

## 14.2 GOOD CAUSE FOR EVICTION

### 14.2.1 History and Applicability of the Good Cause Requirement

#### 14.2.1.1 Public Housing

It has not always been this way, however.<sup>1</sup> The earliest indication that a PHA could not arbitrarily deprive tenants of the benefits of Public Housing came in a spate of cases arising under the Gwinn Amendment. That McCarthy era statute prohibited people who refused to sign loyalty oaths from living in Public Housing. A number of courts prevented the enforcement of that statutory provision.<sup>2</sup> In *Rudder v. United States*, the Court of Appeals for the District of Columbia decided that the PHA could not evict a tenant without good cause, and made an observation which has often been quoted, i.e., “The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law.”<sup>3</sup>

Despite this encouraging language, neither HUD’s predecessor, the Public Housing Administration, nor the local PHAs leapt immediately to protect Public Housing tenants’ rights not to be evicted without good cause and without due process. Indeed, it was not until May 31, 1966, that the HUD Central Office issued a circular to the PHAs stating that “[W]e strongly urge as a matter of good social policy, that Local Authorities in a private conference inform any tenants who are given . . . [termination] notices of the reasons for this action.”<sup>4</sup> In February of 1967, HUD went further, establishing a mandatory policy that “no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.”<sup>5</sup>

While HUD was beginning to act administratively with regard to evictions from Public Housing, numerous Public Housing tenants began to file cases challenging the actions of PHAs terminating their tenancies. One of those suits, *Thorpe v. Housing Authority of Durham*, reached the Supreme Court twice in the late 1960s.<sup>6</sup> In the second *Thorpe* decision the Court ruled that HUD’s 1967 circular on eviction procedures was mandatory, constitutional, within HUD’s regulatory power, and applicable to all tenants residing in Public Housing, even if eviction proceedings had been commenced prior to the date on which the circular was issued. Thus, the Court reversed the eviction judgment, holding that the PHA had not validly terminated Mrs. Thorpe’s tenancy because it had not met the requirements of the HUD Circular.<sup>7</sup>

The *Thorpe* decision was seminal because it established the principle that PHAs, and arguably other federally subsidized landlords, cannot validly terminate tenancies and secure eviction judgments unless they have followed the procedural rules on evictions prescribed by HUD. On that point the decision also lent encouragement to the judicial and administrative efforts to provide greater protections to Public Housing tenants threatened with eviction. However, the Court deliberately left undecided the question

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<sup>1</sup> See generally Note, *Non-Financial Eligibility and Eviction Standards in Public Housing — The Problem Family in the Great Society*, 53 CORNELL L. REV. 1122 (1968).

<sup>2</sup> See *Rudder v. United States*, 226 F.2d 51 (D.C. Cir. 1955); *Housing Auth. v. Cordova*, 130 Cal. App. 2d Supp. 883, 279 P.2d 215 (Cal. App. Dep’t Super. Ct., Los Angeles Cnty., 1955); *Chicago Hous. Auth. v. Blackman*, 4 Ill. 2d 319, 122 N.E.2d 522 (1954); **Error! Main Document Only.** *Peters v. New York Hous. Auth.*, 9 Misc.2d 942, 128 N.Y.S.2d 224 (N.Y. Sup. Ct. 1953), *modified*, 283 A.D. 801, 128 N.Y.S.2d 712 (App. Div. 1954), *rev’d on other grounds*, 307 N.Y. 519, 121 N.E.2d 529 (1954), *appeal dismissed*, 1 A.D.2d 264, 147 N.Y.S.2d 859 (1955).

<sup>3</sup> *Rudder v. United States*, *supra* note 2, 226 F.2d at 53.

<sup>4</sup> Circular from Commissioner Marie C. McGuire to Local Authorities, Regional Directors, and Central Office Division and Branch Heads (May 31, 1966) (quoted in **Error! Main Document Only.** *Thorpe v. Housing Auth. of Durham*, 386 U.S. 670 (1967), *subsequent opinion*, 393 U.S. 268 (1969)).

<sup>5</sup> HUD Circular, from Don Hummel, Assistant Secretary for Renewal and Housing Assistance, HUD, to Local Housing Authorities, Assistant Regional Administrators for Housing Assistance, HAA Division and Branch Heads, Re Terminations of Tenancy in Low-Rent Projects (Feb. 7, 1967) (quoted in **Error! Main Document Only.** *Thorpe v. Housing Auth. of Durham*, 386 U.S. 670 (1967), *subsequent opinion*, 393 U.S. 268 (1969)).

<sup>6</sup> 386 U.S. 670 (1967) and *on remand*, 393 U.S. 268 (1969).

<sup>7</sup> **Error! Main Document Only.** *Thorpe v. Housing Auth. of Durham*, 386 U.S. 670 (1967), *subsequent opinion*, 393 U.S. 268 (1969).

whether a PHA could evict arbitrarily, *i.e.*, without good cause.<sup>8</sup>

Soon after *Thorpe*, the good cause issue was resolved administratively in HUD's November 1969 version of the Annual Contributions Contract. Section 203 of that document requires PHAs to use leases which "provide that the Local Authority shall not terminate the tenancy other than for violation of the terms of the lease or other good cause."<sup>9</sup> The next year the National Tenants' Organization and Legal Services attorneys began negotiating with HUD and the National Association of Housing and Redevelopment Officials for administrative rules that would protect Public Housing tenants threatened with eviction. The negotiations lasted until February 1971, when HUD issued two circulars, commonly known as the model lease and grievance circulars.<sup>10</sup> The model lease circular reiterated the basic requirement that the PHA cannot terminate a lease without good cause.<sup>11</sup>

During this period, two federal circuit courts also held public housing tenants have a property interest in their public housing apartment and may not be evicted except for good cause.<sup>12</sup>

In June of 1973, HUD published a notice in the Federal Register indicating that it was reviewing and evaluating the HUD model lease and grievance circulars.<sup>13</sup> That review was finally completed in August of 1975, when HUD's first regulations on Public Housing leases and grievance procedures were published in the Federal Register.<sup>14</sup> Although those regulations were, in some details, less protective of the tenants' interests than the original circulars, they did retain the basic protection against evictions without good cause.

Efforts to reduce eviction protections for public housing tenants were renewed in the 1980's. In December of 1982, as part of the general deregulation movement, HUD proposed to modify its lease and grievance procedure regulations.<sup>15</sup> In response, Congress in 1983 added new provisions to the United States Housing Act which, among other things, oblige PHAs to utilize leases that require good cause for evictions.<sup>16</sup> In August of 1988, HUD published regulations implementing that statutory provision and also radically revising its regulation of the landlord-tenant relationship between Public Housing tenants and their PHAs.<sup>17</sup> Those regulations were subsequently withdrawn, after their implementation had been preliminarily enjoined, and they never became law.<sup>18</sup>

Instead, because of the heavy focus upon drug-related criminal conduct in Public Housing, Congress amended the statutory provisions relating to good cause for eviction four times, over ten years: once in 1988,<sup>19</sup> again in 1990,<sup>20</sup> again in 1996,<sup>21</sup> and yet again in 1998.<sup>22</sup> The law as amended now provides that

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<sup>8</sup> *Id.* at 284 n.49.

<sup>9</sup> HUD, Consolidated Annual Contributions Contract, Part II, HUD Form No. 53011, § 203(B) (Nov. 1969).

<sup>10</sup> HUD Circular, RHM 7465.8, *Requirements and Recommendations to Be Reflected in Tenant Dwelling Leases for Low-Rent Public Housing Projects* (Feb. 22, 1971) (copy on enclosed CD); HUD Circular, RHM 7465.9, *Grievance Procedures in Low-Rent Public Housing Projects* (Feb. 22, 1971) (copy on enclosed CD).

<sup>11</sup> See HUD Circular, RHM 7465.8, *supra* note **Error! Reference source not found.**, ¶ 3(b)(12).

<sup>12</sup> See *Caulder v. Durham Hous. Auth.*, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971); *Escalera v. New York City Hous. Auth.*, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970). **Error! Main Document Only.** *HUD v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230 (2002), *rev'g Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001) (*en banc*), **Error! Main Document Only.** *Rucker v. Davis*, No. C 98-00781 CRB (N.D. Cal., June 19, 1998), 1998 WL 345403, *aff'd*, 237 F.3d 1113 (9th Cir. 2001) (*en banc*), *rev'd subnom. HUD v. Rucker*, 535 U.S. 125, 122 S.Ct. 1230, 152 L.Ed.2d 258 (2002)

<sup>13</sup> 38 Fed. Reg. 15,988 (June 19, 1973).

<sup>14</sup> Former 24 C.F.R. § 866, 40 Fed. Reg. 33,402 (Aug. 7, 1975).

<sup>15</sup> See 47 Fed. Reg. 55,689 (Dec. 13, 1982) (proposed 24 C.F.R. Part 866).

<sup>16</sup> See 42 U.S.C.A. § 1437d(k) and (l) (West 2003).

<sup>17</sup> See 53 Fed. Reg. 33,216, 33,304 (Aug. 30, 1988) (proposed 24 C.F.R. Part 966; never implemented).

<sup>18</sup> See *National Tenants Org. v. Pierce*, No. 88-3134, 1989 U.S. Dist. LEXIS 18348 (D.D.C. Jan. 25, 1989) (Clearinghouse No. 43,958), *add'l preliminary injunction denied sub nom. National Tenants Org. v. Kemp*, No. 88-3134/TPJ, 1989 U.S. Dist. LEXIS 18387 (D.D.C. June 20, 1989), *injunction pending appeal denied*, No. 89-5175, 1989 U.S. App. LEXIS 20676 (D.C. Cir. July 7, 1989) (Clearinghouse No. 43,958); Notice, 54 Fed. Reg. 6886 (Feb. 15, 1989).

<sup>19</sup> Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300 (1988), *codified at* 42 U.S.C.A. § 1437d(l) (West 2003).

<sup>20</sup> Pub. L. No. 101-625, § 504, 104 Stat. 4079, 4185 (1990), *amending former* 42 U.S.C.A. § 1437d(l)(5) (West 1994).

<sup>21</sup> Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9, 110 Stat. 834, 836 (Mar. 28, 1996), *amending former* 42 U.S.C.A. § 1437d(l)(5) and (k) (hereafter referred to as "the Extension Act of 1996").

<sup>22</sup> Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 575, 112 Stat. 2518, 2634 (1998), *codified at*

good cause for eviction exists if a tenant, household member, guest or visitor under the tenant's control engages in drug-related criminal activity on or off the premises or other criminal activity that threatens other tenants' health, safety or right to peaceful enjoyment of the premises.

In 1991 HUD published new regulations to implement the 1988 and 1990 statutory changes.<sup>23</sup> HUD made in clear in issuing the 1991 regulations that it interpreted the statute and its regulations as giving local PHAs the authority to evict a tenant whose household members or guests are involved in criminal or drug-related activity, regardless whether the tenant knew or should have known of the activity or tried to prevent the activity.<sup>24</sup> However, HUD also encouraged PHAs to use discretion in deciding whether to evict.<sup>25</sup> In 1996, however, President Clinton and HUD sent the PHAs a directly conflicting message when the President announced the "One Strike and You're Out" policy for combating crime in public housing<sup>26</sup> — a policy encouraging evictions regardless of the circumstances and tying federal funding to increased crime-related evictions.<sup>27</sup>

In addition to expanding authority to evict innocent tenants for others' drug and criminal activity, Congress has also restricted procedural protections for Public Housing tenants facing such evictions. Congress acted again in the Housing Opportunity Program Extension Act of 1996 ("The Extension Act of 1996"), which provided (1) for the exclusion from the tenant grievance procedure of evictions premised on activity that threatened the health, safety, or right to peaceful enjoyment of the premises of other tenants or PHA employees or drug-related activity "on or off" such premises (removing the statutory requirements that such activity either be "criminal" or that the drug-related activity occur "on or near" such premises); and (2) for eviction for criminal activity threatening the health, safety or peaceful enjoyment of the premises by other tenants or any drug-related criminal activity "on or off such premises" (removing the provision that the conduct occur "on or near such premises").<sup>28</sup> Also in the Extension Act of 1996, Congress required PHAs to establish standards of occupancy to reject applicants and evict public housing tenants and terminate Section 8 assistance for any person who the PHA determines is illegally using a controlled substance or whose illegal use of a controlled substance, or whose abuse of alcohol, is determined by the PHA to interfere with the health, safety, or right to peaceful enjoyment of the premises by other project residents.<sup>29</sup> In 1997, HUD proposed regulations to implement the 1996 amendments that were never finalized in their proposed form.<sup>30</sup>

These "One Strike" policies enacted by PHAs have produced a proliferation of litigation on the legality of evicting innocent tenants for the actions of their guests or household members of which they had no knowledge.<sup>31</sup> The litigation culminated with the Supreme Court's decision on March 26, 2002,<sup>32</sup>

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42 U.S.C.A. § 1437d(k) (West 2003)(hereafter referred to as "Quality Housing and Work Responsibility Act of 1998" or "QHWRA"). Section 512(b)(1) of QHWRA, 112 Stat. 2543 (1998), redesignated the drug eviction provision from subparagraph (5) to (6).

<sup>23</sup> See 56 Fed. Reg. 51,560 (Oct. 11, 1991), *codified at* former 24 C.F.R. Part 966 (1993), previously proposed at 56 Fed. Reg. 6248 (Feb. 14, 1991).

<sup>24</sup> See 56 Fed. Reg. 51,560, 51,567 (Oct. 11, 1991) ("The tenant should not be excused from contractual responsibility by arguing that the tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.") (comment preceding final regulations).

<sup>25</sup> See 56 Fed. Reg. 51,560 (Oct. 11, 1991) (proposed § 966.4(l)(5)(i), *currently codified at* 24 C.F.R. § 966.4(l)(5) (vii) (2003)).

<sup>26</sup> John F. Harris, *Clinton Links Housing Aid to Eviction of Crime Suspects*, WASH. POST, Mar. 29, 1996, Section A, available at 1996 WL 3071468. See also HUD Notice PIH 96-16, "One Strike and You're Out" Screening and Eviction Guidelines for Public Housing Authorities (HAs) (Apr. 12, 1996).

<sup>27</sup> See *id.*

<sup>28</sup> The Extension Act of 1996, *supra* note 21, § 9(a), *codified at* 42 U.S.C.A. § 1437d(k) and § 1437(l)(6) [formerly (5)] (West 2003).

<sup>29</sup> *Id.* § 9(e), *codified at* 42 U.S.C.A. § 1437n (West 2003).

<sup>30</sup> See 62 Fed. Reg. 15,345 (Mar. 31, 1997) (Section 8 Certificate, Voucher & Moderate Rehabilitation); 62 Fed. Reg. 25,727 (May 9, 1997) (Public Housing) (withdrawn by HUD at 64 Fed. Reg. 23,460 (Apr. 30, 1999)). For a discussion of the proposed 1997 regulations and the statutory background in the Extension Act of 1996, see *HUD Proposes Regulations on Admissions, Evictions and Subsidy Terminations*, 27 HOUS. L. BULL. 81 (June 1997).

<sup>31</sup> For a discussion of those cases, see the following articles: *The Severest Justice Is Not the Best Policy: The One-Strike Policy in Public Housing*, 10 J. AFFORDABLE HOUS. 234 (Spring 2001); *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 TEX. L. REV. 1495 (May 1998); *Mean Things Happening in This Land: Defending*

reversing the Ninth Circuit's *en banc* decision,<sup>33</sup> and holding that neither the statute nor the constitution prohibits eviction of such innocent tenants. The Supreme Court's holding is narrow, but its consequences certainly threaten many poor families in public and subsidized housing.<sup>34</sup> The Court held that 42 U.S.C. § 1437d(l)(6) requires lease terms that give PHAs the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, and that federal law imposes no "innocent tenant" defense based upon the tenant's lack of actual or constructive knowledge of the drug-related activity.<sup>35</sup> The Court rejected the Ninth Circuit's concerns about due process that were based on the statute's deprivation of the tenant's property interest in the leasehold without any relationship to individual wrongdoing,<sup>36</sup> reasoning that this is not a case in which the government is attempting to criminally punish or civilly regulate tenants as members of the general population.<sup>37</sup> Rather, in the Court's view, the government was acting as a landlord of property that it owns, invoking a clause in a lease to which the tenants agreed and which Congress expressly required.<sup>38</sup> The Court acknowledged that the tenants have a property interest in their leasehold and noted that the tenants would receive due process in the state court eviction process to resolve factual disputes about whether the lease provision was actually violated.<sup>39</sup> Of course, the Court's view that the tenants had contractually agreed to the provision ignores the reality that tenants have no real choice. If an individual wants a subsidized apartment, she must sign the lease, with no bargaining power whatsoever.

Even HUD quickly recognized the potential for abuse and unfairness in light of the Supreme Court's decision. HUD Secretary Martinez sent a letter on April 16, 2002 to all PHAs stating: "I would like to urge you, as public housing administrators, to be guided by compassion and common sense in responding to cases involving the use of illegal drugs. Consider the seriousness of the offense and how it might impact other family members. Eviction should be the last option explored, after all others have been exhausted."<sup>40</sup> HUD regulations give explicitly give PHAs and federally subsidized landlords the right to exercise discretion in deciding whether to evict.<sup>41</sup>

Beyond the "one strike" revisions, Congress also added additional grounds for federal housing evictions with the enactment of the 1996 welfare reform law.<sup>42</sup> That law required that PHAs and

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*Third Party Criminal Activity Public Housing Evictions*, 23 S.U. L. REV. 257 (Spring 1996).

<sup>32</sup> **Error! Main Document Only.***HUD v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230 (2002), *rev'g Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001) (*en banc*); **Error! Main Document Only.***Rucker v. Davis*, No. C 98-00781 CRB (N.D. Cal., June 19, 1998), 1998 WL 345403, *aff'd*, 237 F.3d 1113 (9th Cir. 2001) (*en banc*), *rev'd subnom. HUD v. Rucker*, 535 U.S. 125, 122 S.Ct. 1230, 152 L.Ed.2d 258 (2002). The trial court's injunction, subsequently reversed, was No. C 98-00781 CRB, 1998 WL 345403 (N.D. Cal., June 19, 1998) (memorandum, order and preliminary injunction enjoining eviction of innocent tenants for criminal activity of household members outside the unit).

<sup>33</sup> **Error! Main Document Only.***HUD v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230 (2002), *rev'g Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001) (*en banc*); **Error! Main Document Only.***Rucker v. Davis*, No. C 98-00781 CRB (N.D. Cal., June 19, 1998), 1998 WL 345403, *aff'd*, 237 F.3d 1113 (9th Cir. 2001) (*en banc*), *rev'd subnom. HUD v. Rucker*, 535 U.S. 125, 122 S.Ct. 1230, 152 L.Ed.2d 258 (2002). After the Supreme Court granted certiorari in *Rucker*, the Eleventh Circuit, adopting the position of the *Rucker* dissent in the Ninth Circuit, held that innocent public housing tenants may be evicted for the drug-related actions of their household members, guests or other persons under their control even in the absence of tenant knowledge or fault. **Error! Main Document Only.***Burton v. Tampa Hous. Auth.*, 171 F. Supp. 2d 1314 (M.D. Fla. 2000), *aff'd*, 271 F.3d 1274 (11th Cir. 2001), *cert. Denied*, 535 U.S. 1053 (2002).

<sup>34</sup> *Compare Housing Auth. of Joliet v. Keys*, 761 N.E.2d 338 (Ill. App. Ct. 2001) (pre-*Rucker* decision refusing to evict tenant for violent criminal activity of her adult grandson while tenant was hospitalized) *with Housing Auth. of Joliet v. Chapman*, 336 Ill. App. 3d 347, 780 N.E.2d 1106 (Ill. App. Ct. 2002) (post-*Rucker* decision upholding eviction because of arrest of tenant's son on premises for possession of marijuana).

<sup>35</sup> *HUD v. Rucker*, *supra* note 12, 535 U.S. 125 at 136; *Rucker v. Davis*, *supra* note 12.

<sup>36</sup> *Id.* at 135-36.

<sup>37</sup> *Id.* at 135.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Letter from HUD Secretary Mel Martinez to Public Housing Directors re One-Strike Evictions (Apr. 16, 2002), available at <http://www.nhlp.org/html/pubhsg/Martinez%204-16-02%20ltr.pdf>.

<sup>41</sup> 24 C.F.R. § 5.852, § 966.4(l)(5)(vii) (2003).

<sup>42</sup> Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, § 903, 110 Stat. 2105, 2348 (Aug. 22, 1996), *codified at* 42 U.S.C.A. § 1437d(l)(9), § 1437f(d)(1)(B)(v) (West 2003).

subsidized owners include lease clauses permitting eviction if a tenant (1) is fleeing to avoid prosecution, or custody or confinement after conviction for a felony crime, or (2) is violating a condition of probation or parole.<sup>43</sup>

Congress also revisited the issue of cause for eviction in 1998 with the Quality Housing and Work Responsibility Act of 1998 (“QHWRA”).<sup>44</sup> In the 104<sup>th</sup> Congress, the bills that ultimately became QHWRA had proposed repeal of the good cause for eviction requirement altogether, but that basic protection was ultimately preserved in the final version. In QHWRA, Congress first added to the categories of cases excluded from the public housing grievance procedure by excluding eviction cases involving violent criminal activity or activity resulting in a felony conviction.<sup>45</sup> Congress also expanded the coverage of the provision added by the Extension Act of 1996<sup>46</sup> requiring the use of leases that allow the eviction of tenants whom the owner or PHA determines are illegally using drugs or whose use of illegal drugs or abuse of alcohol interferes with the right to peaceful enjoyment of the premises by other tenants.<sup>47</sup> With the 1998 amendments, Congress extended that requirement to also apply to the Section 8 Voucher program, project-based Section 8, Sections 202, 811, 221(d)(3), 236 and 514 and RHS 515 Rural Rental Housing projects, and other housing.<sup>48</sup> With respect to the public housing program, QHWRA required PHAs to include in their leases clauses providing for eviction for illegal drug use and alcohol abuse and furnishing false information about rehabilitation from abuse.<sup>49</sup> Finally, Congress also mandated in the appropriations bill accompanying QHWRA that PHAs establish standards for public housing and Section 8 that “immediately and permanently terminate the tenancy in any public housing unit of, and the assistance under section 8, for any person convicted of manufacturing or otherwise producing methamphetamine on the premises in violation of any Federal or State law.”<sup>50</sup>

In April 1999, HUD withdrew its 1997 proposed rule on evictions and screening for criminal activity, drug-related activity and alcohol abuse.<sup>51</sup> In July 1999, HUD published new proposed regulations to implement the statutory requirements relating to eviction for drug-related activity and other criminal activity in public housing, federally assisted housing and the Section 8 Housing Voucher Program.<sup>52</sup> Finally, on May 24, 2001, HUD published a final rule on “One Strike” policies implementing Congressional amendments on eviction and termination of benefits for tenants in public housing, federally assisted housing and the Section 8 Voucher Program.<sup>53</sup> As noted, the changes in the final rule derived from several sources, including the Extension Act of 1996<sup>54</sup>, the welfare reform law,<sup>55</sup> and the Quality Housing and Work Responsibility Act of 1998.<sup>56</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> QHWRA, *supra* note 22.

<sup>45</sup> QHWRA, *supra* note 22, § 575(a), *codified at* 42 U.S.C.A. § 1437d(k) (West 2003).

<sup>46</sup> *See* the Extension Act of 1996, *supra* note 21.

<sup>47</sup> QHWRA, *supra* note 22, §§ 577, 579 and 576(d), *striking* 42 U.S.C.A. § 1437n(e), *codified at* 42 U.S.C.A. § 13,662 (West 2003).

<sup>48</sup> *Id.*, *codified at* 42 U.S.C.A. § 13,664 (West Supp. 2003)). Also covered is housing assisted under 12 U.S.C.A. § 1701g (West 2001), *as amended by* § 801 of the Cranston-Gonzalez National Affordable Housing Act.

<sup>49</sup> *Id.* § 575(b), *codified at* 42 U.S.C.A. §§ 1437d(l)(7) and 13,662 (West 2003).

<sup>50</sup> Fiscal Year 1999 HUD Appropriations Act, Pub. L. No. 105-276, § 428, 112 Stat. 2511, *adding* 42 U.S.C.A. § 1437n(f) (West 2003).

<sup>51</sup> *See* 64 Fed. Reg. 23,460 (Apr. 30, 1999) (proposed rule on changes to admission and occupancy requirements in the public housing and Section 8 programs; also announcing in the comments the withdrawal of the May 9, 1997, proposed rule and indicating an intent to issue another proposed rule implementing the changes mandated by Congress in 1996 and 1998).

<sup>52</sup> *See* 64 Fed. Reg. 40,262, 40,280 (July 23, 1999).

<sup>53</sup> *See* 66 Fed. Reg. 28,776-28,806 (May 24, 2001) (codified in scattered sections of Title 24 of the 2003 Code of Federal Regulations, including §§ 5.850-.861 (Federally Assisted Housing); Parts 960 and 966 (Public Housing); Part 882 (Section 8 Moderate Rehabilitation); and Part 982 (Section 8 Voucher Program). For a discussion of the regulations, *see Screening and Eviction for Drug Use and Other Criminal Activity in HUD-Assisted Housing*, 31 HOUS. L. BULL. 140 (June 2001).

<sup>54</sup> *See* the Extension Act of 1996, *supra* note 21.

<sup>55</sup> Personal Responsibility and Work Opportunity Act of 1996, *supra* note 42.

<sup>56</sup> *See* QHWRA, *supra* note 22.

### 14.2.1.2 HUD-subsidized Housing

Although HUD established strong requirements regarding Public Housing evictions in the early 1970s, the task of developing similar protections for subsidized housing tenants fell on the courts during that same period. The leading case, *McQueen v. Druker*,<sup>57</sup> concerned tenants in a Section 221(d)(3) housing project faced with eviction when their landlord refused to renew their lease. Noting that the government's "interdependence" with the landlords supported a finding of state action, and drawing from the Public Housing cases, the court held that "plaintiffs are entitled to a declaration of their rights not to be evicted until they receive from defendants a notice alleging good cause and have in the state courts a hearing in which the court determines that defendants have alleged and proved good cause."<sup>58</sup>

Although the good cause and due process issues in *McQueen* were not reached on appeal,<sup>59</sup> they were well-settled in subsequent cases.<sup>60</sup> The dominant theme of the cases is that, as a matter of substantive law, tenants have a property right, *i.e.*, an entitlement, to remain in their apartments unless there is good cause for their eviction; that the entitlement is protected by the Fifth and Fourteenth Amendments; and that due process requires timely notice specifying the good cause, an opportunity to confront and cross-examine witnesses and present evidence, a right to counsel, and a right to an impartial decision-maker and a written decision.

### 14.2.1.3 Project-Based Section 8

When HUD first began promulgating regulations for these variations of the Section 8 program, it took the position that landlords operating under these programs should be able to evict tenants without good cause and without adhering to any procedural protections.<sup>61</sup> After a few years, however, HUD recognized that tenants in these types of Section 8 projects, just like tenants in the predecessor FHA-subsidized projects, should not be evicted without good cause and should be provided procedural protections.<sup>62</sup>

Tenants in project-based Section 8 developments finally received statutory good cause eviction protection in 1998. With the enactment of Section 599 of QHWR, <sup>63</sup> Congress extended the statutory good cause

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<sup>57</sup> *McQueen v. Druker*, 317 F. Supp. 1122 (D. Mass. 1970), *aff'd on other grounds*, 438 F.2d 781 (1st Cir. 1971).

<sup>58</sup> *Id.*, 317 F. Supp. at 1132.

<sup>59</sup> *Id.*, 438 F.2d at 781.

<sup>60</sup> *See, e.g., Lopez v. Henry Phipps Plaza S., Inc.*, 498 F.2d 937 (2d Cir. 1974); *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973); *Short v. Fulton Redev. Co.*, 390 F. Supp. 517, *on reconsideration*, 398 F. Supp. 1234 (S.D.N.Y. 1975); *Walton v. Darby Town Houses, Inc.*, 395 F. Supp. 553 (E.D. Pa. 1975); *Anderson v. Denny*, 365 F. Supp. 1254 (W.D. Va. 1973); *McClellan v. University Heights, Inc.*, 338 F. Supp. 374 (D.R.I. 1972); *Appel v. Beyer*, 39 Cal. App. 3d Supp. 7, 114 Cal. Rptr. 336 (Cal. App. Dep't Super. Ct. 1974); *Henry Knox Sherrill Corp. v. Randall*, 33 Conn. Supp. 15, 358 A.2d 154 (1975), *appeal dismissed*, 33 Conn. Supp. 522, 358 A.2d 159 (Conn. Super. Ct. 1976); *Jenkins v. Allen Temple Dev.*, 127 Ga. App. 61, 192 S.E.2d 714 (Ga. Ct. App. 1972); *Green v. Copperstone Ltd. Partnership*, 28 Md. App. 498, 346 A.2d 686 (1975) (Clearinghouse No. 16,940); *Fuller v. Urstadt*, 28 N.Y.2d 315, 270 N.E.2d 321, 321 N.Y.S.2d 601 (1971) (copy on enclosed CD); *Hudsonview Terrace, Inc. v. Maury*, 100 Misc.2d 331, 419 N.Y.S.2d 409 (App. Term 1979) (Clearinghouse No. 26,672); *Bonner v. Park Lake Hous. Dev. Fund Corp.*, 70 Misc. 2d 325, 333 N.Y.S.2d 277 (Sup. Ct. 1972) (Clearinghouse No. 8,238).

<sup>61</sup> *See, e.g.,* the original 24 C.F.R. §§ 880.219 and 880.220, 41 Fed. Reg. 17,468, 17,484 (Apr. 26, 1976); Introductory Comments to 24 C.F.R. Part 450, 41 Fed. Reg. 43,330 (Sept. 30, 1976).

<sup>62</sup> Possibly HUD's recognition was spurred along by litigation and commentary in this area. *See, e.g., Wesley v. Rawlins & Rex*, No. 78-612 (D. Or. Feb. 16, 1979), 13 CLEARINGHOUSE REV. 48 (No. 26,225, May 1979); *Belvoir Cliffs Apts., Ltd. v. Bembry*, 56 Ohio Misc. 37, 383 N.E.2d 1170 (1978); Mary L. Heen, *Due Process Protections for Tenants in Section 8 Assisted Housing: Prospects for a Good Cause Eviction Standard*, 12 CLEARINGHOUSE REV. 1 (May 1978).

requirement to also include properties receiving project-based Section 8 assistance or enhanced vouchers.<sup>64</sup>

The HUD Handbook for subsidized multifamily programs and its prescribed Model Lease contain examples of material noncompliance with the lease that are also specified in the regulations.<sup>65</sup> In 1991, HUD issued a Notice providing guidelines for project-based Section 8 landlords to revise their leases to make criminal activity cause for eviction.<sup>66</sup> HUD added that language to the model lease contained in the Handbook in 1992.<sup>67</sup> In light of the 2001 regulations specifying additional required lease provisions for criminal and drug-related activity evictions, HUD issued another notice providing guidance on screening and eviction for drug abuse and other criminal activity.<sup>68</sup> HUD's current family model lease for subsidized programs includes provisions for criminal and drug-related activity evictions.<sup>69</sup>

#### 14.2.1.4 Section 8 Vouchers

With the tenant-based Section 8 Voucher program and its Certificate predecessor, a comparable struggle occurred to develop the doctrine that participating landlords cannot evict tenants without good cause, both during the term of the lease and at the end of the lease term. From the late 1970s to 1995, cases, statutes and rules had established this protection for tenant-based Section 8 recipients.

***Historical Background of the Good Cause Requirement for Tenant-Based Section 8.*** The following history of the good cause requirement at the end of the lease term for tenant-based Section 8 may be useful to clarify any confusion. When Congress created the Section 8 Certificate (now voucher) program, it included statutory language which provided:

The [Public Housing] [a]gency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy. ...<sup>70</sup>

By requiring the PHA, and not the private landlord, to decide whether to terminate the tenancy, it appeared that Congress was prohibiting evictions without good cause. HUD's initial regulations, however, allowed the landlords to include a lease clause allowing either party to terminate the tenancy on 30 days' notice and authorizing the PHA to approve an eviction as long as it was in accord with the lease.<sup>71</sup>

In a series of decisions, the courts rejected HUD's interpretation of the statute and held that the landlords cannot evict without good cause, either during the term of the lease or by refusing to renew the lease at the end of the term.<sup>72</sup> In *Brown v. Harris*,<sup>73</sup> the court held that HUD's regulations were inconsistent with the Section 8 statutory provision giving the PHA the sole right to issue a notice to

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<sup>65</sup> HUD Handbook 4350.3 REV-1, ¶¶ 8-11 through 8-16, app. 4-A, ¶ 23 (issued June 12, 2003, dated 5/03).

<sup>66</sup> HUD Notice H 91-35 (HUD), *Re Drug Problems in HUD-Insured and Assisted Housing — Lease Changes* (May 9, 1991) (copy on enclosed CD).

<sup>67</sup> HUD Handbook 4350.3, app. 19a, ¶ 23(b) (CHG-22, June 1992).

<sup>68</sup> HUD Notice H-2002-22 (HUD), *supra* note **Error! Bookmark not defined.**

<sup>69</sup> HUD Handbook 4350.3 REV-1, app. 4-A, ¶ 23(c) (issued June 12, 2003, dated 5/03).

<sup>70</sup> Former 42 U.S.C.A. § 1437f(d)(1)(B) (West Supp. 1992), Pub. L. No. 93-383, 88 Stat. 633, 664 (Aug. 22, 1974).

<sup>71</sup> Former 24 C.F.R. §§ 882.107(b) and 882.215, 43 Fed. Reg. 61,246, 61,249 and 61,260 (Dec. 29, 1978).

<sup>72</sup> *See, e.g., Jeffries v. Georgia Residential Fin. Auth.*, 503 F. Supp. 610 (N.D. Ga. 1980), *aff'd*, 678 F.2d 919 (11th Cir. 1982), *cert. denied*, 459 U.S. 971 (1982) (mid-term terminations); *Swann v. Gastonia Hous. Auth.*, 502 F. Supp. 362 (W.D.N.C. 1980), *aff'd in part*, 675 F.2d 1342 (4th Cir. 1982) (nonrenewal); *Mitchell v. United States Dep't of HUD.*, 569 F. Supp. 701 (N.D. Cal. 1983), 17 CLEARINGHOUSE REV. 885 (No. 35,106, Dec. 1983); *Brown v. Harris*, 491 F. Supp. 845 (N.D. Cal. 1980); *R & D Realty v. Shields*, 196 N.J. Super. 212, 482 A.2d 40, 43-44 (N.J. Super. Ct. Law Div. 1984).

<sup>73</sup> *Supra* note 72.

vacate. In *Jeffries v. Georgia Residential Finance Authority*,<sup>74</sup> the court went further, holding that the PHA must determine whether the landlord has good cause to request termination in the middle of the lease term. In *Swann v. Gastonia Housing Authority*,<sup>75</sup> the court took the final step of deciding that a landlord could not refuse to renew the lease in the absence of good faith business reasons or other good cause.

As these principles were being developed in the courts, HUD went to Congress in the spring of 1981, seeking an amendment that would have both eliminated the PHA's role in the Section 8 Existing Housing eviction process and erased any good cause requirement, relegating tenants to the protections provided by state courts and state law, if any.<sup>76</sup> The eventual statutory amendment eliminated the requirement that the PHA give the notice to vacate, but required the landlord to have good cause before terminating the tenancy. The statute as amended in 1981 provided:

[T]he owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause. . .<sup>77</sup>

The primary legislative history of this statutory provision indicates that Congress intended to require landlords to have good cause to terminate tenancies at any time, unless they, in good faith, were going to cease to participate in the program.<sup>78</sup>

HUD's initial set of interim regulations to implement the 1981 statutory amendment<sup>79</sup> were severely criticized and eventually held invalid, because they allowed an owner to avoid the good cause requirement when removing the particular unit in question from the Section 8 program.<sup>80</sup> In light of the *Mitchell* decision, as well as adverse comments received on its interim regulations, HUD published radically different final regulations in March of 1984.<sup>81</sup> Those regulations created a tenancy of an indefinite, as opposed to a fixed, term.<sup>82</sup> The tenancy could be terminated by the landlord only for serious or repeated lease violations, violations of state or local law or other good cause. The regulations specified examples of good cause, indicating that good cause could be either tenant misbehavior or good faith business or other reasons for terminating the tenancy.<sup>83</sup>

HUD's 1984 regulations initially raised the question of whether a landlord could evict for good cause during the first year of the lease, even if the grounds were unrelated to tenant misbehavior. The statute in effect at the time required leases under the Section 8 program to have a term of at least one year.<sup>84</sup> HUD initially took the position that the landlord could still have a one-year lease that could be terminated for good faith business reasons before the year expired, but a court invalidated that position.<sup>85</sup> HUD then issued a conforming notice in the Federal Register<sup>86</sup> and eventually amended the regulations to provide that during the first year of the lease the landlord could not evict for good cause other than tenant malfeasance or nonfeasance.<sup>87</sup>

When the Voucher program was enacted in 1983, tenant advocates were concerned that a struggle

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<sup>74</sup> *Jeffries v. Georgia Residential Fin. Auth.*, *supra* note 72.

<sup>75</sup> *Swann v. Gastonia Hous. Auth.*, *supra* note 72.

<sup>76</sup> S. 1197, 97th Cong., 1st Sess. (1981).

<sup>77</sup> Former 42 U.S.C.A. § 1437f(d)(1)(B) (West Supp. 1992), Pub. L. No. 97-35, 95 Stat. 357, 407 (Aug. 13, 1981).

<sup>78</sup> H.R. CONF. REP. NO. 208, 97th Cong., 1st Sess. 673, 694-95 (1981). The Senate Report on the HUD bill which was rejected in conference is S. REP. NO. 139, 97th Cong., 1st Sess. (1981).

<sup>79</sup> Former 24 C.F.R. § 882.215, 47 Fed. Reg. 33,497, 33,500 (Aug. 3, 1982).

<sup>80</sup> *Mitchell v. United States Dep't of HUD.*, *supra* note 72; *R & D Realty v. Shields*, *supra* note 72.

<sup>81</sup> Former 24 C.F.R. § 882.215 (1995), 49 Fed. Reg. 12,215, 12,242 (Mar. 29, 1984).

<sup>82</sup> *See id.*

<sup>83</sup> In this regard, one of the examples of good cause given in the March 29, 1984, Federal Register, a landlord's desire not to use the housing for HUD-assisted residential purposes, was subsequently corrected to cover only a landlord's desire to remove the property from residential rental use. 49 Fed. Reg. 14,729 (Apr. 13, 1984). This deletion of the words "HUD-assisted" indicated that an owner's desire not to participate in the Section 8 program was no longer *per se* good cause to terminate the tenancy.

<sup>84</sup> *See* former 42 U.S.C.A. § 1437f(d)(1)(B)(i) (West Supp. 1992).

<sup>85</sup> *Levy v. Department of HUD*, No. C 84 7983 WWS (N.D. Cal. permanent injunction entered Mar. 22, 1985), 19 CLEARING-HOUSE REV. 187 (No. 38,811, June 1985).

<sup>86</sup> 50 Fed. Reg. 15,733 (Apr. 22, 1985).

<sup>87</sup> Former 24 C.F.R. § 882.215(c)(3) (1993).



similar to the one that occurred with respect to public housing would be necessary to establish the good cause requirement for that program as well, because the statute did not specify that the tenants could be evicted only for good cause.<sup>88</sup> However, when HUD first made Voucher funds available, it provided that Voucher tenants would have the same eviction protections as Section 8 Certificate holders, including leases of indefinite terms that could be terminated only for good cause.<sup>89</sup> When those rules were finally promulgated as regulations, HUD retained the good cause for eviction requirement.<sup>90</sup>

In 1995, HUD changed its position once again and authorized the use of fixed-term leases in the Certificate and Voucher programs.<sup>91</sup> The revised regulations required the lease to have an initial term for at least one year and to renew either for indefinite terms or for fixed terms, for example, month-to-month or year-to-year. Under the regulations, the lease had to include language providing for automatic renewal after the initial term expired. If the owner wished to terminate the tenancy during the lease or on its ending date, he would still have to have good cause, because the lease automatically renewed unless the owner terminated it and the owner could only terminate it for violations of the lease or state law or other good cause.<sup>92</sup> Congress, however, reentered the controversy in 1996, for the first time taking a step backward in the effort to provide tenants protections against evictions without cause. For fiscal years 1996-1998, Congress suspended the statute upon which the requirement of automatic renewal is based, substituting a requirement allowing the landlord to terminate the tenancy without cause at the end of the lease.<sup>93</sup> HUD did not amend its regulations, because the statutory change was temporary, but it issued an implementing Notice, explaining how the change was to be made.<sup>94</sup> Subsequently, with the enactment of the Quality Housing and Work Responsibility Act of 1998, Congress made permanent the statutory provision limiting the good cause protection for voucher tenants to the term of the lease.<sup>95</sup> HUD then implemented the requirements,<sup>96</sup> establishing the current governing rules. Note that some landlords, however, may not have yet revised their leases to reflect these changes in the law. Finally, in some jurisdictions, state or local rent and eviction control or tax abatement laws may limit an owner's ability to pull out of the voucher program at lease expiration by offering a renewal at the full contract rent without the Section 8 subsidy.<sup>97</sup>

#### 14.2.4.3 Eligibility for additional subsidies

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<sup>88</sup> Former 42 U.S.C.A. § 1437f(o) (West Supp. 1992), added by Pub. L. No. 98-181, § 207, 97 Stat. 1153, 1181 (1983).

<sup>89</sup> Notice, 49 Fed. Reg. 28,458 (July 12, 1984), and Notice, 50 Fed. Reg. 19,475, 19,485-86 (May 8, 1985).

<sup>90</sup> Former 24 C.F.R. §§ 887.209 and 887.213 (1995).

<sup>91</sup> Former 24 C.F.R. § 982.309 (1996), added at 60 Fed. Reg. 34,704 (July 3, 1995).

<sup>92</sup> Former 24 C.F.R. § 982.310 (1996), added at 60 Fed. Reg. 34,704 (July 3, 1995).

<sup>93</sup> Pub. L. No. 104-134, § 203 of § 101(e), 110 Stat. 1321, 1321-281 (Apr. 26, 1996); Pub. L. No. 104-204, § 201(e), 110 Stat. 2873, 2893 (Sept. 26, 1996); Pub. L. No. 105-65, § 201(b), 111 Stat. 1343, 1364 (Oct. 27, 1997).

<sup>94</sup> HUD Notice PIH 96-23, *Omnibus Consolidated Rescissions and Appropriations Act of 1996 Statutory Changes Affecting the Administration of the Section 8 Certificate, Voucher, and Moderate Rehabilitation Programs*, ¶ 2(B) (May 1, 1996).

<sup>95</sup> See Quality Housing and Work Responsibility Act of 1998, *supra* note 22, Pub. L. No. 105-276, § 545(a), 112 Stat. 2518 (1998).

<sup>96</sup> See 24 C.F.R. § 982.310 (2001), *as amended by* 66 Fed. Reg. 28,776, 28,804-28,805 (May 24, 2001), *codified at* 24 C.F.R. at § 982.310(c), (h); § 982.551(l), (m) (2003).

<sup>97</sup> See, e.g., *Rosario v. Diagonal Realty*, 872 N.E.2d 860 (N.Y. 2007) (rejecting federal preemption claim based upon repeal of federal good cause requirement and upholding application of local rent stabilization laws requiring lease renewal on same terms and conditions to Section 8 voucher tenants, effectively prohibiting owners from refusing voucher at end of lease term), *aff'g* 32 A.D.3d 739 (N.Y. App. Div. 2006); *Cosmopolitan Assocs. v. Fuentes*, 812 N.Y.S. 2d 738 (N.Y. App. Term Jan. 2006) (owner accepting local tax abatements cannot withdraw from Section 8 under local law; no holding made concerning other potentially applicable local laws); *Barrientos v. 1801-1825 Morton, LLC*, 583 F.3d 1197 (9th Cir. 2009) (voucher tenants covered by local eviction protections, which are not federally preempted); HUD Notice PIH 2009-18 (HA) (June 22, 2009) (clarifying continuing applicability of state and local tenant protection laws to Section 8 voucher holders).

At one time, other statutory provisions prohibited subsidized landlords from discriminating against certificate and voucher holders.<sup>98</sup> In the QHWRA of 1998, however, Congress repealed the provision that had barred landlords with one Section 8 contract from rejecting a certificate or voucher holder on that ground alone.<sup>99</sup> It also repealed a 1987 statute that had prohibited other HUD-subsidized landlords from discriminating against certificate and voucher holders.<sup>100</sup>

#### 14.2.4.4 Definition of Rent:

Although this principle is not made explicit in the regulations, it is supported by the history of the regulations. Under the original model lease circular, rent was separated from charges for damages and there was a specific provision requiring the PHA to accept rent without regard to any other charges owed by the tenant. In addition, the PHA was required to use a separate legal remedy to collect those charges, instead of an unlawful detainer action for nonpayment.<sup>101</sup> This division between rent and extra charges was retained when the model lease requirements were later revised.<sup>102</sup>

#### 14.2.4.5 Tender of Rent

Prior to the 1991 revisions of HUD's Public Housing regulations, an additional argument could be made to preserve the tenant's right to cure before the expiration of the federal 14-day notice period, and this argument may still be available. Under the old regulations the 14-day notice could be a notice only of proposed termination of the tenancy. That proposed termination could not become final until the grievance procedure had been exhausted or the time for requesting a hearing had elapsed and no hearing had been requested.<sup>103</sup> Only after the decision was final could the PHA take steps required by state law to evict the tenant. If the state law required a notice to vacate, it could not be issued until the decision to terminate had become final.<sup>104</sup> If under state law the notice to vacate had been phrased in the alternative, *i.e.*, pay or quit, then a tender of rent within that state law notice period would again defeat the PHA's right to evict.

#### 14.2.6.7 Eligibility of Non-Citizens

After restricting eligibility of non-immigrant foreign students in 1980, Congress enacted legislation in 1981 making some non-citizens ineligible for many HUD-assisted housing programs.<sup>105</sup> The legislation

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<sup>98</sup> Pub. L. No. 100-242, §§ 147 and 183(c), 101 Stat. 1852 and 1872 (1988), *formerly codified at* 42 U.S.C.A. § 1437f(t) and former § 1437f note ("Nondiscrimination Against Section 8 Certificate Holders and Voucher Holders") (West 1994). *But see Peyton v. Reynolds Assocs.*, 955 F.2d 247 (4th Cir. 1992) (narrowly construing § 1437f(t)); *Salute v. Stratford Greens Apts.*, 136 F.3d 293 (2d Cir. 1998) (holding that landlord was not compelled by Fair Housing Act or § 1437f(t) to accept Voucher applicant). *Compare Riddick v. Summit House, Inc.*, 835 F. Supp. 137 (S.D.N.Y. 1993) (Section 221(d)(3) landlord with one Section 8 contract may not refuse to sign HAP contract for tenant-based Section 8 recipient because of now repealed § 1437f(t); remedy for owner's objections to contract's contents was to complain to HUD, and signing contract would not waive objections).

<sup>99</sup> See Pub. L. No. 105-276, § 554, 112 Stat. 2518 (1998), *repealing* 42 U.S.C.A. § 1437f(t) (West Supp. 1998).

<sup>100</sup> See *id.* § 582(a)(2), *repealing* Section 183(c) of the Housing and Community Development Act of 1987, Pub. L. 100-242, 101 Stat. 1815, 1872 (Feb. 5, 1988), noted after 42 U.S.C.A. § 1437f (West 2003) ("Nondiscrimination Against Section 8 Certificate Holders and Voucher Holders"). However, another explanation for repeal of this provision could be that it was no longer necessary in light of 12 U.S.C.A. § 1715z-1b(b) (West 2001) (prohibiting interference with tenants' efforts to get rent subsidies or other public assistance).

<sup>101</sup> HUD Circular, RHM 7465.8, *supra* note **Error! Reference source not found.**, App. 1, ¶ 7.

<sup>102</sup> See 39 Fed. Reg. 39,285, 39,286 (Nov. 6, 1974) (proposed 24 C.F.R. § 410.53); Introductory Comment No. 4, 40 Fed. Reg. 33,402 (Aug. 7, 1975).

<sup>103</sup> *Staten v. Housing Auth. of Pittsburgh*, 469 F. Supp. 1013 (W.D. Pa. 1979).

<sup>104</sup> *Id.* See also *Housing Auth. of Atlanta v. Berryhill*, 146 Ga. App. 374, 246 S.E.2d 406 (1978).

<sup>105</sup> 42 U.S.C.A. § 1436a (West 2003). See generally § 2.2.3, *supra*.

was intended primarily to deny subsidized housing to undocumented immigrants. Three times since then, Congress has amended that legislation.<sup>106</sup> On several occasions HUD issued proposed regulations to implement these laws, some of which would have required the eviction of tenants made ineligible under the legislation.<sup>107</sup> Finally, in 1995, HUD issued final regulations to implement these laws as they were in effect at that time.<sup>108</sup> In 1999, HUD amended these regulations<sup>109</sup> in order to implement the most recent amendment, contained in Section 592 of the Quality Housing and Work Responsibility Act of 1998, which precludes PHAs from declining to implement the prior statutory restrictions.<sup>110</sup> The 1999 regulations also finalized provisions of the 1996 Immigration Act<sup>111</sup> that placed restrictions on assistance that may be provided to non-citizens. The 1996 Immigration Act had been implemented by HUD with the publication of an interim rule in November 1996,<sup>112</sup> and the 1999 regulations made those interim rule changes final.<sup>113</sup> See generally § 2.2.3, *supra*, on the non-citizen eligibility rules.

### 14.2.7.3 Criminal Conduct

1988, although many PHAs and owners included lease provisions addressing the subject, none of the federal statutes expressly addressed evictions for criminal activity. That year, Congress amended the public housing legislation to make criminal activity grounds for eviction from public housing in certain circumstances, and in 1990 refined the 1988 amendment. With those amendments Congress required that the activity must threaten PHA employees or the health, safety or right to peaceful enjoyment of the premises by other tenants or be drug-related activity on or near the premises and that the tenant, other household members, guests or others under the tenant's control must have engaged in the criminal activity.<sup>114</sup>

Not much legislative history exists on the 1988 amendment, because it was rushed through Congress near the end of that election year. However, when the 1990 amendments were made, the Senate report did specify that each case must be judged on its merits, with the exercise of wise and humane judgment by the PHA and the eviction court. That report, by way of example, indicates that an eviction would not be appropriate if the tenant did not know of the criminal activities or had taken

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<sup>106</sup> See Quality Housing and Work Responsibility Act of 1998, *supra* note 22, Pub. L. No. 105-276, § 592, amending Section 214 of the Housing and Community Development Act of 1980, codified at 42 U.S.C.A. § 1436a (West 2003); Pub. L. No. 100-242, Title I, § 164, 101 Stat. 1860, 1863 (Feb. 5, 1988); Pub. L. No. 99-603, Title I, § 121, 100 Stat. 3385 (Nov. 6, 1986).

<sup>107</sup> *E.g.*, 51 Fed. Reg. 11,198 (Apr. 1, 1986).

<sup>108</sup> 60 Fed. Reg. 14,816 (Mar. 20, 1995), now codified at 24 C.F.R. Part 5, Subpart E (2003). These final regulations became effective June 19, 1995. Proposed regulations had been published by HUD in 1994. 59 Fed. Reg. 43,900 (Aug. 25, 1994). See *HUD Issues New Regulations on Undocumented Immigrants*, 24 HOUS. L. BULL. 92 (Sept./Oct. 1994) and *Non-Citizens Rights to Housing Assistance*, 26 HOUS. L. BULL. 170 (Dec. 1996).

<sup>109</sup> 64 Fed. Reg. 25,726-25,733 (May 12, 1999), codified at 24 C.F.R. §§ 5.500-5.528 (2003). See also *HUD Finalizes Rules Restricting Housing Assistance for Non-Citizens*, 29 HOUS. L. BULL. 122 (June 1999).

<sup>110</sup> See Quality Housing and Work Responsibility Act of 1998, *supra* note 22, Pub. L. No. 105-276, § 592, 112 Stat. 2461 (Oct. 21, 1998), amending Section 214 of the Housing and Community Development Act of 1980, codified at 42 U.S.C.A. § 1436a (West 2003).

<sup>111</sup> The Use of Assisted Housing by Aliens Act of 1996, Title V, Subtitle E of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 571-577, 110 Stat. 3009-546 (Sept. 30, 1996).

<sup>112</sup> See 61 Fed. Reg. 60,537 (Nov. 29, 1996) (interim rule implementing 1996 Immigration Act).

<sup>113</sup> See 64 Fed. Reg. 25,726-25,733 (May 12, 1999), codified at 24 C.F.R. §§ 5.500-5.528 (2003).

<sup>114</sup> See Pub. L. No. 100-690, § 5101, 102 Stat. 4300 (Nov. 18, 1988), and amended by Pub. L. 101-625, § 504, 104 Stat. 4185 (Nov. 28, 1990). See *Boston Hous. Auth. v. Guirola*, 410 Mass. 820, 575 N.E.2d 1100 (1991) (Public housing tenant can be evicted for the unlawful conduct of regular occupant, even if not listed on lease); *Chavez v. Hous. Auth. of El Paso*, 973 F.2d 1245 (5th Cir. 1992) (PHA policy of evicting tenants for criminal activities of their guests and relatives is constitutional).

reasonable steps under the circumstances to prevent the crime.<sup>115</sup> In *Rucker*, the Supreme Court chose to reject this history.<sup>116</sup>

Between 1988 and 1991, HUD implemented that statute in two forms. First it published a notice in the 1989 Federal Register, alerting the PHAs to the statutory amendment, directing them to conform their leases to the statute and explaining that the PHA should exercise wise and humane judgment in each case, weighing the interests of all concerned, when deciding whether or not to evict a particular tenant.<sup>117</sup> Then in 1991 HUD revised its regulations on public housing leases, specifying in language similar to the statute that criminal activity can be cause for eviction.<sup>118</sup> HUD's regulations also granted the PHA discretion to consider all the circumstances of the case when deciding whether to evict and authorized the PHA to allow innocent family members to remain if the offender was barred from residing in the unit.<sup>119</sup>

Other statutory provisions making criminal activity grounds for eviction govern the tenant-based Section 8 programs and were added in 1990 (for Certificates) and in 1998 (for vouchers).<sup>120</sup> Modeled after the public housing statute, they make criminal activity by the tenant, other household members or others under the tenant's control that either threatens others or is drug-related and located *on or near* the premises grounds for eviction. HUD revised the Section 8 Certificate and Voucher eviction regulations to reflect the first statutory change in July 1995,<sup>121</sup> with subsequent revisions in 2001.

However, HUD's Model Lease for those programs included a general clause under which the tenant agrees not to engage in or permit unlawful activities in the unit, in the common areas or on the project grounds.<sup>122</sup> In addition, HUD issued a 1991 Notice authorizing landlords who are required to use that lease to modify it, after following the normal lease modification procedures, to make the language closer to the public housing statute.<sup>123</sup> In 1992, HUD then amended the Model Lease to incorporate the language that previously was in the Notice.<sup>124</sup> In 1996 HUD finally amended its regulations regarding evictions from project-based Section 8 and other HUD-subsidized housing to require eviction for criminal activity.<sup>125</sup>

Congress again addressed evictions for criminal activity in 1996 when enacting the Housing Opportunity Program Extension Act.<sup>126</sup> That statute amended the public housing statute, but not the tenant-based Section 8 statutes, on evictions for drug-related criminal activity to eliminate the

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<sup>115</sup> S. REP. NO. 316, 101st Cong., 2d Sess. 179 (June 8, 1990).

<sup>116</sup> *HUD v. Rucker*, *supra* note 12; *Rucker v. Davis*, *supra* note 12.

<sup>117</sup> HUD Notice, *Termination of Public Housing Tenancy for Drug-Related Criminal Activity*, 54 Fed. Reg. 15,998 (Apr. 20, 1989).

<sup>118</sup> See 56 Fed. Reg. 51,560, 51,578 (Oct. 11, 1991). Those regulations were previously published in different form at 53 Fed. Reg. 33,216, 33,306 (Aug. 30, 1988), then withdrawn at 54 Fed. Reg. 6,886 (Feb. 15, 1989) and subsequently published as proposed regulations at 56 Fed. Reg. 6,248 (Feb. 14, 1991).

<sup>119</sup> 24 C.F.R. § 966.4(l)(5)(vii) (2003).

<sup>120</sup> 42 U.S.C.A. § 1437f(d)(1)(B)(iii) and § 1437f(o)(7)(D) (West 2003).

<sup>121</sup> 24 C.F.R. § 982.310 (2001), added at 60 Fed. Reg. 34,704 (July 3, 1995), and as revised at 66 Fed. Reg. 28,776, 28,804-28,806 (May 24, 2001).

<sup>122</sup> HUD Handbook 4350.3, app. 19a, ¶ 13(c) (Nov. 1981). See also HUD Handbook 4350.3 REV-1, app. 4-A, ¶ 13(c) (12/07) (current version).

<sup>123</sup> HUD Notice H 91-35, Re *Drug Problems in HUD-Insured and Assisted Housing — Lease Changes* (May 9, 1991) (copy on Companion Website).

<sup>124</sup> HUD Handbook 4350.3, app. 19a, ¶ 23(b) (CHG-22, June 1992); see also Handbook 4350.3 REV-1, app. 4-A, ¶ 23(c) (12/07) (current version).

<sup>125</sup> Fed. Reg. 47,379 (Sept. 6, 1996), *codified at* 24 C.F.R. §§ 247.3(a), 880.607(b)(3), 881.601, 883.701, 886.128, 886.328 (1997). Those regulations were again revised in 2001, 66 Fed. Reg. 28,776 (May 24, 2001).

<sup>126</sup> Pub. L. No. 104-120, § 9, 110 Stat. 834, 836 (Mar. 28, 1996).

requirement that the activity at least be *near* the premises.<sup>127</sup> It also amended the public housing grievance procedure statute to allow PHAs to by-pass the grievance procedure for evictions involving drug-related criminal activity even if that activity is not near the premises.<sup>128</sup> The statute also required PHAs to establish standards for evicting tenants from public housing or terminating their Section 8 assistance if they are illegally using drugs or if their abuse of alcohol is determined by the PHA to interfere with the health, safety or right to peaceful enjoyment of the premises by other residents of the project.<sup>129</sup> Finally, the Extension Act authorized PHAs to secure criminal records from law enforcement agencies and the National Crime Information Center for purposes of public housing evictions.<sup>130</sup> Juvenile records were excluded if they are confidential under state law and tenants must be given an opportunity to dispute the accuracy and relevance of the record before any adverse action is taken.<sup>131</sup>

Congress also added additional grounds for eviction from public housing, the Section 8 programs and HUD-subsidized housing with the enactment of the 1996 welfare reform law.<sup>132</sup> That law required that PHAs and subsidized owners include in their leases clauses allowing for eviction if a tenant (1) is fleeing to avoid prosecution, or custody or confinement after conviction for a felony crime or (2) is violating a condition of probation or parole.<sup>133</sup>

In 1997 HUD proposed regulations to implement the various 1996 amendments,<sup>134</sup> but before finalizing them in 2001, HUD took two other administrative implementation actions. One was the issuance of a Notice that explains how PHAs should implement the statute and its limitations.<sup>135</sup> Reviewing that notice closely may be useful when handling cases in which the Extension Act comes into play.

In the wake of President Clinton's announcement of the policy in his 1996 State of the Union address, HUD's other action was to release a public relations document entitled "One Strike and You're Out."<sup>136</sup> That release was HUD's effort to get PHAs to evict more families as the way of combating drug dealing and violent crime in public housing. To do so, HUD resorted to simplistic, catchy phrases and exhorted PHAs to take swift, dramatic actions. In large print -- the title, subtitles and first paragraphs of each section -- the document conveyed a single message: PHAs should crack down on entire families by being more aggressive on evictions. On the extremely controversial issue of tenant's absolute liability for the conduct of other household members and guests, HUD entitled its discussion, "Make tenants

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<sup>127</sup> See *id.*, § 9(a)(2).

<sup>128</sup> See *id.*, § 9(a)(1).

<sup>129</sup> See *id.*, § 9(d), 110 Stat. 834, 837.

<sup>130</sup> The regulations implementing the provisions on access to criminal records and information were published at 66 Fed. Reg. 28,776, 28,794-28,796 (May 24, 2001), *codified at* 24 C.F.R. §§ 5.901- 5.905 (2003). Because the law authorizes only PHAs to obtain this information, it is unclear whether private owners of HUD-assisted properties must work with PHAs to obtain this information. See generally § 2.6.2.6, *supra*. HUD's 2007 Handbook revisions cautioned owners to carefully and consistently implement all criminal background checks and decision-making procedures, which must be included in their Tenant Selection Plan. HUD Handbook 4350.3, REV-1, CHG-2 ¶ 8-14 B (6/07). HUD also added procedures for owners who choose to request criminal records checks through a PHA. HUD Handbook 4350.3, REV-1, CHG-2 ¶ 8-14 C (6/07).

<sup>131</sup> 42 U.S.C.A. § 1437d(q) (West 2003), *as amended by* Pub. L. No. 104-120, § 9(b), 110 Stat. 834, 836 (Mar. 28, 1996).

<sup>132</sup> Personal Responsibility and Work Opportunity Act of 1996, *supra* note 42.

<sup>133</sup> *Id.*

<sup>134</sup> See 62 Fed. Reg. 15,345 (Mar. 31, 1997) (Section 8 Certificate, Voucher and Moderate Rehabilitation); 62 Fed. Reg. 25,727 (May 9, 1997) (Public Housing) (withdrawn at 64 Fed. Reg. 23,460 (April 30, 1999)). For a discussion of the proposed 1997 regulations and the statutory background in the 1996 Extension Act, see *HUD Proposes Regulations on Admissions, Evictions and Subsidy Terminations*, 27 HOUS. L. BULL. 81 (June 1997). With the publication of the final regulations in 2001, HUD finally implemented these statutory provisions. See 66 Fed. Reg. 28,776 (May 24, 2001).

<sup>135</sup> HUD Notice PIH 96-27, *Occupancy Provisions of the Housing Opportunity Program Extension Act of 1996* (May 13, 1996).

<sup>136</sup> HUD Notice PIH 96-16, "One Strike and You're Out" *Screening and Eviction Guidelines for Public Housing Authorities (HAs)* (Apr. 12, 1996).

responsible for the conduct of everyone in their households.”<sup>137</sup> The first of the three paragraphs dedicated to this issue discusses solely the position that every tenant should be held liable for the conduct of her family members and guests. HUD simplistically stated, “A promise is a promise,” asserting that a tenant who has promised a crime-free household should be responsible “regardless of whether he or she was personally engaged in the prohibited drug or other criminal activity.”<sup>138</sup>

Congress then revisited the issue of eviction for drug and criminal activity in 1998 with the Quality Housing and Work Responsibility Act of 1998 (“QHWRA”).<sup>139</sup> Congress first added to the categories of cases excluded from the public housing grievance procedure by excluding eviction cases involving violent criminal activity or activity resulting in a felony conviction.<sup>140</sup> Congress also expanded the coverage of the provision added by the Extension Act of 1996<sup>141</sup> concerning eviction of tenants illegally using drugs or abusing alcohol, <sup>142</sup> applying it to project-based Section 8, HUD-subsidized and RHS-subsidized projects.<sup>143</sup> For public housing, QHWRA required PHAs to include lease clauses providing for eviction for illegal drug use and alcohol abuse and furnishing false information about rehabilitation from drug use or alcohol abuse.<sup>144</sup> Finally, in the appropriations bill accompanying QHWRA, Congress also mandated that PHAs establish eviction and termination standards for public housing and Section 8 assistance for any person convicted of manufacturing or producing methamphetamine on the premises in violation of any Federal or State law.<sup>145</sup>

In April of 1999, HUD withdrew its 1997 proposed rule on evictions and screening for criminal activity, drug-related activity and alcohol abuse.<sup>146</sup> Three months later, in July 1999, HUD published new proposed regulations to implement the again-modified statutory requirements relating to eviction for drug-related and other criminal activity.<sup>147</sup> Finally, on May 24, 2001, HUD published a final rule on “One Strike” policies implementing these statutory amendments for all of the federal housing programs.<sup>148</sup> As noted, the changes in the final rule derived from several sources, including the Extension Act of 1996,<sup>149</sup> the welfare reform law,<sup>150</sup> and the 1998 QHWRA.<sup>151</sup> See the discussion *supra* at § 14.2.2.

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<sup>137</sup> *Id.* at 8.

<sup>138</sup> *Id.*

<sup>139</sup> See Quality Housing and Work Responsibility Act of 1998, *supra* note 22.

<sup>140</sup> *Id.* § 575(a), *codified at* 42 U.S.C.A. § 1437d(k) (West 2003).

<sup>141</sup> The Extension Act of 1996, *supra* note 21.

<sup>142</sup> Quality Housing and Work Responsibility Act of 1998, *supra* note 22, § 577, § 579 and § 576(d) (striking 42 U.S.C. § 1437n(e)), *codified at* 42 U.S.C.A. § 13662 (West, WESTLAW through Pub. L. No. 108-140, 2003).

<sup>143</sup> *Id.*, *codified at* 42 U.S.C.A. § 13662 (requiring lease terms that allow for eviction for illegal drug use and alcohol abuse in federally assisted housing); 42 U.S.C.A. § 13664 (defining “federally assisted housing”) (West, WESTLAW through Pub. L. No. 108-140, 2003).

<sup>144</sup> *Id.*, § 575(b), *codified at* 42 U.S.C.A. § 1437d(l)(7) (West 2003); 42 U.S.C.A. § 13662, 13664 (West, WESTLAW through Pub. L. No. 108-140, 2003).

<sup>145</sup> Fiscal Year 1999 Appropriations Act, Pub. L. No. 105-276, § 428, 112 Stat. 2511, *adding* 42 U.S.C.A. § 1437n(f) (West 2003).

<sup>146</sup> See 64 Fed. Reg. 23,460 (Apr. 30, 1999) (proposed rule on changes to admission and occupancy requirements in the public housing and Section 8 programs; also announcing in the comments the withdrawal of the May 9, 1997, proposed rule and indicating intent to issue another proposed rule implementing the changes mandated by Congress in 1996 and 1998).

<sup>147</sup> See 64 Fed. Reg. 40,262, 40,280 (July 23, 1999).

<sup>148</sup> See 66 Fed. Reg. 28,776-28,806 (May 24, 2001) (codified in scattered sections of Title 24 of the 2003 Code of Federal Regulations, including Sections 5.850 -5.861 (Federally Assisted Housing); Parts 960 and 966 (Public Housing); Part 882 (Section 8 Moderate Rehabilitation); and Part 982 (Section 8 Voucher Program)). For a discussion of the regulations, see *Screening and Eviction for Drug Use and Other Criminal Activity in HUD-Assisted Housing*, 31 HOUS. L. BULL. 140 (June 2001).

<sup>149</sup> See the Extension Act, *supra* note 21.

<sup>150</sup> Personal Responsibility and Work Opportunity Act of 1996, *supra* note 42.

<sup>151</sup> See Quality Housing and Work Responsibility Act of 1998, *supra* note 22.

### 14.2.8.1 Refusal to Renew an Expiring Lease

For the Section 8 Voucher program, HUD has taken a different approach. Originally, HUD's position was that tenant-based Section 8 landlords need not have good cause to evict, either during the term or at the end of the lease. In light of judicial decisions<sup>152</sup> and a statutory change in 1981,<sup>153</sup> HUD eventually published revised regulations in 1984 requiring good cause for evictions in the Section 8 Certificate program.<sup>154</sup> In those regulations HUD sought to avoid the problem of a landlord seeking to evict when a lease expired by requiring that leases be of an indefinite, instead of a fixed, term. Thus the leases would never expire and the issue whether the landlord could evict because a lease had expired and whether a landlord must have good cause to refuse to renew a lease would never arise. If a landlord wished to evict a tenant, he would have to follow HUD's requirements for terminating the lease, which include alleging and proving a breach or other good cause. HUD initially followed this same approach with the voucher regulations.<sup>155</sup>

When it revised the certificate and voucher regulations in 1995, HUD changed its approach again, because of criticism of the indefinite term leases by some landlord organizations. Under those regulations, certificate and voucher landlords were required to use leases that had an initial term of at least one year. At the end of the lease term, the lease automatically renewed by its own terms, either for another fixed term (i.e. month-to-month or year-to-year) or for an indefinite term (i.e., a term without an end). The lease could only end if the owner or the tenant validly terminated the lease, they both agreed to terminate it, or the PHA terminated the HAP contract or the family's assistance.<sup>156</sup>

The next year, 1996, Congress amended its 1981 statute, for fiscal years 1996-1998, limiting the good cause for eviction protection to the term of the lease and allowing the landlord to terminate the tenancy without cause at the end of the lease.<sup>157</sup> In the Quality Housing and Work Responsibility Act of 1998, Congress amended the voucher statute to limit the good cause protection to the term of the lease.<sup>158</sup> Congress thus made permanent the annual post-1996 appropriations act provisions<sup>159</sup> allowing voucher and Certificate landlords to evict at the end of a lease, either the initial term or a renewal term, without good cause. Congress also gave PHAs authority to approve voucher leases of less than one year if shorter terms are a prevailing market practice and will increase tenants' housing opportunities.<sup>160</sup> HUD has implemented these provisions in the current voucher regulations.

## 14.3 WHAT PROCEDURAL PROTECTIONS ARE REQUIRED?

### 14.3.1.1 Public Housing (history)

The development of procedural protections for tenants facing eviction from federal housing programs began with the public housing program, although not until nearly 30 years after the program

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<sup>152</sup> E.g., *Mitchell v. United States Dep't of HUD*, *supra* note 72.

<sup>153</sup> See Pub. L. No. 97-35, § 326(e), 95 Stat. 407 (1981).

<sup>154</sup> See 49 Fed. Reg. 12,242 (Mar. 29, 1984).

<sup>155</sup> See former 24 C.F.R. §§ 887.209 and 887.213 (1993).

<sup>156</sup> Former 24 C.F.R. § 982.309 (1996), *added at* 60 Fed. Reg. 34,704 (July 3, 1995).

<sup>157</sup> Pub. L. No. 104-134, § 203 of § 101(e), 110 Stat. 1321, 1321-281 (Apr. 26, 1996); Pub. L. No. 104-204, § 201(e), 110 Stat. 2873, 2893 (Sept. 26, 1996); Pub. L. No. 105-65, § 201(b), 111 Stat. 1343, 1364 (Oct. 27, 1997).

<sup>158</sup> See Pub. L. No. 105-276, § 545(a), 112 Stat. 2518 (1998), *codified at* 42 U.S.C.A. § 1437f(o)(7)(C) (West 2003).

<sup>159</sup> See Pub. L. No. 104-134, § 203 of § 101(e), 110 Stat. 1321, 1321-281 (Apr. 26, 1996).

<sup>160</sup> 42 U.S.C.A. § 1437f(o)(7)(A) (West 2003).

was created. In May 1966, the HUD Central Office issued a circular to Public Housing authorities stating that “we strongly urge as a matter of good social policy, that Local Authorities in a private conference inform any tenants who are given . . . [termination] notices of the reasons for this action.”<sup>161</sup> In February of 1967, HUD went further, establishing a mandatory policy that “no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.”<sup>162</sup>

While HUD was initiating these administrative steps, Public Housing tenants began to file cases challenging PHAs’ termination actions. One of these suits, *Thorpe v. Housing Authority of Durham*, reached the Supreme Court twice.<sup>163</sup> In the second *Thorpe* opinion, the court held that PHAs cannot validly terminate tenancies unless they have followed the HUD-prescribed procedural rules on eviction. The Court deliberately did not decide, however, whether a Public Housing tenant facing eviction was entitled, as a matter of due process, to procedural protections greater than those required by the HUD Circular.<sup>164</sup> Almost one month after *Goldberg v. Kelly*<sup>165</sup> was decided, the Second Circuit provided the answer to that question.

In *Escalera v. New York City Housing Authority*<sup>166</sup> the court held that the New York City Housing Authority’s pro-cedures for carrying out evictions were invalid even though they met the requirements of HUD’s February 1967 circular. The court specified six procedural requirements that had to be met in order to comply with the Due Process Clause:

- the PHA must give the tenant a notice of all the reasons for the termination which is sufficiently specific to enable the tenant to rebut effectively the evidence against him;
- the tenant must have access to all material in the housing authority’s files upon which the PHA is relying;
- the PHA must disclose to the tenant the legal standards which the hearing officers will apply in deciding whether or not to uphold the determination;
- at the hearing the tenant must have an opportunity to confront and cross-examine the individuals who provide the evidence against him;
- there must be an impartial decision-maker, not merely the project manager who initially proposes to terminate the tenancy; and
- the decision-maker must state the reasons for the decision and indicate the evidence relied upon.

This decision by the Second Circuit has led to numerous other decisions spelling out the procedural protections that are required by due process.<sup>167</sup>

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<sup>161</sup> Circular from Commissioner Marie C. McGuire to Local Authorities, Regional Directors and Central Office Division and Branch Heads (May 31, 1966) (quoted in *Thorpe v. Housing Auth. of Durham*, *supra* note 4).

<sup>162</sup> HUD Circular, Terminations of Tenancy in Low-Rent Projects (Feb. 7, 1967) (quoted in *Thorpe v. Housing Auth. of Durham*, *supra* note 4).

<sup>163</sup> *Supra* note 4.

<sup>164</sup> *Supra* note 4.

<sup>165</sup> *Supra* note **Error! Bookmark not defined.**

<sup>166</sup> *Supra* note 12.

<sup>167</sup> *Caulder v. Durham Hous. Auth.*, *supra* note 12; *Owens v. Housing Auth. of Stamford*, *supra* note **Error! Bookmark not defined.**; *Morales v. Golar*, 75 Misc.2d 157, 347 N.Y.S.2d 325 (Sup. Ct. 1973); *Housing Auth. of King v. Saylor*, *supra* note **Error! Bookmark not defined.** See also *Ruffin v. Housing Auth. of New Orleans*, 301 F. Supp. 251 (E.D. La. 1969); *Vinson v. Greenburgh Hous. Auth.*, *supra* note **Error! Bookmark not defined.**



Following this major judicial victory, the focus of attack shifted to the administrative level. There, at HUD, the National Tenants' Organization and Legal Services attorneys had already begun negotiating with HUD and the National Association of Housing and Redevelopment Officials for administrative rules that would protect Public Housing tenants threatened with eviction. The negotiations lasted more than a year, culminating in February 1971, when HUD issued two circulars, commonly known as the model lease and grievance circulars.<sup>168</sup> The grievance procedure circular established in regulatory form the essential procedural protections for tenants facing eviction which had been recognized in *Escalera v. New York City Housing Authority*.<sup>169</sup>

Soon after these circulars were issued, PHAs from Omaha, Nebraska, and eight other cities filed an action in Omaha, on behalf of a nationwide class of PHAs, challenging the validity of the HUD Circulars. The National Tenants' Organization and certain individual Public Housing tenants intervened to defend the circulars. The Court of Appeals for the Eighth Circuit unanimously upheld the circulars and the United States Supreme Court denied certiorari.<sup>170</sup> On remand, the district court in Omaha entered an order requiring all housing authorities to implement the circulars and enjoining the named housing authorities from evicting any tenants without complying with the circulars' grievance procedure requirements.<sup>171</sup> While that litigation was pending, numerous other courts also sustained the validity of the circulars in the context of actions against individual housing authorities or eviction actions against individual tenants.<sup>172</sup>

Before all the PHAs had complied with the circulars, the Public Housing tenants' influence at HUD began to wane. In June of 1973, HUD published a notice in the Federal Register indicating that it was reviewing and evaluating the HUD model lease and grievance circulars.<sup>173</sup> That review was finally completed in August of 1975, when regulations on Public Housing leases and grievance procedures were published in the Federal Register.<sup>174</sup> Those regulations are, in some details, less protective of the tenants' interests than the original circulars. They do, however, provide the basic due process protections, including that:

- the PHA must give the tenant a written notice of termination stating the reasons for the termination<sup>175</sup>
- the PHA give the tenant an opportunity in most cases to resolve the problem at an informal conference with PHA officials<sup>176</sup>
- the PHA give the tenant an opportunity in most cases for a formal grievance hearing<sup>177</sup> before an

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<sup>168</sup> HUD Circular, RHM 7465.8, *supra* note **Error! Reference source not found.**; HUD Circular, RHM 7465.9, *Grievance Procedures in Low-Rent Public Housing Projects* (Feb. 22, 1971 (copy on enclosed CD)).

<sup>169</sup> *supra* note **12**.

<sup>170</sup> *Housing Auth. of Omaha v. United States Hous. Auth.*, 54 F.R.D 402 (D. Neb. 1972), *rev'd*, 468 F.2d 1 (8th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973).

<sup>171</sup> *Housing Auth. of Omaha v. United States Hous. Auth.*, Civ. No. 71-0-287 (D. Neb. order Mar. 12, 1973) (Clearinghouse No. 49,407).

<sup>172</sup> *Brown v. Housing Auth. of Milwaukee*, 471 F.2d 63 (7th Cir. 1972); *Glover v. Housing Auth. of Bessemer*, 444 F.2d 158 (5th Cir. 1971); *Chicago Hous. Auth. v. Harris*, *supra* note **Error! Bookmark not defined.**; *Housing Auth. of Milwaukee v. Mosby*, *supra* note **Error! Bookmark not defined.**

<sup>173</sup> 38 Fed. Reg. 15,988 (June 19, 1973).

<sup>174</sup> 40 Fed. Reg. 33,402 (Aug. 7, 1975), *as amended*, 56 Fed. Reg. 51,560 (Oct. 11, 1991), *codified at* 24 C.F.R. § 966.50-§ 966.57 (2011).

<sup>175</sup> 24 C.F.R. § 966.4(l)(3) (2011).

<sup>176</sup> 24 C.F.R. §§ 966.4(n) and 966.54.

<sup>177</sup> 24 C.F.R. §§ 966.4(n) and 966.52.

impartial decision-maker<sup>178</sup>;

- the PHA inform the tenant of her rights to the informal conference and the formal grievance proceeding<sup>179</sup> (§ 966.4(l)(3)(ii)); and
- the grievance hearing provide the basic safeguards of due process, including the right to examine relevant records and regulations, the right to have counsel present, the right to confront and cross-examine adverse witnesses and the right to a written decision based on the record that outlines the reasons for the decision.<sup>180</sup>

The struggle to preserve procedural protections for Public Housing tenants facing eviction did not end when the grievance procedure regulations were promulgated in 1975. In December of 1982, as part of a general deregulation effort by the Reagan administration, HUD proposed to modify its grievance procedure regulations by eliminating any federal regulatory obligation for PHAs to make grievance procedures available to tenants prior to evictions.<sup>181</sup> In response to HUD's proposed regulations, Congress, in 1983, added new provisions to the United States Housing Act which required PHAs to (1) establish and implement grievance procedures and (2) utilize leases that require good cause for evictions.<sup>182</sup> However, that statutory amendment allowed a PHA to exclude all evictions from its grievance procedure if the Secretary determined that the judicial eviction process to be used by the authority would provide the tenant an opportunity to be heard in conformance with due process requirements.<sup>183</sup>

In 1988, after a delay of nearly five years for agency rulemaking, HUD published Public Housing lease and grievance procedure regulations that would have eviscerated tenants' procedural protections in the eviction context.<sup>184</sup> However, implementation of those regulations was preliminarily enjoined in a suit brought by the National Tenants Organization,<sup>185</sup> and HUD, in response, withdrew the regulations.<sup>186</sup> Then, in 1990, Congress amended its 1983 legislation to narrow the category of evictions that can be excluded from the grievance process, before HUD had issued new regulations.<sup>187</sup> HUD then promulgated a few amendments to the regulations to implement the 1990 legislation.<sup>188</sup> Those amendments were not anywhere near as devastating as the ones proposed in 1982 and published in 1988.<sup>189</sup>

These regulations, as amended in 1991,<sup>190</sup> are the ones to which you must look when you are representing Public Housing tenants facing eviction. They apply to federally subsidized conventional

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<sup>178</sup> 24 C.F.R. § 966.55(b).

<sup>179</sup> 24 C.F.R. § 966.4(l)(3)(ii)

<sup>180</sup> 24 C.F.R. §§ 966.56(b) and 966.57(a).

<sup>181</sup> 47 Fed. Reg. 55,689 (Dec. 13, 1982) (proposed 24 C.F.R. Part 866).

<sup>182</sup> 42 U.S.C.A. §§ 1437d(k) and (l) (West 2011).

<sup>183</sup> Pub. L. No. 98-181, § 204, 97 Stat. 1153, 1178 (1983).

<sup>184</sup> 53 Fed. Reg. 33,216 (Aug. 30, 1988).

<sup>185</sup> *National Tenants Org. v. Pierce*, *supra* note 18.

<sup>186</sup> 54 Fed. Reg. 6,886 (Feb. 15, 1989).

<sup>187</sup> 42 U.S.C.A. §§ 1437d(k) and (l) (West 2011), *as amended* by Pub. L. No. 101-625, § 503, 104 Stat. 4079, 4184 (1990). The exclusion from the grievance procedure now covers evictions for drug-related and certain criminal activity. *See* § 14.3.3.1, *infra*.

<sup>188</sup> 56 Fed. Reg. 51,560-80 (Oct. 11, 1991), previously proposed at 56 Fed. Reg. 6,248 (Feb. 14, 1991), *now codified* at 24 C.F.R. Part 966 (2011).

<sup>189</sup> In 1990, HUD attempted to find another avenue for avoiding procedural protections when trying to evict alleged drug dealers from Public Housing, namely, the federal forfeiture laws. The courts, however, barred HUD from evicting tenants under those laws without prior notice and an opportunity to be heard. *United States v. Leasehold Interest in 121 Nostrand Ave.*, *supra* note **Error! Bookmark not defined.**; *Richmond Tenants Org. v. Kemp*, 753 F. Supp. 607 (E.D. Va. 1990), *aff'd*, 956 F.2d 1300 (4th Cir. 1992).

<sup>190</sup> 24 C.F.R. § 966.50-§ 966.57 (2011).

Public Housing projects owned by PHAs and Section 23 leased housing where the PHA owns or leases the building and then subleases the apartment directly to the tenants.<sup>191</sup> The regulations do not apply to housing subsidized under the Section 8 program (except in those rare cases where the PHA is the Section 8 owner) or the HUD-subsidized housing programs, such as Section 221(d)(3), Section 236 and Rent Supplement. If your client lives in housing subsidized under those programs, you will have to look to the regulations governing those programs, which are discussed *infra*. You can, however, draw upon these Public Housing regulations for analogies where the regulations for the other programs are silent.

#### 14.3.1.2 HUD-Subsidized Housing

Although HUD, in the early 1970s, established strong requirements regarding Public Housing evictions, the task of developing similar protections for HUD-subsidized housing tenants fell on the courts during that same period. The leading case, *McQueen v. Druker*,<sup>192</sup> concerned tenants in a Section 221(d)(3) housing project faced with eviction when their landlord refused to renew their lease. Noting that the government's "interdependence" with the landlords supported a finding of state action, and drawing from the Public Housing cases, the court held that "plaintiffs are entitled to a declaration of their rights not to be evicted until they receive from defendants a notice alleging good cause and have in the state courts a hearing in which the court determines that defendants have alleged and proved good cause."<sup>193</sup>

Although the good cause and due process issues in *McQueen* were not reached on appeal,<sup>194</sup> they were well-settled in subsequent cases.<sup>195</sup> The dominant theme of the cases is that, as a matter of substantive law, tenants have a property right, *i.e.*, an entitlement, to remain in their apartments unless there is good cause for their eviction; that the entitlement is protected by the Fifth and Fourteenth Amendments; and that due process requires timely notice specifying the good cause, an opportunity to confront and cross-examine witnesses and present evidence, a right to counsel, and a right to an impartial decision-maker and a written decision.

HUD finally recognized these developments in 1976 by adopting regulations prescribing "Tenant Eviction Procedures" for HUD-subsidized and certain HUD-owned multifamily projects.<sup>196</sup> Two years later, Congress, in the Housing and Community Development Amendments of 1978, also adopted the requirement of good cause and notice for HUD-subsidized housing.<sup>197</sup> In 1998, Congress extended the statutory requirement for good cause evictions to multifamily projects receiving project-based Section 8 (covered separately *infra*) or enhanced vouchers.<sup>198</sup>

#### 14.3.1.4 Tenant- Based Section 8 Voucher Programs

The original statute governing the vVoucher program's predecessor, the Certificate program, provided that the PHA would have the sole right to give a notice to vacate, with the owner having the

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<sup>191</sup> *Id.* § 966.1.

<sup>192</sup> *McQueen v. Druker*, *supra* note 57.

<sup>193</sup> *Id.*, 317 F. Supp. at 1132.

<sup>194</sup> *Id.*, 438 F.2d 781.

<sup>195</sup> *See, e.g.*, *supra* note 60.

<sup>196</sup> 24 C.F.R. Part 247 (201103), 41 Fed. Reg. 43,330 (Sept. 30, 1976), *originally codified at* 24 C.F.R. Part 450 (1978).

<sup>197</sup> 12 U.S.C.A. § 1715z-1b (West 2001).

<sup>198</sup> *supra* note 22, at § 599, *codified at* 12 U.S.C.A. § 1715z-1b(a) (West 2001).

right to ask the PHA to terminate the tenancy.<sup>199</sup> HUD's initial regulations implementing that statutory provision deviated from the statutory language, allowing the landlord to give the eviction notice, subject only to a very abbreviated approval process at the PHA.<sup>200</sup> In numerous decisions, courts held these initial regulations invalid because they conflicted with the statute.<sup>201</sup> As it became clear that other courts were going to follow these decisions, HUD began to quickly stipulate that its original regulations were inconsistent with the governing statute and authorized waivers of them for any PHAs that were sued.<sup>202</sup> Courts also decided that tenants were entitled to a due process hearing on the question whether good cause existed for the termination of the tenancy, and many consent decrees established specific administrative hearing procedures for housing authorities to follow.<sup>203</sup> In the two leading cases in the area, however, the courts eventually held that state court eviction procedures were adequate to provide tenants the hearing on good cause required by the Due Process Clause.<sup>204</sup>

As these principles were being developed in the courts, HUD went to Congress in 1981, seeking an amendment that would have both eliminated the PHA's role in the Section 8 Certificate eviction process and erased any good cause requirement, relegating tenants to the protections provided by state courts and state law, if any.<sup>205</sup> Although the Senate passed the bill that HUD proposed, the House did not, and the eventual 1981 compromise produced new statutory language eliminating the requirement that the PHA give the notice to vacate, but requiring that the landlord have good cause to terminate the tenancy.<sup>206</sup>

HUD published interim regulations implementing that statutory change in August 1982.<sup>207</sup> Those regulations removed the PHA from the eviction approval process and required the owner to have good cause for the eviction, including good cause not to renew a lease, unless he was taking the particular unit in question out of the Section 8 program. That provision of the regulation, which created what became known as the single-unit loophole, was challenged and held invalid in *Mitchell v. United States Dep't of HUD*.<sup>208</sup> In light of the *Mitchell* decision, as well as adverse comments received on its interim regulations, HUD published radically different final regulations in March of 1984.<sup>209</sup>

With regard to procedures, those 1984 regulations required the landlord to give the tenant notice of an eviction and prohibited self-help evictions, but did not specify much else. For example, they did not say that the notice must specify the grounds for the eviction nor did they prescribe any minimum time

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<sup>199</sup> Pub. L. No. 93-383, § 201(a), 88 Stat. 667 (1974). This language was derived from the Section 23 program. See Housing and Urban Development Act of 1965, Pub. L. No. 89-117, § 103, 79 Stat. 451, 455 (1966).

<sup>200</sup> Former 24 C.F.R. § 882.215, 41 Fed. Reg. 19,884, 19,894 (May 13, 1976).

<sup>201</sup> See, e.g., *Swann v. Gastonia Hous. Auth.*, supra note 72; *Jeffries v. Georgia Residential Fin. Auth.*, supra note 72; *Brown v. Harris*, supra note 72; *Alexander v. Landrieu*, No. 80-A-1321 (D. Colo. June 18, 1981), 15 CLEARINGHOUSE REV. 525 (No. 31,423, Oct. 1981).

<sup>202</sup> See, e.g., *Fleming v. Akron Metro. Hous. Auth.*, No. C80-1393A (N.D. Ohio order filed Aug. 14, 1980), 14 CLEARINGHOUSE REV. 777 (No. 30,005, Nov. 1980); *Riebe v. Landrieu*, No. 3-80-112 (D. Minn. filed Feb. 11, 1980), 14 CLEARINGHOUSE REV. 588 (No. 29,845, Oct. 1980).

<sup>203</sup> *Alexander v. Landrieu*, supra note 201; *Doskocz v. Alameda Cnty. Hous. Auth.*, No. C-80-0448 WAI (N.D. Cal. July 14, 1981), 15 CLEARINGHOUSE REV. 610 (No. 28,647, Nov. 1981) (consent decree); *Bell v. Grand Rapids Hous. Comm'n* (W.D. Mich. Oct. 1, 1980), 14 CLEARINGHOUSE REV. 1117 (No. 30,354, Feb. 1981); *Allen v. Sandford* (E.D. Pa. Aug. 10, 1981), 15 CLEARINGHOUSE REV. 682 (No. 31,615, Dec. 1981).

<sup>204</sup> *Swann v. Gastonia Hous. Auth.*, supra note 72; *Jeffries v. Georgia Residential Fin. Auth.*, supra note 72.

<sup>205</sup> S. 1197, 97th Cong., 1st Sess. (1981).

<sup>206</sup> Pub. L. No. 97-35, § 326(e), 95 Stat. 407 (1981), formerly codified at 42 U.S.C.A. § 1437f(d)(1)(B)(ii) (West Supp. 1992).

<sup>207</sup> Former 24 C.F.R. § 882.215, 47 Fed. Reg. 33,497, 33,500 (Aug. 3, 1982).

<sup>208</sup> supra note 72. See also *R & D Realty v. Shields*, supra note 72.

<sup>209</sup> 49 Fed. Reg. 12,215 (Mar. 29, 1984), codified at former 24 C.F.R. § 882.215 (1993) (since repealed). The current regulation is found at 24 C.F.R. § 982.310 (201103).

period for the eviction. On the former point, however, Congress re-entered the picture in 1990, amending the statute to provide that the notice must specify the reasons.<sup>210</sup>

The rules for Vouchers are now the same as the rules that governed the former Section 8 Certificate program. When HUD first implemented the Voucher program, its rules were contained in Notices of Fund Availability that made the eviction requirements of the Certificate program applicable to the Voucher program.<sup>211</sup> The initial final regulations for the Voucher program used the same language for evictions that the Certificate program regulations used.<sup>212</sup> However, the provision in the 1990 legislation requiring eviction notices to state the reasons expressly applied only to the Certificate program.<sup>213</sup> With the enactment of the Quality Housing and Work Responsibility Act of 1998, Congress specifically adopted lease termination and eviction procedures for the Voucher program identical to the statutory provisions for the now-defunct Certificate program.<sup>214</sup>

When HUD revised its Certificate and Voucher regulations in 1995, it did include a provision purportedly implementing the statutory requirement that the landlord's eviction notice must specify the grounds for the termination.<sup>215</sup> The regulatory requirement applied to both the Certificate and Voucher programs. The regulations allowed the notice specifying the grounds to be given before the eviction action is filed, or as part of the court complaint.

In May 1999 HUD published an interim rule purportedly implementing Congress' 1998 Voucher eviction notice provision.<sup>216</sup> HUD subsequently published a final rule in October 1999 finalizing the interim rule and fully implementing the 1998 Voucher notice requirement.<sup>217</sup>

#### 14.3.2.5 Notice Period

Prior to June of 2001, 30 days' notice had been required, unless the basis for the eviction was nonpayment of rent (in which case 14 days' notice was required) or activity constituting a threat to health or safety (in which case a reasonable time but not to exceed 30 days' notice was required).<sup>218</sup> With the enactment of the Quality Housing and Work Responsibility Act of 1998, Congress revised the 30-day requirement to allow a shorter period of time if permissible under State or local law.<sup>219</sup> HUD implemented the new notice requirements in mid-2001.<sup>220</sup>

#### 14.3.2.6 Two Consecutive Notices

HUD's original public housing regulations required the PHA to give the tenant a notice to vacate prior to initiating an eviction action, even if the state law did not require such a notice.<sup>221</sup> When a tenant opted to pursue the grievance procedure, the PHA could not give the tenant the notice to vacate until after the decision to terminate had been finalized by the completion of the grievance process.<sup>222</sup> If state law required a period of time to elapse between the giving of the notice to vacate and the institution of

<sup>210</sup> See 42 U.S.C.A. § 1437f(d)(1)(B)(iv) (West Supp. 201103).

<sup>211</sup> See Notice of Funding Availability, §§ V(10)(d) and (12), 49 Fed. Reg. 28,458, 28,467-68 (July 12, 1984).

<sup>212</sup> Former 24 C.F.R. § 887.213 (1993) (since repealed).

<sup>213</sup> See 42 U.S.C.A. § 1437f(d)(1)(B)(iv) (West 201103).

<sup>214</sup> See Pub. L. No. 105-276, § 545, 112 Stat. 2518 (1998), *codified at* 42 U.S.C.A. § 1437f(o)(7) (West 201103).

<sup>215</sup> 24 C.F.R. § 982.310(e) (201103), added at 60 Fed. Reg. 34,705 (July 3, 1995).

<sup>216</sup> See 64 Fed. Reg. 26,632 (May 14, 1999).

<sup>217</sup> See 64 Fed. Reg. 56,894, 56,913 (Oct. 21, 1999), *codified at* 24 C.F.R. § 982.310(e)(1)(i) (201103).

<sup>218</sup> See former 24 C.F.R. § 966.4(l)(3) (2001) (not yet incorporating the May 24, 2001, changes in the notice period).

<sup>219</sup> *supra* note 22 at § 575(b), *codified at* 42 U.S.C.A. § 1437d(l)(4) (West 2011).

<sup>220</sup> See 66 Fed. Reg. 28,776, 28,803 (May 24, 2001), 24 C.F.R. § 966.4(l)(3) (2003).

<sup>221</sup> Former 24 C.F.R. § 866.58, 40 Fed. Reg. 33,402, 33,408 (Aug. 7, 1975).

<sup>222</sup> *Id.*

the eviction action, that period could not begin to run until the PHA sent the tenant the grievance decision and the notice to vacate. Thus, public housing tenants who requested a grievance hearing ended up with two consecutive eviction notices, the first proposed and the second final.

Judicial rulings under the former regulations also established that even when the tenant did not invoke the grievance procedure, the PHA still had to give two notices. The first was the notice of proposed termination, which had to be given pursuant to the regulations covering lease terminations.<sup>223</sup> That notice was provisional; it did not reflect a final determination on the matter. If the tenant did not invoke the grievance procedure, then the proposed notice became final when the period for invoking the grievance procedure lapsed. Only at that point could the PHA give the notice to vacate required by state law.<sup>224</sup>

HUD, however, was never satisfied with that two-notice requirement for public housing and proposed regulations which would have allowed concurrent rather than consecutive federal and state notices.<sup>225</sup> It later withdrew those proposed regulations as part of its effort to repeal the grievance procedure requirement altogether for evictions.<sup>226</sup> Although HUD was unsuccessful in eliminating the grievance process for public housing evictions, it did revise the regulations significantly. HUD eliminated the former provision requiring the PHA to issue a notice to vacate before commencing an eviction action, and thus only one federal notice is now required.<sup>227</sup>

#### 14.3.3.1 The “Criminal Activity” Exception<sup>228</sup>

**Historical Background on Exceptions to the Grievance Procedure.** This exception for evictions involving criminal activity was preceded by an earlier regulatory exception for evictions of a tenant who creates or maintains a threat to the health or safety of other tenants or PHA employees.<sup>229</sup> Several principles from that era may still be useful to defending evictions where grievance procedures are not provided under the current law. For example, some courts concluded that there was not a sufficient threat to health and safety if there were long lapses of time between the PHA’s first becoming aware of the alleged conduct and its eventual decision to evict.<sup>230</sup> In addition, this health and safety exception was

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<sup>223</sup> Former 24 C.F.R. § 866.4(l) (1980), 40 Fed. Reg. 33,402, 33,405 (Aug. 7, 1975).

<sup>224</sup> *Staten v. Housing Auth. of Pittsburgh*, *supra* note 103; *Housing Auth. of Atlanta v. Berryhill*, 146 Ga. App. 374, 246 S.E.2d 406 (1978); *Walls v. Beaver Cnty. Hous. Auth.*, No. 78-1450 (W.D. Pa. June 25, 1980), 14 CLEARINGHOUSE REV. 587 (No. 26,995, Oct. 1980); *San Francisco Hous. Auth. v. Cortes*, No. 782268 (Cal. Mun. Ct., San Francisco Cnty., May 21, 1980), 14 CLEARINGHOUSE REV. 779 (No. 30,069, Nov. 1980); *City of Jacksonville v. Peterson*, No. 91-3709-CC (Duval Cnty., Fla., Ct. July 25, 1991), 25 CLEARINGHOUSE REV. 730 (No. 46,957, Oct. 1991); *Brunswick Hous. Auth. v. Portell*, *supra* note **Error! Bookmark not defined.**; *Burlington Hous. Auth. v. Jewer*, No. 2-1-89CnC (Vt. Dist Ct., Chittenden Cnty., Apr. 17, 1989), 23 CLEARINGHOUSE REV. 619 (No. 44,756, Aug./Sept. 1989); Letter from Joseph F. Gelletich, Assistant General Counsel for Low-Rent Housing, Office of General Counsel, HUD, to Thomas J. Henderson, Attorney, Neighborhood Legal Services Ass’n, Pittsburgh, Pa. (Feb. 9, 1979), and related correspondence (copy on enclosed CD). *But see Ferguson v. Housing Auth. of Middlesboro*, 499 F. Supp. 334 (E.D. Ky. 1980) (second notice not required when grounds were cause other than nonpayment and tenants either did not request grievance hearing or did not dispute alleged grounds and conceded that terms of notice met state law requirements).

<sup>225</sup> See 45 Fed. Reg. 51,615 (Aug. 4, 1980).

<sup>226</sup> 47 Fed. Reg. 48,430 (Oct. 28, 1982); 47 Fed. Reg. 55,689 (Dec. 13, 1982).

<sup>227</sup> 56 Fed. Reg. 51,580 (Oct. 11, 1991), *codified at* 24 C.F.R. § 966.4 (l)(3)(iii) (201103).

<sup>228</sup> For a brief historical explanation of this exception, see § 13.2.3 *supra* and for the detailed history, see the [companion website/enclosed CD](#). See also *Grillasca v. N.Y.C.Hous.Auth.*, 2010 WL 1491806 (S.D.N.Y. 2010).

<sup>229</sup> Former 24 C.F.R. § 866.51(a), 40 Fed. Reg. 33,406, 33,407 (Aug. 7, 1975); *Housing Auth. of Lincoln v. Wolfe*, 212 Neb. 657, 324 N.W.2d 891 (1982).

<sup>230</sup> See *Palacios v. Block*, No. C-81-462-JLQ (E.D. Wash. order entered Apr. 21, 1983) (Clearinghouse No. 49,412) (FmHA case); *Housing Auth. of Fresno v. Webster*, No. 93585-8 (Cal. Mun. Ct., Fresno, Jan. 15, 1985) (Clearinghouse No. 43,182) (PHA could not claim health and safety exemption because of delay in filing suit). *Cf. Housing Auth. of DeKalb Cnty. v. Pyrtle*, *supra* note **Error! Bookmark not defined.** (repeated incidents of intoxication and irresponsible use of kitchen facilities not sufficient threat). *But see Housing Auth. of Hartford v. McKenzie*, *supra* note **Error! Bookmark not defined.** (upholding PHA’s eviction of

available only if the state court eviction procedures met HUD's then-applicable definition of due process.<sup>231</sup> Several courts enjoined PHAs from using the health and safety exception when the state eviction procedures did not meet HUD's then-applicable definition.<sup>232</sup> Courts also prohibited PHAs from using the exception if they had not put a specific provision in their grievance procedure authorizing the PHA to skip the hearing in health and safety cases.<sup>233</sup>

In 1983, Congress required each PHA to adopt and implement a grievance procedure, but allowed them to exclude any evictions from the grievance procedure if HUD determined that the tenant would receive a due process hearing in state court.<sup>234</sup> Because that statute, unlike the earlier HUD regulations, required HUD to make a due process determination before the PHA could bypass the grievance process, courts held that PHAs could not use the old health and safety exception to skip the grievance process in the absence of a HUD determination.<sup>235</sup> HUD eventually did make due process determinations, but could not approve the ordinary eviction procedures in many states since they do not allow discovery and HUD's definition of due process at that time required discovery to be available (since superceded by statute requiring PHA to provide discovery). Although some of HUD's determinations were set aside by the courts or withdrawn by HUD,<sup>236</sup> most general attacks on the HUD determinations failed.<sup>237</sup>

In 1994, however, one systemic challenge to HUD's due process determinations was successful. In *Yesler Terrace Community Council v. Cisneros*,<sup>238</sup> the Ninth Circuit ruled that, under HUD's own rulemaking regulations, HUD could not make due process determinations without first notifying affected tenants and providing them an opportunity to comment. In response, HUD first issued a memorandum to all PHAs within the jurisdiction of the Ninth Circuit, informing them that until further notice they would not be able to rely upon HUD's due process determinations for their states, because of the *Yesler Terrace* decision.<sup>239</sup> Then, HUD amended its rulemaking regulations to clarify that HUD's due process determinations do not require notice and comment rulemaking and that HUD does not interpret the 1990 statute on excluding evictions from the grievance procedure as requiring such rulemaking.<sup>240</sup> Thus,

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tenant without grievance hearing because dog ate her own puppies and poor housekeeping, despite 18-month delay by PHA).

<sup>231</sup> Former 24 C.F.R. § 866.53(c), 40 Fed. Reg. 33,406, 33,407 (Aug. 7, 1975).

<sup>232</sup> *King v. Housing Auth. of Huntsville*, 670 F.2d 952 (11th Cir. 1982); *Austin v. Housing Auth. of St. Petersburg*, No. 85-814 Civ-T-10 (M.D. Fla. May 17, 1985), 19 CLEARINGHOUSE REV. 527 (No. 39,432, Aug./Sept. 1985) (TRO issued on basis of *King*; tenant entitled to hearing if discovery not required by state law); *Davis v. Housing Auth. of Newport*, *supra* note **Error! Bookmark not defined.** (PHA must use grievance procedure for all evictions per *King*; separate consent decree requires notice to inform tenant of right to grievance procedure); *Lacy v. Housing Auth. of Baltimore City*, No. 84-2431 HAR (D. Md. consent decree entered Aug. 13, 1984) (bars use of health and safety exemption because discovery unavailable); *Oklahoma City Hous. Auth. v. Harris*, *supra* note **Error! Bookmark not defined.** (same holding).

<sup>233</sup> *Buczko v. Lucas Metro. Hous. Auth.*, No. C-78-26 (N.D. Ohio Mar. 7, 1978), 11 CLEARINGHOUSE REV. 1013 (No. 23,372, Apr. 1978).

<sup>234</sup> Former 42 U.S.C.A. § 1437d(k), *as added by* Pub. L. No. 98-181, § 204, 97 Stat. 1153, 1178 (1983).

<sup>235</sup> *Skinner v. Boston Hous. Auth.*, 690 F. Supp. 109 (D. Mass. 1988), *subsequent decision on attorney's fees reversed*, 873 F.2d 1433 (1st Cir. 1989) (Table); *Chicago Hous. Auth. v. Thomas*, No. 88 MI 231788 (Ill. Cir. Ct. 1989) (Clearinghouse No. 45,130).

<sup>236</sup> *Simmons v. Kemp*, 751 F. Supp. 815 (D. Minn. 1990) (setting aside HUD determination for Minnesota because tenants had no discovery rights); *Housing Auth. of Jersey City v. Jackson*, 749 F. Supp. 622 (D.N.J. 1990) (setting aside HUD determination for New Jersey because tenants had no discovery rights); *Lopez v. Nogales Hous. Auth.*, No. CIV 89-182-TUC-WDB (D. Ariz. Mar. 2, 1990), 24 CLEARINGHOUSE REV. 1167 (No. 46,166, Feb. 1991) (HUD withdrew due process determination for Arizona after tenants filed judicial challenge).

<sup>237</sup> *National Tenants Org. v. Kemp*, *supra* note 18; *Riverside Tenants Ass'n v. Kemp*, No. N-89-545(WWE) (D. Conn. complaint filed May 18, 1990) 24 CLEARINGHOUSE REV. 1167 (No. 46,137, Feb. 1991) (preliminary injunction denied); *Ruffin v. Kemp*, No. 90 C 2065 (N.D. Ill. complaint dismissed as moot July 7, 1992) (Clearing-house No. 45,788).

<sup>238</sup> *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442 (9th Cir. 1994), *rev'g sub nom. Yesler Terrace Cmty. Council v. Kemp*, No. C 92-535 (W.D. Wash. June 2, 1992) (Clearinghouse No. 48,081).

<sup>239</sup> Memorandum from Joseph Shuldiner, Ass't Sec'y for Public and Indian Housing to State Coordinators for Arizona, Washington, Montana, Idaho, Oregon and California, Re: *Public Housing Due Process Determination -- Effect of Court Decision* (Nov. 14, 1994). See 60 Fed. Reg. 27,059 (May 22, 1995).

<sup>240</sup> 24 C.F.R. §§ 10.3(c) and 966.51(a) (201103), 61 Fed. Reg. 13,273 (Mar. 26, 1996).

challenges to HUD's due process determinations based upon the Yesler Terrace rulemaking theory are unlikely to succeed.

HUD also required itself to publish in the Federal Register a notice listing the specific judicial eviction procedures for which HUD has issued a due process determination and to make publicly available the legal analysis underlying each determination.<sup>241</sup> HUD published a basic list of its determinations in the Federal Register at 61 Fed. Reg. 13,276 (March 21, 1996) and subsequently updated it with new determinations.<sup>242</sup> The determinations themselves are available on HUDCLIPS in the legal opinions database, which can be browsed or searched.<sup>243</sup>

In the interim, Congress revisited the issue and in 1990 narrowed the statute to allow PHAs to skip the grievance process only if the eviction involved criminal activity that is drug-related or activity threatening others.<sup>244</sup> In addition, Congress broadened the applicable definition of due process to exclude any requirement that the state courts allow discovery, thereby enabling HUD to approve some eviction procedure in most states.<sup>245</sup> At the same time, however, Congress required PHAs as a matter of federal law to provide access to documents before any grievance hearings and eviction trials.<sup>246</sup>

Congress revisited the issue yet again in 1998. For the most part Congress did not change the grievance procedure, but it made clear that PHAs could also exclude from the grievance procedure eviction cases involving violent criminal activity or activity resulting in a felony conviction.<sup>247</sup> Given the previous exclusions remaining in the statute, these changes were not that significant since such conduct would almost always already have been covered by the exclusion for "threat to health or safety" evictions.

In light of the changes enacted by Congress, PHAs in New York and Baltimore sought and obtained modifications to earlier consent decrees under which the PHA had agreed to provide tenants with administrative grievance hearings prior to the start of eviction proceedings.<sup>248</sup> However, in a more recent case, one court refused to allow the Philadelphia Housing Authority to modify its grievance procedure.<sup>249</sup>

For the subsidized housing programs, HUD has gradually added regulations requiring landlords to use the courts to evict tenants. In response to the decision in *Love v. United States Department of HUD*, HUD amended the regulations for the HUD-subsidized projects to explicitly provide that the landlord shall not evict any tenant except by judicial action pursuant to state or local law. Since many of the project-based Section 8 programs are now covered by Part 247 by reference, that prohibition against self-help evictions applies to them as well.

### 14.3.5 Self-Help Evictions Prohibited

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<sup>241</sup> 24 C.F.R. § 966.51(a)(2)(iii) (201103).

<sup>242</sup> 61 Fed. Reg. 47,953 (Sept. 11, 1996) (Connecticut, Massachusetts and Mississippi); 62 Fed. Reg. 45,434 (Aug. 27, 1997) (North Carolina and Louisiana).

<sup>243</sup> HUDCLIPS can be reached at <<http://www.hudclips.org>>. Go from there into the Library to find the legal opinions database.

<sup>244</sup> Pub. L. No. 101-625, § 503, 104 Stat. 4079, 4184 (1990), *codified at* 42 U.S.C.A. § 1437d(k)(3) (West 2003). *Housing Auth. of Elgin v. Ellis*, 168 Ill. Dec. 52, 226 Ill. App. 3d 124, 589 N.E.2d 166 (1992) (PHA could not exclude eviction for nonpayment of rent from grievance procedure after Nov. 28, 1990).

<sup>245</sup> *Id.*

<sup>246</sup> Pub. L. No. 101-625, § 503, 104 Stat. 4079, 4184 (1990), *codified at* 42 U.S.C.A. §§ 1437d(k)(3) and (l)(7) (West 201103).

<sup>247</sup> Pub. L. No. 105-276, § 575(a), 112 Stat. 2518, 2634 (1998), *codified at* 42 U.S.C.A. § 1437d(k) (West 201103).

<sup>248</sup> See *Gilmore v. Housing Auth. of Baltimore City*, 170 F.3d 428 (4th Cir. 1999); *Escalera v. New York Hous. Auth.*, *supra* note 12, 924 F.Supp. 1323.

<sup>249</sup> *Brown v. Philadelphia Hous. Auth.*, 237 F. Supp.2d 567 (E.D. Pa. 2002).



In response to the decision in *Love v. United States Department of HUD*,<sup>250</sup> HUD amended the regulations for the HUD-subsidized projects to explicitly provide that the landlord shall not evict any tenant except by judicial action pursuant to state or local law.<sup>251</sup> Since many of the project-based Section 8 programs are now covered by Part 247 by reference, that prohibition against self-help evictions applies to them as well.<sup>252</sup>

Soon after the *Love* decision, HUD revised the regulations for the Section 8 Moderate Rehabilitation program and, in the process, inserted a prohibition against self-help evictions.<sup>253</sup> HUD did the same for the Certificate program when it rewrote that program's eviction regulations in 1984,<sup>254</sup> and for the Voucher program when it issued formal regulations for that program in 1988.<sup>255</sup> HUD preserved that prohibition against self-help evictions when it consolidated the Certificate and Voucher program regulations in 1995.<sup>256</sup> Finally in 1991, HUD added an express prohibition against self-help evictions to the Public Housing regulations.<sup>257</sup>

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<sup>250</sup> *Love v. United States Dep't of HUD*, No. 80-1041B (W.D. Pa. order nove. 4, 1981) (Clearinghouse No. 30,034).

<sup>251</sup> Former 24 C.F.R. § 450.6(a), 48 Fed. Reg. 22,913, 22,915 (May 23, 1983), *finalized at* 24 C.F.R. § 247.6(a) (201103), 50 Fed. Reg. 38,787 (Sept. 25, 1985).

<sup>252</sup> *See* 24 C.F.R. § 886.128, § 886.328, § 891.630 (201103) (applying Part 247); § 884.215(c) (201101) (listing prohibited lease terms including prohibition on waiver of legal proceedings).

<sup>253</sup> 24 C.F.R. § 882.511(e) (2011).

<sup>254</sup> Former § 882.215(c)(4), since moved to § 982.310(f) (2011).

<sup>255</sup> Former § 887.213(c), since moved to § 982.310(f) (2011).

<sup>256</sup> 24 C.F.R. § 982.310(f) (2011), *added at* 60 Fed. Reg. 34,705 (July 3, 1995).

<sup>257</sup> 24 C.F.R. § 966.4(l)(4) (2011). The courts had already so held. *See Juarez v. Housing Auth. of Hidalgo Cnty.*, No. B-80-42 (S.D. Tex. Mar. 4, 1980) (Clearinghouse No. 29,883); *Hunt v. Sikeston Hous. Auth.* (E.D. Mo. Dec. 18, 1980), 14 CLEARINGHOUSE REV. 377 and 1299 (No. 29,037, July 1980 and Apr. 1981) (consent decree enjoining PHA from disconnecting utilities for nonpayment of rent); *Randall v. Kelly*, No. 79-3387 (E.D. Pa. Apr. 8, 1980), 14 CLEARINGHOUSE REV. 377 (No. 29,049, July 1980) (stipulated order prohibiting same practice).