
  - an impartial decision maker.

Due Process Requirements, cont.

A. Notice

- Notice procedure, informal requirements for federal and state Administrative Procedures Act
- When is notice timely?
- Notice must state the basis for the proposed termination
  - Must provide legal grounds for termination
  - Must provide factual grounds for termination
- Informal hearing process

Due Process Requirements, cont.

B. Fair Hearing

- 24 CFR § 982.555 sets for when informal hearing required
- Must follow process set forth in 24 C.F.R. § 982.555, MDOC Admin Manual
- Participant must request hearing in writing within 20 days of the date of the written notice of the decision
- Hearings held telephonically, if requested by participant
- Request for all documents prior to hearing; all MDOC documents must be provided to participant before hearing

IV. EVIDENTIARY REQUIREMENTS

A. Documentary Evidence

- Written correspondence, notes, reports, etc.
- Must provide copies to all parties prior to hearing; offer as exhibits during the hearing

B. Testimony

- Provided at hearing, opportunity to respond – cross-examination.

C. Reliability

- Trustworthiness, hearsay (ability to perceive, memory, narration, and sincerity: must be under oath or affirmation, in person, and subject to cross.)

Hearsay

- Definition – "A statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of matter asserted in the statement."

- BASIC RULE: "Is the person who made the statement in the witness chair at the hearing?" If not, it's hearsay!

- In general rules of evidence, hearsay is **not admissible** ("Hearsay Rule"). Why?
  - Judge/hearings officer is not in a position to assess the accuracy of the statement, or the weight to be assigned to the "fact" sought to be proven by the statement;
  - Not made under oath;
  - Cannot observe the witness's demeanor;
  - Not subject to cross-examination
- 30 "exceptions" to the Hearsay Rule
- HUD hearings do not need to follow the normal rules of evidence (so can accept hearsay into the record); **BUT** cannot take away a person's voucher on hearsay alone

- What do you have to do to avoid the Hearsay Rule?
  - Generally, if you intend to use the statement to prove a fact, the witness making the statement must testify at the hearing (in person or by phone)
    - Ex: Police report submitted – statements written down by police officer are usually (double) hearsay. Must have the witness making the statement to the officer testify at the hearing, or the police officer, if he or she was a witness to the event him/herself.
  - Participant must have the opportunity to cross-examine the witness
  - If the first two are not possible, must provide additional evidence (documents, testimony, etc.) to prove the truth of the matter asserted. As hearings officer, I will generally let the hearsay in as evidence (different from court), but will not terminate based on hearsay alone.

V. ISSUES OF CONCERN

A. Deferred sentences/criminal activity
   - In Montana, a "deferred" sentence suspends the conviction until conditions are met – IF MET, no conviction ever occurs.
   - Generally speaking, must have a conviction to terminate for criminal activity

B. Changes in family composition

C. Denial v. Termination – due process applies to both

QUESTIONS

Contact Information
Department of Commerce

Laura Morrison
Program Manager
841-2828
lmorrison@mt.gov

Kelly A. Casillas
Legal Counsel
841-2727
kcasillas@mt.gov

http://commerce.mt.gov/housing