

AVOID THE SECTION 8 TERMINATION BLUES

**NAHRO SPRING CONFERENCE
Madden's on Gull Lake
May 25, 2007
8:00 to 9:15**

Presented by:

Mary G. Dobbins
7400 Metro Boulevard
Suite 100
Edina, MN 55439
(952) 893-2925

and

Robert A. Alsop
Kennedy & Graven, Chartered
470 US Bank Plaza
200 South Sixth Street
Minneapolis, MN 55402
(612) 337-9224

I. INTRODUCTION

Federal law provides applicants to and participants in the Section 8 Housing Choice Voucher Program certain due process rights if such benefits are either denied or terminated by a public housing authority (“PHA”). The following materials are intended to summarize the appropriate due process procedures available to Section 8 participants and also provide practical suggestions to avoid PHA termination decisions from being overturned on appeal.

ALL STEPS IN THE TERMINATION PROCESS SHOULD BE TAKEN WITH THE EXPECTATION THAT THE CASE WILL BE SUBJECT TO CHALLENGE AND REVIEW BY THE COURT OF APPEALS.

II. THE DECISION TO TERMINATE SECTION 8 ASSISTANCE

A. Grounds for Termination of Section 8 Assistance

Federal regulations outline both mandatory and discretionary grounds for terminating assistance under the Housing Choice Voucher Program.

1. Mandatory Termination of Assistance.

Federal regulations identify the following instances when a PHA **MUST** terminate Section 8 assistance:

- a. Participant fails to sign and submit consent forms required for obtaining information on family status as part of reexaminations conducted by the PHA.
- b. Participant fails to declare citizenship or provide documentation of eligible non-citizen status within the prescribed timeframes.
- c. Participant is evicted from housing assisted under the program for serious or repeated violations of the lease.

2. Discretionary Grounds for Termination of Assistance.

Federal regulations allow the PHA to terminate assistance based on the action or inaction of the Section 8 participant. 24 C.F.R. §982.552(a).

Decisions to terminate assistance are often based on the participant’s violation of a family obligation under Housing Choice Voucher Program. 24 C.F.R. §982.552(a). Examples of such violations include the following:

- Failure to supply information that the PHA or HUD determines is necessary in the administration of the program
- Breach of HQS requirements in the unit caused by the family.
- Failure to allow the PHA to inspect the unit at reasonable times and after reasonable notice.
- The family commits a serious or repeated violation of the lease.
- The family fails to notify the PHA and the owner before the family moves out of a unit.
- The family fails to promptly give the PHA a copy of any owner eviction notice.
- The family fails to use the assisted unit for its sole residence.
- The family fails to promptly notify the PHA of any change in the composition of the family members residing in the unit.
- Members of the household wrongfully engage in legal profitmaking activities in the unit.
- The family fails to promptly notify the PHA of any absences from the unit.
- A member of the family commits fraud, bribery or other corrupt or criminal act in connection with the program.
- A member of the family is engaged in criminal activity or alcohol abuse as described below.
- If the family has not reimbursed any PHA for amounts paid to an owner under a HAP contract for rent, damages to the unit, or other amounts owed by the family under the lease.

In determining whether to terminate assistance because of action or failure to act by members of the family, the PHA may consider all relevant circumstances such as (1) the seriousness of the case; (2) the extent of the participation or culpability of individual family members; (3) mitigating circumstances related to the disability of a family member; and (4) the effects of termination of assistance on other family members who were not involved in the action or failure. 24 C.F.R. §982.552(c)(2).

3. Termination of Assistance for Criminal Activity or Alcohol Abuse

The PHA must establish standards that allow for the termination of assistance if the PHA determines that:

- a. A member of the household is engaged in any illegal use of a drug.
- b. A member of the household has been convicted of drug-related criminal activity for the manufacture or production of methamphetamine on the premises of federally assisted housing.
- c. A member of the household engages in drug-related criminal activity, violent criminal activity or other criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents or persons residing in the immediate vicinity of the premises.
- d. A member of the household abuses or has a pattern of abuse of alcohol that threatens the health, safety or right to peaceful enjoyment of other residents on the premises.

The PHA may terminate assistance for criminal activity regardless of whether the household member has been arrested or convicted of the offense. If the PHA does not wait for the conviction, it should be prepared to establish the criminal activity by a preponderance of the evidence.

If the PHA proposes to terminate assistance based on a copy of a relevant criminal record, the PHA must provide the family with a copy of the criminal record prior to the informal hearing and provide the family with the opportunity to dispute the accuracy or relevance of the record.

The PHA may consider a household member's participation or completion in a supervised drug or rehabilitation program in determining whether to terminate assistance for illegal drug use or alcohol abuse.

The PHA may prohibit the offending household member from residing in the unit as condition of providing continued assistance to the remaining family members.

B. Practical Considerations Related to the Termination Decision

- Identify and gather relevant facts supporting the decision to terminate – both in terms of witness testimony and documents.
- Be prepared to establish the underlying crime or lease violation, if the PHA is unable to wait for the completion of any pending judicial proceedings (i.e. criminal action or eviction proceeding).

- Anticipate possible defenses or objections to the termination decision, including but not limited to claims of discrimination, failure to accommodate and possible application of VAWA.
- The decision to proceed with the termination will depend on the grounds for the termination, the nature and scope of the evidence supporting the decision and the mitigating factors required to be considered by the PHA under 24 C.F.R. §982.552(c)(2) (see above).
- Anticipate judicial review of the termination decision and prepare a comprehensive record that meets the standard of proof required by the appellate court.

C. Notice of Termination

Written notification of the decision to terminate assistance must be provided to the owner and participant with the following:

- Identify the reasons for the termination of assistance.
- Identify the effective date that assistance will be terminated.
- Advise the participant of the opportunity for informal review of the decision and the means by which review can be obtained.
- Advise the participant of the right to review all relevant documents supporting the decision to terminate assistance and the means by which such documents can be obtained.

The PHA is limited to the reasons identified in the written notice and will be precluded from relying on other grounds or evidence without supplementation of the original written notice.

III. THE HEARING

A. Discovery Prior to Hearing

1. By family

- a. Under the federal regulations, “the family must be given the opportunity to examine before the PHA hearing any PHA documents that are directly relevant to the hearing. The family must be allowed to copy such document at the family’s expense. If the PHA does not make the document available for examination on

request of the family, the PHA may not rely on the document at the hearing”. 24 C.F.R. §982.555(e)(2)(i).

- b. Notice of right to examine documents should be included in termination notice.
- c. Only documents that are relevant to the hearing are required to be produced.
- d. The term “document” is defined as including “records and regulations”. 24 C.F.R. § 982.555(e)(2)(iii).
 - Be sure to include copies of any regulations relied upon to support the termination.
- e. What about documents including witness names or names of persons who have made complaints about the participant?
 - Some witnesses or complainants are fearful of retaliation by participants.
- f. There is nothing in the regulations restricting the PHA from putting reasonable restrictions on time and manner of examination of documents.
- g. PHA should require written permission for Release of Information signed by the participant if any person other than the participant seeks access to the documents or participant file.

2. By PHA

- a. The federal regulations provide that “the PHA hearing procedures may provide that the PHA must be given the opportunity to examine at PHA offices before the PHA hearing any family documents that are directly relevant to the hearing. The PHA must be allowed to copy any such documents at the PHA’s expense. If the family does not make the document available for examination on request of the PHA, the family may not rely on the document at the hearing. 24 C.F.R. § 982.555(e)(2)(ii).
 - In order to require production of documents by the family, the PHA’s hearing procedures must provide for the examination of the family’s documents by the PHA prior to the hearing.
 - If the participant is represented by counsel, it may be possible to simply agree to exchange documents prior to the hearing.

B. The Hearing Officer

1. Under the federal regulations, “the hearing may be conducted by any person or persons designated by the PHA, other than a person who made or approved the decision under review or a subordinate of this person.” 24 C.F.R. §982.555(e)(4)(i).
2. Selection of Hearing Officer
 - a. It is important that the Hearing Officer be familiar with the requirements of the Section 8 program.
 - b. Experience in conducting hearings can be helpful.
 - c. The hearing officer must be able to control the conduct of the hearing.
 - d. Some PHAs use hearing officers that are employed in another department of the PHA.
 - Cannot be person who made the challenged decision or someone who reports to the person making the decision.
 - e. Some PHAs use either current or former employees of other PHAs as hearing officers.
 - f. The PHA should make certain that the selected Hearing Officer does not have a conflict of interest [for example, prior contact with the participant].
 - g. The Hearing Officer must maintain and demonstrate objectivity during the proceeding.
 - h. Pre-hearing contacts between either party and the Hearing Officer should be limited to administrative matters [for example, scheduling].
 - Neither party should submit materials regarding the case to the Hearing Officer prior to the hearing, unless it is done with the knowledge and consent of all parties.
 - i. Appearance of impartiality and fairness, as well as actual impartiality and fairness is important.

C. Timing of Hearing

1. According to the federal regulations, “the PHA must proceed with the hearing in a reasonably expeditious manner upon the request of the family. 24 C.F.R. §982.555(d).
2. The hearing must take place before the housing assistance is terminated. 24 C.F.R. §982.555(a)(2).

D. Hearing Procedures

1. The PHA’s Administrative Plan “must state the PHA procedures for conducting informal hearings for participants”. 24 C.F.R. §982.555(e)(1).
2. Many PHAs include a copy of the agency’s Hearing Procedures with the termination notice that is sent to the participant.
3. Under the federal regulations, “the person who conducts the hearing may regulate the conduct of the hearing in accordance with the PHA hearing procedures”. 24 C.F.R. § 982.555(e)(4)(ii).

E. Limited English Proficiency Issues

1. The PHA should comply with HUD’s Guidance with respect to persons with Limited English Proficiency.
2. If in doubt, inquire regarding whether an interpreter is needed for the hearing.

F. Evidence at the Hearing

1. The PHA has the burden of convincing the Hearing Officer that its decision to terminate the assistance to the participant was correct.
2. According to the federal regulations, “the PHA and the family must be given the opportunity to present evidence, and may question any witnesses. Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings”. 24 C.F.R. § 982.555(e)(5).
 - a. Sometimes counsel for participants objects to evidence as being “hearsay”. That objection is not valid in this setting.
 - b. All evidence presented by either side should be relevant to the issues at the hearing. The hearing officer may exclude evidence that does not relate to the specific issues being considered.

3. The hearing record should be “closed” at the end of the hearing unless there is agreement by both parties that one or both may submit evidence at a later date or respond to evidence submitted by the other side.
4. In determining what evidence to present, the PHA should always be cognizant of the need to be certain that the hearing record contains ample evidence to support the termination. This is especially important if the case is appealed to the Minnesota Court of Appeals.

G. Representation at the Hearing

1. The federal regulations require that “at its own expense, a family may be represented by a lawyer or other representative”. 24 C.F.R. §982.555(e)(3).
2. The PHA may want to consider representation at the hearing in cases where it knows that the participant is represented by counsel.

H. Practical Considerations for the Hearing

1. Should the hearing be recorded?
 - a. A recording may facilitate the creation of a record if the case is appealed.
 - b. Tape recordings can be very difficult and costly to transcribe due to the difficulty of establishing who is speaking and what is being said. In addition, sometimes tapes may be difficult or impossible to decipher.
 - c. In specific instances, the PHA may want to consider retaining a court reporter to provide a transcript of the hearing.
2. How should evidence be presented?
 - a. Live testimony
 - b. Exhibit books or packets
 - c. Summary documents

THE PHA SHOULD MAKE SURE TO PRESERVE A COMPLETE SET OF ALL DOCUMENTS PRESENTED TO THE HEARING OFFICER BY BOTH PARTIES IN CASE OF A POSSIBLE APPEAL OF THE DECISION TO THE COURT OF APPEALS.

I. Reasonable Accommodation Issues

1. In some instances, the participant raises a request for reasonable accommodation for the first time at the hearing.
 - a. Is this an appropriate issue to be determined by the Hearing Officer?
 - b. Should the matter be returned to the PHA for a determination regarding the request?
 - c. Is the request for an accommodation timely at this stage of the proceeding?

IV. THE DECISION AND THE APPEAL

A. The Decision

- Federal regulations require the hearing officer to issue a written decision a brief statement indicating the reasons of the decision. 24 C.F.R. §982.555(e)(6).
- The Minnesota Court of Appeals decision of *Carter v. Olmstead County Housing and Redevelopment Authority*, 574 N.W.2d 725 (Minn. Ct. App. 1998) raises the following issues with respect to the decision:
 - *Carter* requires that the facts and conclusions essential to the hearing officer's decision be stated with clarity and completeness (i.e. identify the evidence upon which the hearing officer relied and how the evidence connects rationally with the ultimate decision).
 - Decisions that are not supported with proper findings will be considered "prima facie arbitrary" for purposes of the appeal.
- The PHA should immediately send a copy of the decision to the participant and their counsel – making special note of the date of delivery for purposes calculating the deadline for a possible appeal of the decision.
- Pursuant to 24 C.F.R. §982.555(f), the PHA is not bound by the hearing officer's decision if:
 1. the PHA was not required to provide an informal hearing to the participant or the hearing officer exceeded his/her authority under the hearing procedures; or

2. the decision is contrary to HUD regulations or otherwise contrary to federal, state or local law.

- If the PHA determines that it is not bound by the decision, the family must be notified immediately of the determination and the reasons related thereto.

B. Judicial Review of the Decision

1. Commencement of the Appeal.

Termination of a Section 8 housing voucher constitutes a quasi-judicial decision that is reviewed by means of a writ of certiorari before the Minnesota Court of Appeals.

THE WRIT OF CERTIORARI MUST BE OBTAINED FROM THE COURT AND SERVED ON THE PHA WITHIN SIXTY (60) DAYS OF THE PARTICIPANT'S RECEIPT OF THE DECISION FROM THE PHA.

2. The Record on Appeal.

A complete record of the proceedings must be submitted to the Court of Appeals. The appellate rules of procedure permit the record to be prepared in one of the following ways:

- a. A transcript of the proceedings is prepared and filed with the court along with all exhibits and papers provided to the hearing officer.
- b. A statement of the proceedings and list of all documentary evidence is prepared by the hearing officer after receiving proposed statements of the proceedings from each of the parties to the appeal.
- c. A stipulated statement of the proceedings is prepared and signed by each of the parties to the appeal.

THE COURT'S REVIEW OF THE CASE IS LIMITED EXCLUSIVELY TO THE RECORD PRESENTED BEFORE THE HEARING OFFICER – NO OTHER EVIDENCE WILL BE CONSIDERED BY THE COURT OF APPEALS.

3. Process and Standard of Review

- Each of the parties will submit formal briefs to the Court of Appeals outlining the specific arguments and authority relevant to their respective positions.

- An agency's quasi-judicial decision will be upheld unless it is not supported by substantial evidence, based on an erroneous interpretation of the law, outside the agency's jurisdiction, procedurally defective, or arbitrary and capricious.
- The appellate court examines the findings to determine if they support the decision, but does not retry facts or challenge the credibility determinations of the agency.
- The interpretation of a statute or regulation is a question of law, which the court reviews de novo.
- A decision is rendered by a three-judge panel after oral arguments are made by counsel for each of the parties.
- The Court of Appeals will generally affirm, reverse or remand the decision back to the PHA for additional action or consideration.
- An aggrieved party may seek review of the Court of Appeals' decision by the Minnesota Supreme Court but such requests rarely granted and only in very limited situations.