

14.3.1 History and Nature of the Federal Procedural Requirements

14.3.1.1 Public Housing

The development of procedural protections for tenants facing eviction from HUD-subsidized housing began with the Public Housing program, although not until nearly 30 years after the program 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.”¹ 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.”²

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.³ 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.⁴ Almost one month after *Goldberg v. Kelly*⁵ was decided, the Second Circuit provided the answer to that question.

In *Escalera v. New York City Housing Authority*⁶ the court held that the New York City Housing Authority’s procedures 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.⁷

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

¹ 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 **Error! Bookmark not defined.**).

² HUD Circular, Terminations of Tenancy in Low-Rent Projects (Feb. 7, 1967) (quoted in *Thorpe v. Housing Auth. of Durham*, *supra* note **Error! Bookmark not defined.**).

³ *Supra* note **Error! Bookmark not defined.**

⁴ *Supra* note **Error! Bookmark not defined.**

⁵ *Supra* note **Error! Bookmark not defined.**

⁶ *Supra* note **Error! Bookmark not defined.**

⁷ *Caulder v. Durham Hous. Auth.*, *supra* note **Error! Bookmark not defined.**; *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.**

year, culminating in February 1971, when HUD issued two circulars, commonly known as the model lease and grievance circulars.⁸ 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*.⁹

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.¹⁰ 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.¹¹ 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.¹²

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.¹³ That review was finally completed in August of 1975, when regulations on Public Housing leases and grievance procedures were published in the Federal Register.¹⁴ 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, in summary:

- that the PHA must give the tenant a written notice of termination stating the reasons for the termination (§ 966.4(l)(3));
- that the tenant must be given an opportunity in most cases to resolve the problem at an informal conference with PHA officials (§§ 966.4(n) and 966.54);
- that the tenant must be given an opportunity in most cases for a formal grievance hearing before an impartial decision-maker (§§ 966.4(n) and 966.52);
- that the tenant must be informed of his or her rights to the informal conference and the formal grievance proceeding (§ 966.4(l)(3)(ii)); and
- that the grievance hearing must provide the basic safeguards of due process, including discovery of relevant records and regulations, representation by counsel, the right to confront and cross-examine adverse witnesses and the right to a written decision based on the record and specifying the reasons (§§ 966.56(b) and 966.57(a)).

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.¹⁵ 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

⁸ 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).

⁹ *supra* note **Error! Bookmark not defined.**

¹⁰ *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).

¹¹ *Housing Auth. of Omaha v. United States Hous. Auth.*, Civ. No. 71-0-287 (D. Neb. order Mar. 12, 1973) (Clearinghouse No. 49,407).

¹² *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.**

¹³ 38 Fed. Reg. 15,988 (June 19, 1973).

¹⁴ 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 (2003).

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

implement grievance procedures and (2) utilize leases that require good cause for evictions.¹⁶ 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.¹⁷

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.¹⁸ However, implementation of those regulations was preliminarily enjoined in a suit brought by the National Tenants Organization,¹⁹ and HUD, in response, withdrew the regulations.²⁰ 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.²¹ HUD then promulgated a few amendments to the regulations to implement the 1990 legislation.²² Those amendments were not anywhere near as devastating as the ones proposed in 1982 and published in 1988.²³

These regulations, as amended in 1991,²⁴ are the ones to which you must look when you are representing Public Housing tenants facing eviction. They apply to federally subsidized conventional 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.²⁵ 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.

14.3.3.1 Availability and Exceptions

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.²⁶ 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.²⁷ In addition, this health and safety exception was

¹⁶ 42 U.S.C.A. §§ 1437d(k) and (l) (West 2003).

¹⁷ Pub. L. No. 98-181, § 204, 97 Stat. 1153, 1178 (1983).

¹⁸ 53 Fed. Reg. 33,216 (Aug. 30, 1988).

¹⁹ *National Tenants Org. v. Pierce*, *supra* note **Error! Bookmark not defined.**

²⁰ 54 Fed. Reg. 6,886 (Feb. 15, 1989).

²¹ 42 U.S.C.A. §§ 1437d(k) and (l) (West 2003), *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*.

²² 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 (2003).

²³ 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).

²⁴ 24 C.F.R. § 966.50-§ 966.57 (2003).

²⁵ *Id.* § 966.1.

²⁶ 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).

²⁷ *See Palacios v. Block*, No. C-81-462-JLQ (E.D. Wash. order entered Apr. 21, 1983) (Clearinghouse No. 49,412) (FmHA case);

available only if the state court eviction procedures met HUD's then-applicable definition of due process.²⁸ Several courts enjoined PHAs from using the health and safety exception when the state eviction procedures did not meet HUD's then-applicable definition.²⁹ 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.³⁰

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.³¹ 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.³² 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,³³ most general attacks on the HUD determinations failed.³⁴

In 1994, however, one systemic challenge to HUD's due process determinations was successful. In *Yesler Terrace Community Council v. Cisneros*,³⁵ 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.³⁶ 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

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

²⁸ Former 24 C.F.R. § 866.53(c), 40 Fed. Reg. 33,406, 33,407 (Aug. 7, 1975).

²⁹ *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).

³⁰ *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).

³¹ Former 42 U.S.C.A. § 1437d(k), as added by Pub. L. No. 98-181, § 204, 97 Stat. 1153, 1178 (1983).

³² *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).

³³ *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).

³⁴ *National Tenants Org. v. Kemp*, *supra* note **Error! Bookmark not defined.**; *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).

³⁵ *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).

³⁶ 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).

statute on excluding evictions from the grievance procedure as requiring such rulemaking.³⁷ Thus, 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.³⁸ 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.³⁹ The determinations themselves are available on HUDCLIPS in the legal opinions database, which can be browsed or searched.⁴⁰

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.⁴¹ 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.⁴² 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.⁴³

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.⁴⁴ 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.⁴⁵ However, in a more recent case, one court refused to allow the Philadelphia Housing Authority to modify its grievance procedure.⁴⁶

13.2.1 Historical Overview and Purpose

Until the late 1960s, Public Housing residents possessed virtually no rights beyond those afforded by the common law. Moreover, Public Housing residents often had fewer rights than residents leasing on the private market. Public Housing leases often imposed up to five times the number of restrictions contained in private leases and these restrictive terms were strictly enforced.⁴⁷ In this environment, there were no uniform procedures to resolve disputes between PHAs and residents. Residents who were the subject of arbitrary and discriminatory practices had no administrative means to redress their complaints. Any

³⁷ 24 C.F.R. §§ 10.3(c) and 966.51(a) (2003), 61 Fed. Reg. 13,273 (Mar. 26, 1996).

³⁸ 24 C.F.R. § 966.51(a)(2)(iii) (2003).

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

⁴⁰ HUDCLIPS can be reached at <<http://www.hudclips.org>>. Go from there into the Library to find the legal opinions database.

⁴¹ 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).

⁴² *Id.*

⁴³ 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 2003).

⁴⁴ Pub. L. No. 105-276, § 575(a), 112 Stat. 2518, 2634 (1998), *codified at* 42 U.S.C.A. § 1437d(k) (West 2003).

⁴⁵ *See Gilmore v. Housing Auth. of Baltimore City*, 170 F.3d 428 (4th Cir. 1999); *Escalera v. New York Hous. Auth.*, *supra* note **Error! Bookmark not defined.**, 924 F.Supp. 1323.

⁴⁶ *Brown v. Philadelphia Hous. Auth.*, 237 F. Supp.2d 567 (E.D. Pa. 2002).

⁴⁷ Dunham and Grundstein, *Impact of a Confusion of Social Objectives on Public Housing: A Preliminary Analysis*, 12 MARRIAGE & FAM. LIVING 103, 109 (1955). *See also* Note, *Public Landlords and Private Tenants: The Eviction of "Undesirables" From Public Housing*, 77 YALE L.J. 988, 992 (1968).

challenge to an arbitrary action could precipitate an eviction action.

The Public Housing grievance process grew out of efforts in the late 1960s to curb arbitrary lease terminations and evictions. These advocacy efforts were primarily directed toward extending procedural due process to affected Public Housing residents.⁴⁸ As a result, two leading housing cases, *Thorpe v. Housing Authority of Durham*⁴⁹ and *Escalera v. New York City Housing Authority*,⁵⁰ took the *Goldberg v. Kelly*⁵¹ due process requirements that had been won in the welfare arena and applied them to Public Housing evictions.

In 1971, in response to those early decisions, HUD issued directives, which were called circulars, establishing a lease and grievance procedure. PHAs were required to follow the provisions of each before terminating a tenancy and tenants could use the grievance procedure to address their complaints.⁵² Widespread opposition by PHAs to those mandatory circulars resulted in a concentrated, but unsuccessful, assault on HUD's authority to issue them.⁵³ Four years later, the circular provisions, with some modifications, were published in the Federal Register.⁵⁴ In 1983, Congress finally passed legislation requiring PHAs to provide grievance procedures, except in certain eviction disputes.⁵⁵

The battle surrounding the lease and grievance procedures continued. During the 1980's, HUD changed direction and mounted substantial attempts to severely limit the scope and elements of the grievance procedures.⁵⁶ HUD's efforts to eliminate the grievance protections were met with strenuous objections from both Congress and residents. Fortunately, the proposals were withdrawn before being finalized.⁵⁷ HUD later developed a new strategy to avoid the grievance process by permitting PHAs to

⁴⁸ See generally *id.*, and Note, *Nonfinancial Eligibility and Eviction Standards in Public Housing — The Problem Family in the Great Society*, 53 CORNELL L. REV. 1122 (1968).

⁴⁹ 386 U.S. 670 (1967), *vacated and remanded*, 393 U.S. 268 (1969) (Public Housing tenant could not be evicted without notice of reasons and opportunity to reply in administrative proceeding); **Error! Main Document Only.** *Thorpe v. Housing Auth. of Durham*, 386 U.S. 670 (1967), *subsequent opinion*, 393 U.S. 268 (1969).

⁵⁰ 425 F.2d 853 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970). See also *Caulder v. Durham Hous. Auth.*, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971); **Error! Main Document Only.** *Owens v. Housing Auth. of Stamford*, 394 F. Supp. 1267 (D. Conn. 1975).

⁵¹ 397 U.S. 254 (1970).

⁵² 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) (providing a model grievance procedure) (copy on enclosed CD).

⁵³ See *Housing Auth. of Omaha v. United States Hous. Auth.*, *supra* note **Error! Bookmark not defined.** (sustaining the validity of the 1971 circulars). See also, e.g., *Glover v. Housing Auth. of Bessemer*, 444 F.2d 158 (5th Cir. 1971) (giving circulars retroactive effect to live controversies); *Brown v. Housing Auth. of Milwaukee*, 471 F.2d 63 (7th Cir. 1972) (giving circulars retroactive effect to live controversies); *Braxton v. Poughkeepsie Hous. Auth.*, 382 F. Supp. 992 (S.D.N.Y. 1974) (rejecting argument that circulars would create administrative morass).

⁵⁴ 40 Fed. Reg. 33,406 (Aug. 7, 1975) (former 24 C.F.R. § 866.50).

⁵⁵ Pub. L. No. 98-181, § 204, 97 Stat. 1183, 1185 (1983), *codified at* 42 U.S.C.A. § 1437d(k) (West 2003), *as amended by* Pub. L. No. 101-625, § 503, 104 Stat. 4079, 4184 (Nov. 28, 1990) (allowing "expedited grievance procedure" or none upon due process determination in drug-related criminal activity eviction cases) and Quality Housing and Work Responsibility Act (QHWRA), Pub. L. No. 105-276, § 575, 112 Stat. 2539, 2634 (1998). QHWRA expanded the exception to the mandatory grievance procedures to include tenants involved in "violent" criminal activity and "any activity resulting in a felony conviction." *Id.*

⁵⁶ See 47 Fed. Reg. 55,689 (Dec. 13, 1982) (proposal to eliminate, among other things, requirement that PHA provide grievance hearing for tenant upon any termination of tenancy); 53 Fed. Reg. 33,216 (Aug. 30, 1988) (final regulations substantially amending required lease provisions and limiting availability of administrative grievance procedure for tenants). See also *Samuels v. District of Columbia*, *supra* note **Error! Bookmark not defined.**, 770 F.2d at 189-191, for discussion of the administrative and legislative history of the grievance hearing up to 1986.

⁵⁷ See *National Tenants Org. v. Pierce*, No. 88-3134, 1989 U.S. Dist. LEXIS 18348 (D.D.C. Jan. 25, 1989) (preliminarily enjoining HUD implementation of lease and grievance regulations published at 53 Fed. Reg. 33,216 (Aug. 30, 1988)) (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); HUD Notice, 54 Fed. Reg. 6,886 (Feb. 15, 1989) (withdrawing the 1988 regulations); *Public Housing Lease and Grievance Procedure*, 56 Fed. Reg. 6,248 (Feb. 14, 1991) (discussing proposed rules regarding administrative hearing requirements); *Public Housing Lease and Grievance Procedure*, 56 Fed. Reg. 51,560 (Oct. 11, 1991) (*codified at* 24 C.F.R. Part 966, as amended) (announcing and discussing the then-final rule regarding PHA grievance procedures).

completely bypass the judicial eviction process and immediately evict residents by using the federal civil forfeiture statute.⁵⁸ The courts, however, took the position that HUD could not evict tenants without providing the most basic of due process requirements: adequate notice and a hearing.⁵⁹

Unfortunately in the eviction context, the statutory amendments thereafter weakened the original due process requirements afforded residents. As a result, current statutory law permits PHAs to provide limited due process with “expedited” grievance procedures — or in certain cases, no grievance procedure at all — if the grievance concerns an eviction or termination of tenancy involving any activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other residents (or PHA employees), or any violent or drug-related criminal activity on or near the premises, or any activity resulting in a felony conviction.⁶⁰ These statutory changes did not affect residents’ rights to grieve PHA action or inaction in other contexts. Thus, the grievance process remains an important advocacy tool for both residents and housing advocates.

13.2.2.1 The “Criminal Activity” Exception

Over the past decade, Congress amended the governing statute that specified which evictions can be excluded from the Public Housing grievance procedure. The first change allows the exclusion of evictions involving drug-related criminal activity (even if the activity is not “near” the public housing premises).⁶¹ The same 1996 amendment allowed the exclusion of evictions involving threats to the health or safety of other tenants or PHA employees even if those threats are not criminal in nature.⁶² HUD implemented those changes by Notice, advising PHAs that it was not necessary to wait for regulatory changes to implement the statute.⁶³

Congress again expanded the types of evictions excludable from the grievance procedure through the Quality Housing and Work Responsibility Act of 1998 (QHWRA).⁶⁴ When HUD issued its final regulations addressing the revised statutory exceptions in May 2001,⁶⁵ it sought to incorporate provisions relating to both the 1996 and 1998 housing acts. Accordingly, the regulations currently provide PHAs with the discretion to exclude an eviction from its grievance procedure that involves any violent or drug-related criminal activity on *or off* the premises, or any other criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents or PHA employees.⁶⁶ The PHA may also exclude evictions from its grievance process that are based on any type of criminal activity that results in a felony conviction of a household member.⁶⁷ However, the regulations are narrower than the statute: they do not allow bypass of the grievance procedure for evictions posing a threat to health and safety where the offending activity is not criminal in nature. For a discussion of criminal activity and the

⁵⁸ 21 U.S.C.A. § 881(a)(7) (West Supp. 2001). The new strategy, called the National Public Housing Asset Forfeiture Project, was announced by HUD Secretary Kemp in a speech delivered on May 15, 1990. The effort was also directed toward lawyers who might possibly represent the evicted residents. *See* Letter from Secretary Jack Kemp to George W. Wittgraf, Chairman, Legal Services Corporation (May 20, 1990) (copy on enclosed CD).

⁵⁹ *Richmond Tenants Org., Inc. v. Kemp*, 753 F. Supp. 607, 609-10 (E.D. Va. 1990), *aff’d*, 956 F.2d 1300 (4th Cir. 1992) (except in exigent circumstances, Public Housing tenants are entitled to notice and an opportunity to be heard before eviction for suspected drug activity under Civil Forfeiture Act). For an alarmist’s claim that the courts exceeded their authority by providing residents’ due process rights which, in turn, resulted in the demise of Public Housing, *see* R.M. Smyers, *High Noon in Public Housing: The Showdown Between Due Process Rights and Good Management Practices in the War on Drugs and Crime*, 30 URB. LAW. 573 (Summer 1998).

⁶⁰ *See* 42 U.S.C.A. § 1437d(k) (West 2003). *See also* 24 C.F.R. § 966.55(g) (2003) and *Screening and Eviction for Drug Abuse and Other Criminal Activity*, 66 Fed. Reg. 28,776, 28,804 (May 24, 2001), *codified at* 24 C.F.R. § 966.51(a)(2)(i) (2003).

⁶¹ Pub. L. No. 104-120, § 9, 110 Stat. 834, 836 (Mar. 28, 1996), *codified at* 42 U.S.C.A. § 1437d(k) (West 2003).

⁶² *Id.* *See also* *New Bedford Hous. Auth. v. Olan*, 736 N.E.2d 410 (Mass. App. Ct. 2000) (in eviction proceedings for criminal activity, PHA must prove as part of *prima facie* case that warrantless entry by police leading to arrest was proper).

⁶³ HUD Notice PIH 96-27 (HA), *Occupancy Provisions of the Housing Opportunity Program Extension Act of 1996* (May 13, 1996), expiration date extended by HUD Notice PIH 97-27 (May 20, 1997).

⁶⁴ 42 U.S.C.A. § 1437d(k) (West 2003), *as amended by* Pub. L. No. 105-276, § 575(a), 112 Stat. 2461, 2634 (Oct. 21, 1998).

⁶⁵ *Screening and Eviction for Drug Abuse and Other Criminal Activity*, 66 Fed. Reg. 28,776, *codified at* 24 C.F.R. § 966.51(a)(2)(i) (2003).

⁶⁶ *Id.* *See also* § 14.2.7.3, *infra*, for discussion of eviction on these grounds.

⁶⁷ *Id.*

availability and exceptions to the grievance procedure in the eviction context, *see* § 14.3.3.1, *infra*.

Despite HUD's attempt to clarify "criminal activity," there will undoubtedly be disputes as to whether the facts involving a particular eviction action constitute the kind of criminal activity that justifies bypassing, or expediting, the grievance process. PHAs may attempt to classify a tenant's action as "criminal activity" simply to avoid the grievance process.⁶⁸ HUD has taken the position in the introductory comments of its regulations that the courts will have to resolve any such disputes.⁶⁹

Importantly, there is no statute, regulation or case law that *requires* a PHA to exclude evictions involving these criminal activities from the grievance process. PHAs may provide the right to a grievance hearing for all tenants, even those charged with criminal activity.⁷⁰ Alternatively, the PHA could use an expedited grievance process for evictions based on alleged criminal activity.⁷¹ In addition, to avoid the possibility of evictions involving allegations of less serious criminal activity being expedited or completely excluded from the grievance process, residents and advocates can request that PHAs limit the excluded evictions to those involving *felonious*, *serious* or *violent* criminal activity, or to evictions brought only after criminal conviction. Distinctions could also be made depending upon where the activity takes place and who is accused of being involved in the violent or drug-related criminal activity. For example, the grievance hearing could be bypassed if the adult tenant was accused of perpetrating the criminal activity, but if the act were committed by a child, guest or visitor of the resident, a grievance hearing could be provided. Moreover, PHAs should be encouraged to use the grievance hearing to adhere to HUD's directive to consider all circumstances and to determine whether all other options have been exhausted before proceeding with an eviction.⁷² These and other alternatives could be included in the PHA's grievance procedure. The resident council, residents and advocates could raise these issues in the context of the PHA plan process. For a discussion of the PHA plan process, *see* § 12.2.6, *supra*.

Finally, even if the PHA chooses to exclude the designated evictions from the grievance procedure, it may do so *only* if HUD has determined that the state eviction procedure used by the PHA provides the tenant a due process hearing in court.⁷³ Originally, HUD could not approve the summary eviction

⁶⁸ *See Housing Auth. of Covington v. Stacy*, No. 94-C-00607 (Ky. Dist. Ct., Kenton Cnty. Apr. 28, 1994) (Clearinghouse No. 49,894) (eviction action dismissed because victim of domestic violence was not "involved in criminal activity" and therefore could not be denied a grievance hearing). *But see Hous. Auth. of New Haven v. DeRoche*, 962 A.2d 904 (Conn. App. Ct. 2009) (holding that tenant who became intoxicated and started fire in unit was not entitled to grievance hearing prior to termination because she had engaged in criminal activity and PHA need not specify criminal statute allegedly violated in termination notice); *Hous. Auth. of New Haven v. Martin*, 898 A.2d 245 (Conn. App. Ct. 2006) (since federal law does not require a grievance hearing for evictions due to criminal activity, PHA can deny tenant's request for a grievance hearing even though tenant was informed in the eviction notice of the right to a grievance hearing).

⁶⁹ *See Public Housing Lease and Grievance Procedures*, 56 Fed. Reg. 51,560, 51,573 (Oct. 11, 1991). With respect to this issue, it is useful to review cases decided under the prior regulations regarding what conduct constitutes an imminent threat to health and safety permitting the bypass of the grievance procedure under the prior regulations. One state appellate court held that the PHA's allegation of "repeated incidents of intoxication and irresponsible use of kitchen facilities" could not justify bypassing the grievance procedure under the health and safety exception. *Housing Auth. of DeKalb Cnty. v. Pyrtle*, 167 Ga. App. 181 (Ga. App. 1983). Likewise, a tenant's repeated attempts to seek police protection from her estranged husband was found to be insufficient justification. *Lee v. Housing Auth. of Morgantown*, No. C89-0113 BG (M) (W.D. Ky. Aug. 28, 1989), 23 CLEARINGHOUSE REV. 901 (No. 44,993, Nov. 1989). *Cf. Hartford Hous. Auth. v. McKenzie*, 36 Conn. Supp. 515 (1979), 14 CLEARINGHOUSE REV. 588 (No. 25,516, Oct. 1980) (health and safety exception implied by law into tenant's lease, and affirming finding of health hazard).

⁷⁰ *See, e.g.*, Housing Authority of Kansas City, Missouri (HAKC), Residential Lease Agreement, ¶¶ 13(d) and 14 (Feb. 21, 1996) and Admissions and Continued Occupancy Policy, Eviction Procedures, at pp. 16-2 to 16-5 (Nov. 1999) (providing tenants with grievance procedures without exception) (copies on enclosed CD).

⁷¹ 24 C.F.R. § 966.55(g) (2003). Note that HUD failed to amend this section governing "expedited grievance procedures" to include the expanded grounds for bypassing the grievance procedure.

⁷² *See* Letter from Mel Martinez to all Public Housing Directors (Apr. 16, 2002) (urges PHAs to be guided by compassion and common sense and to apply one-strike rule responsibly, not rigidly), available at <http://www.nhlp.org/html/pubhsg>; Letter from Michael M. Liu, Assistant Secretary of HUD, to Public Housing Directors (June 6, 2002) (reminds PHAs in applying one-strike rule that they are not required to evict for every lease violation and may evict just the wrongdoer), available at <http://www.nhlp.org/html/pubhsg>.

⁷³ Notice of HUD Due Process Determinations, 61 Fed. Reg. 13,276 (March 26, 1996); *HUD Due Process Determinations* (Clearinghouse No. 44,785).

process, or the eviction courts ordinarily used by landlords, in several states because the state summary proceedings did not guarantee a right for tenants to discover their files, as required by the former regulatory definition of “due process.”⁷⁴ In several states, the HUD waiver was either withdrawn or invalidated by court action because of the lack of discovery in the states’ eviction processes.⁷⁵ In addition, tenants successfully challenged the HUD waiver process itself as a violation of the Administrative Procedure Act.⁷⁶

In 1990, Congress amended the public housing statute and, while requiring PHAs to provide discovery, also specified that HUD could not use the absence of guaranteed discovery as a ground for withholding approval of a particular state court eviction procedure.⁷⁷ As a result, HUD issued due process determinations and has approved state court procedures in most states.⁷⁸ Although there have been continuing questions as to whether HUD’s determinations approving various state court eviction procedures are valid since HUD does not recognize certain protections arguably required by due process (such as a written decision explaining the basis of the determination and a right to counsel), there have not been any recent challenges to HUD’s due process determinations.

HUD must publish a notice in the *Federal Register* listing the judicial eviction procedures for which

⁷⁴ Former 24 C.F.R. § 866.53(c), 40 Fed. Reg. 33,406 (Aug. 7, 1975). See also Subcommittee on Housing and Community Development of the Committee on Banking, Finance and Urban Affairs, 98th Cong., 2d Sess., *Compilation of the Domestic Housing and International Recovery and Financial Stability Act of 1983*, 229, 321 (Comm. Print Sept. 1984) (statement by Chairman St. Germain indicating that determination of what constitutes due process should be made locally on jurisdiction-by-jurisdiction basis, due to enormous variations between urban and rural courts within same state). See also the following cases invalidating a PHA’s attempts to bypass the grievance process on the grounds that discovery was not guaranteed for the tenant. These cases did not involve a HUD waiver, but relied upon regulations that permitted the PHA to bypass the grievance procedure if the state court proceeding contained certain elements of due process: *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); *Lacy v. Housing Auth. of Baltimore*, No. 84-2431 (D. Md. Aug. 13, 1984), 19 CLEARINGHOUSE REV. 188 (No. 38,559, June 1985); *Oklahoma City Hous. Auth. v. Harris*, No. FC 82-17938 (Okla. Dist. Ct., Okla. Cnty., Dec. 22, 1982), 17 CLEARINGHOUSE REV. 136 (No. 33,824, June 1983).

⁷⁵ *Simmons v. Kemp*, 751 F. Supp. 815 (D. Minn. 1990) (opinion invalidates HUD waiver for Minnesota because state law does not guarantee discovery); *Housing Auth. of Jersey City v. Jackson*, 749 F. Supp. 622 (D.N.J. 1990) (opinion invalidating HUD waiver for New Jersey because state law does not guarantee discovery); *Lopez v. Nogales Hous. Auth.*, No. Civ. 89-182-TUC-WDB (D. Ariz. Mar. 2, 1990) (Clearinghouse No. 46,166) (successful challenge to HUD’s due process determination for Arizona; waiver withdrawn by July 17, 1990, letter from Secretary Kemp to Governor Mofford, on the grounds that Arizona courts do not have sufficient pre-trial discovery of documents). General attacks on the HUD waiver process failed, see, e.g., *Ruffin v. Kemp*, 90-C-2065, 1992 U.S. Dist. LEXIS 10320 (1992) (summary judgment granted and challenge to 1989 Illinois determination dismissed as moot); *National Tenants Org. v. Pierce*, No. 88-3134 (D.D.C. memorandum and order filed Jan. 25, 1989), *preliminary injunction denied sub nom. National Tenants Org., Inc. v. Kemp*, No. 89-5175/TJP (D.D.C. June 20, 1989) (order denying injunction against HUD waivers of grievance procedures in eviction actions), *injunction pending appeal denied* No. 89-5175 (D.C. Cir. July 7, 1989), 23 CLEARINGHOUSE REV. 610 (No. 43,958, Aug./Sept. 1989). But see *Sims v. Kemp*, 781 F. Supp. 1264 (N.D. Ill. 1991) (limited denial of participation process (LDP) used in lieu of grievance procedure, but LDP does not afford tenant the requisite element of due process mandated in grievance process).

⁷⁶ *Yesler Terrace Comm. Council v. Cisneros*, 37 F.3d 442 (9th Cir. 1994) (HUD’s decision that state eviction procedures satisfied elements of due process was promulgation of substantive rule, and promulgated rule was invalid where HUD did not provide notice and opportunity to comment, in violation of HUD’s own regulations), *reversing Yesler Terrace Comm. Council v. Kemp*, No. C92-535 (W.D. Wash. June 2, 1992), 26 CLEARINGHOUSE REV. 940 (No. 48,081, Dec. 1992) (notice and comment rulemaking not required for HUD due process determinations). Subsequently, HUD amended its rule-making regulations to clarify that notice and comment rule-making is not required when HUD makes due process determinations and that HUD further did not interpret the 1990 statute on excluding evictions from the grievance procedure as requiring such rule-making. 24 C.F.R. §§ 10.3(c) and 966.51(a)(2) (2003); 61 Fed. Reg. 13,273 (Mar. 26, 1996).

⁷⁷ 42 U.S.C.A. § 1437d(k) (West 2003) (note that statute now requires PHA to give tenant documents related to eviction prior to hearing or trial). Note that because of the statutory change, the earlier cases cited in the prior footnote have far less significance. See also **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) (resident’s due process claims failed because Florida eviction procedure provides basic elements of due process).

⁷⁸ For 48 states and the District of Columbia, HUD has published notices in the *Federal Register* listing the judicial eviction procedures for which it has issued a due process determinations. See 61 Fed. Reg. 13,276 (Mar. 26, 1996); 61 Fed. Reg. 47,953 (Sept. 11, 1996) and 62 Fed. Reg. 45,434 (Aug. 27, 1997). HUD has not published in the *Federal Register* an announcement of a waiver for Nevada, Hawaii or Puerto Rico.

it has issued a due process determination and make the legal analysis underlying each determination available to the public.⁷⁹ It is important to determine which state or local judicial eviction procedures HUD evaluated in making the due process determination. If the PHA does not use the procedure upon which HUD made the due process determination, the grievance procedure may not be bypassed. In addition, if a state eviction procedure has materially changed with respect to the elements of the due process after the HUD made its due process determination, HUD may be required to review and issue a new determination and the grievance procedure should not be bypassed until such determination is made.

⁷⁹ 24 C.F.R. § 966.51(a)(2)(iii) (2003). For the list of approved states, see *Notice of HUD Due Process Determination*, 61 Fed. Reg. 13,276 (March 26, 1996) (publication of basic list of states); 61 Fed. Reg. 47,953 (Sept. 11, 1996) (Connecticut, Massachusetts and Mississippi); 62 Fed. Reg. 45,434 (Aug. 27, 1997) (North Carolina and Louisiana). The basis for the determinations of some – but not all – states are available to the public. To view the available legal opinions, search Hudclips' Legal Opinions database at http://www.hudclips.org/sub_nonhud/cgi/hudclips.cgi.