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Table of Contents

Cover: Esperanza, a 120-unit public housing complex that is owned and operated by the Housing Authority of the City of Alameda, California.

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Courts Embellish Procedural Protections for Voucher Terminations

Participants in the Section 8 voucher program, the largest HUD housing subsidy program, often face terminations based on shaky evidence, with hearings before housing authority-designated hearing officers. While previous cases have established that voucher terminations must comport with due process protections,[1] several recent decisions have further detailed the meaning of those protections. Four recent cases on this topic are *Basco v. Machin,*[2] *Kundiger v. Lichterman,*[3] *Hendrix v. Seattle Housing Authority,*[4] and *Carter v. Lynn Housing Authority.*[5] These cases provide useful tools to help prevent unfair or improper voucher terminations.

Sufficiency of Evidence

Two of these recent cases have examined the sufficiency of evidence required for a voucher termination. In *Basco v. Machin*, the Eleventh Circuit provides a promising opinion on the rights of voucher holders in termination proceedings. The case arose when Teresa Basco faced a termination of her Section 8 voucher subsidy when the housing authority alleged an unauthorized tenant was residing in her unit.

As is required for Section 8 voucher tenancies, the housing authority had entered into a Housing Assistance Payments Contract with Ms. Basco's landlord, which ensured the housing authority would pay its housing subsidy on behalf of Ms. Basco. The contract restricted residency in the unit to those persons listed on the lease—Ms. Basco, her husband, and her five children. HUD regulations also prohibit unauthorized residents,[6] which the housing authority interpreted as anyone staying at the unit for more than fifteen consecutive days or more than thirty days total through the year.[7]

The conflict in this case arose when an anonymous person, claiming to be a neighbor of Ms. Basco, informed the housing authority that there were disturbances at her unit, which included arrests. The housing authority employee assigned to investigate the complaint then obtained two police reports: the first one had an attached statement from husband Joseph Basco saying that an Emanuel Jones was "staying at the house," and the second

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[1]For more information on prior cases, *see* NHLP, 36 Hous. Law Bull. 103, 107-08 (May 2006).
[2] ___ F.3d ___, 2008 WL 182249 (11th Cir. 2008).
[3]No. 37-2007-00050190-CU-PU-NC (Cal. Super. Ct. Jan. 25, 2008).
[4]2007 WL 3357715 (W.D. Wash. 2007).
[5]880 N.E.2d 778 (Mass. 2008).
[6]24 C.F.R. § 982.551(h)(2).
[7]*Basco* at *1.

one, issued almost five months later, included "Elonzel Jones" as an eyewitness to a battery, with his address given as Basco's. Based on those two reports, the housing authority decided to terminate Ms. Basco's assistance. The Housing Authority's Notice of Intent to Terminate implied that the housing authority believed Emanuel Jones and Elonzel Jones were the same person and that that person had been living in Ms. Basco's unit from at least February to July 2005 and was therefore an unauthorized resident.[8]

The appellate court found that the housing authority must carry the burden of persuasion; it had to demonstrate, with sufficient evidence, an actual violation of the unauthorized resident policy.

After receiving the notice, Ms. Basco requested an informal hearing. The housing authority presented the two police reports as evidence. Ms. Basco in turn provided her and her landlord's testimony, submitted notarized letters stating that Jones had lived at another address, and asked that her husband be allowed to testify by telephone. After denying that request, the hearing officer upheld the termination decision.[9] Ms. Basco appealed to the Section 8 administrator, who refused to overturn the hearing officer's decision. Pointing to the housing authority's policy that "The burden of proof that the individual is a visitor rests on the family,"[10] the administrator determined that Ms. Basco had not met this burden.

The Bascos then sued in federal court, claiming a violation of their procedural due process rights pursuant to Section 1983. They asserted that the housing authority improperly placed the burden of proof on them and denied them the opportunity to confront and cross-examine witnesses. The trial court rejected their claims, entering judgment for the housing authority.

On appeal, the appellate court separated the burden of proof question into two categories: who has the burden of persuasion and who carries the burden of production. It found that the housing authority must carry the burden of persuasion; it had to demonstrate, with sufficient evidence, an actual violation of the unauthorized resident policy. Once the housing authority met that burden, the tenant would have the burden of production to show that the person was actually only a visitor.[11]

The second aspect of the Bascos' due process claim, that they did not have an opportunity to cross-examine adverse witnesses, folded into the court's analysis of whether or not the two police reports met the burden of persuasion. On this point, the court cited an earlier ruling, which cited four factors to use in determining the admissibility of hearsay evidence in an administrative hearing.[12] One of those factors states that hearsay should be considered if "the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant…"[13] The court noted the applicability of that factor to this situation, stating that it supported denying admission of the evidence. However, the court found that it need not answer that question to decide the case.[14] It held that even if the reports were admissible hearsay, they did not meet the housing authority's burden of persuasion, as they were "legally insufficient to establish a *prima facie* case that either Emanuel or Elonzel had resided at the Bascos' residence for fifteen consecutive days or for thirty days in a twelve-month period."[15] Under this logic, the housing authority should never have initiated this termination proceeding without more evidence.

Another recent case dealing with the sufficiency of evidence in a voucher termination is *Kundinger v. Lichterman*, a California state court case. In that case, James Kundinger, a man with schizophrenic disorder, got into a fight with his parents at their home, more than a mile away from his unit.[16] Because of the fight, the police were called to the parents' unit. Mr. Kundinger was then arrested and eventually pled guilty to misdemeanor disturbance of the peace, an offense that does not involve violence.[17] However, the police report stated that Mr. Kundinger had pushed and grabbed his father. Based on that police report, the San Diego Housing Authority (SDHA) filed a notice to terminate his Section 8 voucher for "violent criminal activity."[18] Mr. Kundinger requested an informal hearing, where the SDHA presented only the police report, minutes of the criminal proceeding, and a housing authority employee's testimony of a conversation with his parents. He had no opportunity to confront or cross-examine witnesses and was not allowed the opportunity to present his own witnesses.[19] After losing at the informal hearing, Mr. Kundinger sought a writ of mandamus in state court.

The court granted the writ. Like other decisions regarding due process and voucher terminations, the court's order compared the termination of a voucher to the termination of welfare subsidies and acknowledged that basic due process is required. However, in this case,

[8] *Id.* at *5.
[9] *Id.* at *2.
[10] *Id.*
[11] *Id.* at *5.
[12] *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1354 (11th Cir. 2000).
[13] *Basco* at *4, (*citing J.A.M. Builders*).
[14] *Id.* at *5.
[15] *Id.*
[16] Brief for Petitioner at 1, *Kundinger v. Lichterman*, No. 37-2007-00050190-CU-PU-NC (Cal. Super. Ct. Jan. 25, 2008) (order granting writ of administrative mandamus).
[17] *Id.* at 2.
[18] *Id.*
[19] *Id.*

the court based its decision on state law, which says that "hearsay alone is generally insufficient to support an administrative finding."[20] Rejecting the SDHA's argument that the hearing and the evidence admitted followed HUD regulations,[21] the court reasoned that because those regulations require a preponderance of the evidence standard, unsupported hearsay is still not sufficient to uphold a voucher termination. Thus, the court saw no reason to veer from the traditional rule that unsupported hearsay alone is insufficient to uphold a decision, even in an informal administrative hearing. By using state law in conjunction with traditional due process doctrine, Mr. Kundinger and his counsel were able to prevent a housing termination based on insufficient evidence.

Adequacy of Informal Hearing Procedures

Yet another recent decision, *Hendrix v. Seattle Housing Authority*, challenges the adequacy of the administrative remedy available by alleging a violation of the right to due process.[22] In this case, Tina Hendrix faced a voucher termination because of alleged misrepresentations of family size and income. When notified of the intent to terminate, she requested an informal hearing, as provided by the rules.[23]

After being granted an informal hearing, Ms. Hendrix filed suit in federal court and requested and received a preliminary injunction against the holding of the informal hearing until resolution of the lawsuit. She pursued this avenue because of an alleged pattern of deficiencies in the hearing policies and practices of the Seattle Housing Authority (SHA). The authority conducts numerous informal hearings under a sole hearing officer, who rarely decides in favor of the tenants. Part of this unfavorable record arises from the fact that SHA policy prohibits legal arguments and defenses from being raised at the informal hearing, including those based on cases and statutes. Thus, tenants may only use HUD regulations and SHA policies, as well as facts, in their defense.

The tenant brought two causes of action in her federal complaint. She sought a writ of prohibition against SHA for exceeding its authority, while also seeking declaratory and injunctive relief. These claims were based on the hearing officer's failure to consider material facts, using the wrong evidentiary standard, refusing to hear all relevant legal arguments, and the officer's lack of proper skills and training for adjudicating such matters.[24] SHA filed a motion to dismiss these causes of action, which the court partially granted and partially denied.

The court first dismissed the cause of action for a writ of prohibition, which stops proceedings of an entity that exceed its jurisdiction,[25] finding that SHA was acting within its authority to conduct pre-termination hearings, even if they were going to proceed incorrectly.[26]

The court did, however, refuse to dismiss the cause of action for a declaratory judgment and permanent injunction. Ms. Hendrix's request for declaratory and injunctive relief rested on two claims. First, she argued that the SHA failed to follow the administrative hearing requirements, using a "sufficient evidence" standard rather than a "preponderance of the evidence" standard. Second, she alleged that the SHA policies and practices constituted a violation of procedural due process under *Goldberg v. Kelly*.[27] In denying the SHA's motion to dismiss, the court stated that a housing authority must provide a full administrative review, and simply adhering to the minimum standards of a pre-termination review when there is no comprehensive post-termination review is inadequate under *Goldberg v. Kelly*. According to the court, Goldberg

[20] *Kundinger v. Lichterman*, No. 37-2007-00050190-CU-PU-NC (Cal. Super. Ct. Jan. 25, 2008) (order granting writ of administrative mandamus) (*citing* California Continuing Education of the Bar, California Administrative Mandamus, at § 3.65).
[21] 24 C.F.R. § 982.553.
[22] *Hendrix* at *4.
[23] 24 C.F.R. § 982.555.
[24] *Hendrix*. at *2.
[25] *Id*.
[26] *Id*. at *3.
[27] 397 U.S. 254 (1970).

SAVE THE DATES

Housing Justice Network National Meeting December 7 - 8, 2008

National Housing Training December 6, 2008

The next meeting of the Housing Justice Network (HJN) is scheduled for Sunday and Monday, December 7 and 8, 2008, in Washington, D.C. A full-day basic training on the federal housing programs will be offered on Saturday, December 6. Both events will be held at the Washington Court Hotel. Low-income housing advocates are invited to both events.

Scheduled for one month after the national elections, the HJN national meeting will be an excellent opportunity to begin planning for a new Administration. It will also serve as a forum for sharing the latest housing news and legal strategies with colleagues from all over the country. Prominent experts on affordable housing, the federally assisted housing programs, and related issues will be featured speakers and panelists. Do not miss two days of high-quality information sharing and discussions for low-income housing advocates and clients!

Detailed meeting information and conference registration forms will follow in the next several months. In the meantime, mark your calendar!

contemplated that "(1) as long as the broader, 'full administrative review' is offered post-termination, a pre-termination hearing need only contain the elements outlined in the opinion; and (2) it is permissible to roll all of these procedural requirements into a single hearing, as long as that hearing takes place before the termination of benefits."[28] The SHA procedures, insofar as they follow HUD regulations, only provide the pre-termination hearing requirements. Therefore, the court denied the defendant's motion for summary judgment because it found that the plaintiff had colorable claims on both issues.[29]

These cases once again demonstrate the continued need for advocates to diligently ensure that the basic due process rights of voucher participants are protected.

This initial success is very promising, but the case has yet to move to a trial on the merits. If the plaintiff succeeds, this would cement the housing authority's duty to provide more than a superficial review of voucher terminations, and may suggest that even HUD regulations are inadequate, as they only provide the pre-termination protections as required by *Goldberg*.

Finally, *Carter v. Lynn Housing Authority*, from the Massachusetts Supreme Judicial Court, enforced the regulatory requirement that a hearing officer must consider "all relevant circumstances" regarding a voucher termination.[30] In 2002, the landlord sought to evict Ms. Carter, but the parties reached a resolution including a stipulation waiving any "then-existing claims against each other."[31] However, three months later, the landlord filed a small claims action stating that Ms. Carter had caused excessive damage to the unit, and the court awarded damages.[32] Based on that judgment, the Lynn Housing Authority (LHA) notified Ms. Carter that it was terminating her Section 8 for violations of the family's duty to avoid damaging the apartment beyond normal wear and tear.

Ms. Carter requested an informal hearing to review the termination decision. She presented evidence including documentation and witnesses that attested to the cleanliness and maintenance of her apartment. However, the hearing officer ignored that evidence and found that because there was a court judgment against her, her voucher was terminated.

The appellate court[33] noted immediately that the termination of a housing benefit "is a 'protected interest,'" the deprivation of which requires due process.[34] This, at a minimum, includes following the regulations that require a hearing officer to consider all relevant circumstances,[35] which must include mitigating circumstances.[36] For Ms. Carter, this meant that the hearing officer should not only have considered that she might not have been the one responsible for the damage to the apartment, but also the fact that she had a disability and that she would not be able to afford housing without a Section 8 voucher. Ms. Carter never presented evidence on the latter two issues, but the court believed that LHA should have considered those factors in any case, as they were readily apparent.[37] The court also carefully distinguished a hearing officer considering all the arguments and ruling a certain way, as required by the rules, from what occurred here—a hearing officer not considering the arguments and making a ruling. Based on HUD regulations and Massachusetts jurisprudence finding a tenant's interest in public housing as a protected one,[38] the court found that a hearing officer must consider the arguments in making the final decision,[39] which necessarily requires some sort of findings of fact in the written decision.[40] Because the hearing officer's decision did not consider any of the facts Ms. Carter presented, the court remanded for a rehearing that allows all relevant evidence to be presented and mitigating circumstances to be considered.

Conclusion

While courts have long held that Section 8 voucher participants are entitled to due process prior to termination, these recent cases have helped more precisely define those vital procedural requirements. Housing authorities use varying methods for informal hearings and frequently disagree with advocates on the degree of procedural formality required. These cases once again demonstrate the continued need for advocates to diligently ensure that the basic due process rights of voucher participants are protected, so that affordable housing is not unjustly denied. ■

[28] *Hendrix* at *5.
[29] *Id.*
[30] *Carter v. Lynn Hous. Auth.*, 450 Mass. 626, 880 N.E.2d 778 (Mass. 2008); 24 C.F.R. § 982.552(c)(2)(i)(2007).
[31] *Carter* at 629.
[32] *Id.*

[33] The termination decision was originally overturned by the Housing Court, which ordered that assistance be reinstated. The intermediate Appeals Court, however, reversed the Housing Court. Carter then appealed to the Supreme Judicial Court, which granted review, but six justices were equally divided after argument, which effectively denied further review. However, Carter then petitioned for rehearing, which the Supreme Judicial Court granted, leading to the current opinion.
[34] *Id.* at 633.
[35] *Id.* at 634. *See* 24 C.F.R. § 982.552(c)(2)(i)(2007).
[36] *Carter* at 635.
[37] *Id.*
[38] *See Spence v. Gormley*, 387 Mass. 258 (1982); *Lowell Hous. Auth. v. Melendez*, 448 Mass. 34 (2007).
[39] *Carter* at 636-7.
[40] *Id.* at 638.