

Recertification: Navigating the “Extenuating Circumstances” and “Totality of the Circumstances” Standards

By Katherine Brady, NHLP Contract Attorney

A tenant’s failure to properly recertify his or her income and family composition can seriously jeopardize the family’s housing benefits. Often, the failure to comply with recertification obligations arises because of a personal hardship or because a tenant has unmet language or reasonable accommodation needs. To protect a tenant’s right to due process, property owners and public housing agencies (PHAs) have a duty to consider circumstances beyond a tenant’s control when a tenant fails to comply with his or her recertification obligations. Specifically, owners of Department of Housing and Urban Development (HUD) Multifamily properties must consider “extenuating circumstances” and PHAs that administer Public Housing or Housing Choice Voucher programs must consider “the totality of circumstances.” In addition, owners and PHAs have a duty to consider whether a tenant requires a reasonable accommodation to the recertification process, has language access issues, or is experiencing domestic violence, dating violence, sexual assault, or stalking that is causing the failure to recertify. This article explores these duties and encourages residents and advocates to argue that owners must consider whether extenuating circumstances led to a tenant’s failure to recertify *before* taking any adverse action.

Background: General Tenant and Owner Recertification Obligations

A family’s eligibility and participation in federally assisted housing programs is based on income and family composition. With few exceptions, tenants must recertify income and composition on a regular basis, often on the anniversary of first receiving assistance, or as established by specific program rules.¹ A change in either income or composition can affect the family’s continued eligibility for the housing program, or may increase or decrease benefits. Owners and PHAs are required to verify tenant eligibility and recalculate a family’s benefits at recertification, including the tenant’s contribution to rent and

¹Tenants who pay full contract or market rent in properties with project-based rental assistance do not need to recertify annually; they must recertify at least once every three years. See 42 U.S.C.A. § 1437a(a)(2)(E) (2014). Public housing tenants who pay flat rents must recertify family composition annually, but income once every three years. 24 C.F.R. § 960.257(a)(2) (2015).

whether the unit size remains appropriate.² Owners and PHAs are motivated to timely complete the recertification process and to hold tenants in strict compliance because assistance payments from HUD can terminate if recertification is late and because HUD can use timely compliance as part of the criteria to evaluate federally subsidized housing programs.³

Recertification in HUD Multifamily Housing: Extenuating Circumstances

Unfortunately, HUD regulations do not address whether owners of multifamily properties must consider extenuating circumstances if a tenant fails to timely recertify. Advocates can, however, turn to the HUD Multifamily Handbook, which obligates owners to provide tenants with multiple recertification notices and to inquire into any extenuating circumstances that may have prevented a tenant from timely re-certifying. The Handbook also provides a procedure whereby tenants may explain any extenuating circumstances that prevented timely recertification, including acts of the owner, third parties, or the tenant’s own condition or circumstances.

Specifically, owners must: (1) inquire into extenuating circumstances that prevented a tenant from timely complying with recertification obligations; (2) investigate the circumstances; (3) allow the tenant to explain the circumstances; (4) and render a decision, which the tenant may appeal.⁴ While the Multifamily Handbook does not have the force and effect of law,⁵ it is considered “highly persuasive” authority and, when the Handbook contains mandatory language, courts have often treated those provisions as binding.⁶

The Wilson Class Action Litigation

The Handbook’s “extenuating circumstances” language arose out of a class action lawsuit filed on due process grounds. Before 1993, Project-Based Section 8 tenants

²The recertification policy for Public Housing tenants is set forth in their lease, the PHA Plan, and federal regulations. Policies and procedures for HUD Multifamily housing are set forth in tenant leases, federal regulations, and the HUD Multifamily Occupancy Handbook. Finally, recertification rules for Section 8 voucher programs administered by PHAs are set forth in the Section 8 administrative plan, the PHA Plan, and federal regulations.

³See 24 C.F.R. § 985.3(j) (2012) (listing recertification criteria for the Section 8 Voucher program); 24 C.F.R. § 990.215 (2005) (listing recertification criteria for Public Housing); HUD, Handbook 4350.3, REV-1, CHG-3, ¶ 7-6 (June 2009), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=43503HSGH.pdf> [hereinafter HUD Handbook] (listing recertification requirements for HUD Multifamily programs).

⁴HUD Handbook, *supra* note 3, at ¶ 7-8 D4.

⁵See *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 278 (1969).

⁶See, e.g., *Whitaker v. Clementon Hous. Auth.*, 788 F. Supp. 226, 229 (D.N.J. 1992) (citing *Burroughs v. Hills*, 564 F. Supp. 1007, 1015 (N.D. Ill. 1983), *aff’d*, 741 F.2d 1525 (7th Cir. 1984) and *Estrada v. Hills*, 401 F. Supp. 429, 437 (N.D. Ill. 1975)); *cf. Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979) (“[HUD’s] interpretation of the [Fair Housing Act] ordinarily commands considerable deference.”).

did not have a pre-termination right to a hearing for failure to timely recertify. As a result, tenants faced termination of their Section 8 subsidy—and potential eviction—when owners reported recertification obligations were unmet, regardless of whether the owner provided adequate notice of the recertification and without regard to whether circumstances justified noncompliance.⁷ A number of tenants subject to these harsh consequences sued HUD, ultimately filing a class action on behalf of all Project-Based Section 8 tenants.⁸ In *Wilson v. Kemp*, tenants contended that the Multifamily Handbook recertification procedures violated their procedural due process protections under the Fifth Amendment by permitting owners to terminate Section 8 benefits without a hearing to determine whether the owner followed HUD's required procedures or whether the tenant had good cause for failing to timely recertify.⁹

The tenants argued that without a hearing, owners routinely terminated housing benefits even though a tenant's failure to timely recertify could have been caused by the owner's failure to provide notice, a theft of that notice by a third party, or hospitalization—an extenuating circumstance that should not result in the diminution or loss of housing benefits.¹⁰ The court agreed with the tenants that terminating Section 8 Program benefits without affording a hearing violated due process.¹¹ Accordingly, the court ordered HUD to develop and implement new notice and hearing procedures. In response, HUD issued CHG-25 to the Multifamily Handbook, requiring owners to provide tenants with written notice stating the date the family's recertification is due (1) when the tenant first signs the lease; and (2) at each annual renewal.¹² Thereafter, owners must give three reminder notices at specified intervals.¹³ If a tenant does not provide recertification information by the due date, but later produces the information, the Handbook change requires the owner to determine whether extenuating circumstances caused the tenant's lateness.¹⁴

Identifying and Addressing Extenuating Circumstances

The Multifamily Handbook, as amended post-*Wilson*, obligates owners to investigate and consider extenuating circumstances when a tenant fails to timely comply with recertification. Once the tenant's compliance date

has passed, if the tenant fails to come forward with the information necessary to recertify, the owner *must* ask the tenant whether extenuating circumstances prevented him or her from responding to recertification notices and forms by the compliance date.¹⁵ HUD defines extenuating circumstances as those beyond the tenant's control and provides examples: hospitalization, travel for a family emergency, or overseas military duty.¹⁶ In response to the owner's inquiry, tenants claiming extenuating circumstances must provide supporting evidence to the owner, who then *must* determine whether there indeed were circumstances beyond the tenant's control that resulted in the failure to recertify.¹⁷ If the owner determines no extenuating circumstances existed, the owner must provide the tenant with a written notice of the decision and inform the tenant of the right to an appeal.¹⁸ The appeal is a meeting, likely between the tenant and owner (the Handbook does not specify participants), where the tenant or a chosen advocate may present information and respond to information presented by others.¹⁹

An owner's failure to cooperate in this process can provide a tenant with a defense to an eviction or benefit termination. In *Somerset Homes v. Woodard*, for example, a tenant in HUD multifamily housing did not timely comply with the recertification process.²⁰ A few weeks prior to the recertification deadline, however, the tenant's father died; two days later, the father of her child was murdered in her apartment while she and her daughter were present.²¹ As part of the ongoing criminal investigation, police treated the apartment as a crime scene for over three months and refused the tenant access to her apartment without a police escort.²² After the tenant failed to recertify she met with the owner, who never inquired about extenuating circumstances, never determined whether the events she experienced immediately prior to and after the recertification deadline constituted extenuating circumstances, and failed to provide written notice that extenuating circumstances were not found.²³ The court overturned a lower court's judgment for possession in favor of the owner because there were "clear extenuating circumstances that prevented [tenant] from complying with the recertification process,"²⁴ and because the owner did not meet the due process requirements in the HUD Multifamily Handbook.²⁵

⁷NHLP, *Federal Court Orders Due Process Protections for Section 8 Tenants Facing Rent Increases to Market Level*, 23 HOUS. L. BULL. 15, 15-19 (May/June 1993).

⁸Tenants filed a second class action lawsuit that was ultimately consolidated with the first, collectively referred to as the *Wilson* action. See *infra* note 9.

⁹See *Wilson v. Kemp*, 1992 WL 12667348, at *10-11 (S.D. Ind. Nov. 30, 1992); *Wilson v. Cisneros*, 1993 WL 13718229, at *2-5 (S.D. Ind. Mar. 17, 1993).

¹⁰*Wilson*, 1993 WL 13718229, at *2.

¹¹*Id.* at *2-4.

¹²HUD Handbook 4350.3, REV-1, CHG-25 (May 1993).

¹³*Id.*

¹⁴*Id.*

¹⁵See HUD Handbook, *supra* note 3, at ¶ 7-8 D4.

¹⁶*Id.* at ¶ 7-8 D4a.

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.* at ¶ 7-8 D4e.

²⁰2014 WL 2574037, at *8-9 (N.J. Super. Ct. App. Div. June 10, 2014).

²¹*Id.* at *9.

²²*Id.*

²³*Id.* at *14.

²⁴*Id.* at *13.

²⁵*Id.* at *15. Specifically, the owner failed to comply with obligations outlined in HUD Handbook, *supra* note 3, at ¶ 7-8 D4c-e. See *supra* text accompanying notes 15-19.

Recertification in Public Housing and the Section 8 Voucher Program: Totality of the Circumstances

Neither the Public Housing Occupancy Guidebook²⁶ nor the Housing Choice Voucher Guidebook²⁷ detail the recertification process to the level of the Multifamily Handbook, leaving PHAs substantial discretion in the recertification process. The Housing Choice Voucher Guidebook contains more specific guidance on the recertification notice requirement that must be afforded (both in timing and substance) than the Public Housing Occupancy Guidebook,²⁸ but neither guidebook explicitly mandates that an owner or PHA inquire into extenuating circumstances if a tenant's recertification obligations are unmet. Nevertheless, courts have suggested that an examiner presiding over a termination or grievance hearing for public housing tenants or Section 8 voucher holders for failure to comply with recertification obligations must consider the totality of the circumstances that prevented the tenant's timely compliance.

In *Cooley v. Housing Authority of Slidell*, for example, the Fifth Circuit held that the PHA acted arbitrarily and capriciously in terminating the tenant's Section 8 assistance for failure to attend an annual recertification meeting based on the "totality of the circumstances."²⁹ Prior to her recertification meeting, the tenant's mother had died and she was staying at her mother's apartment to handle her mother's affairs. During the month the tenant was away, she did not collect her mail and therefore did not receive the recertification notices.³⁰ Once she finally received the notices, she attempted to comply with her recertification obligations by re-scheduling her annual recertification meeting. The Court found that these circumstances demonstrated that the tenant received late notice, acted upon the notice when received, and complied with her obligations.³¹ Even without using the precise term "extenuating circumstances," the Fifth Circuit found that the examiner abused her discretion by failing to consider and credit the "totality of the circumstances,"³² particularly those beyond the tenant's control, prior to taking an adverse action.

²⁶HUD, Public Housing Occupancy Guidebook (June 2003), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_10760.pdf [hereinafter Public Housing Occupancy Guidebook].

²⁷HUD, Housing Choice Voucher Guidebook 7420.10G (Apr. 2001), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11743.pdf.

²⁸Compare *id.* at § 12.4 Reexamination Procedures, Notification to Participant that Annual Reexamination is Due (identifying when PHAs should give notice and what should be included in the content of the notice), with Public Housing Occupancy Guidebook, *supra* note 26, at § 12.2 Annual Reexamination (leaving substantial discretion to the individual PHAs to establish re-examination policies and attendant notice procedures).

²⁹747 F.3d 295, 298-99 (5th Cir. 2014).

³⁰*Id.* at 296.

³¹*Id.*

³²*Id.*

Additionally, shared due process concerns for all HUD program tenants suggest that owners and PHAs should consider circumstances beyond a tenant's control in evaluating recertification problems arising for Public Housing and Section 8 tenants. Public Housing, the Section 8 Voucher Program, and multifamily housing programs originate from a common legislative source, the United States Housing Act of 1937. Having derived from a common source to achieve a common purpose, the most basic protections and rights afforded by each program should be consistently construed.³³ The same due process concerns the *Wilson* court sought to rectify in ordering changes to HUD's Multifamily Handbook³⁴ apply to public housing tenants and Section 8 vouchers holders,³⁵ who have already benefitted from the existence of grievance hearing procedures³⁶ or termination hearing procedures prior to the termination of housing benefits.³⁷ As in multifamily housing, if the adverse action is predicated upon the failure to comply with the recertification process, the tenant may demand a grievance hearing or termination hearing where the tenant should present, and the examiner must consider, evidence of any reasons for the failure to timely recertify, including extenuating circumstances.

Finally, if the failure to timely recertify is the result of the owner's failure to comply with any of the notice requirements, those failures can also provide tenants with a defense to an action to raise rent contributions, evict, or to terminate housing assistance.³⁸ As such, landlords and owners must provide a meaningful opportunity for

³³See *Morales v. TWA, Inc.*, 504 U.S. 374, 387 (1992) (similar statutory language should be interpreted similarly); *TWA, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 432-33 (1989) (statutes with similar purpose should be construed similarly, absent contrary legislative intent).

³⁴See *supra* text accompanying notes 11-14.

³⁵The public housing grievance process grew out of efforts to extend procedural due process requirements to affected public housing residents. See *Thorpe v. Hous. Auth. of Durham*, 388 U.S. 670 (1967); *Escalera v. N.Y. City Hous. Auth.*, 425 F.2d 853 (2d Cir. 1970) (applying due process requirements to public housing evictions); see also *Aikens v. D.C. Dep't. of Hous. & Cmty. Dev.*, 515 A.2d 712 (D.C. 1986) (The PHA's failure to provide written notice to Section 8 participants of the timeframe for reporting recertification information violated due process.).

³⁶See 24 C.F.R. § 966.4(l) (2010).

³⁷See 24 C.F.R. § 982.555(a)(1)(v) (2015) (An informal hearing for a participant is required when there is a determination to terminate assistance for a participant family because of the family's action or failure to act.).

³⁸See, e.g., *Hidden Meadows Townhomes v. Ross*, 2012 WL 6674412, *5-6 (Ohio Ct. App. Dec. 21, 2012) (finding the owner lacked authority to raise tenant's rent contribution where the owner failed to properly notify tenant that she needed to sign one of the requisite HUD recertification forms and that her failure to sign would result in termination of her assistance); *Good Neighbor Apartment Assoc. v. Rosario*, 2008 N.Y. Misc. LEXIS 4584 (N.Y. Civ. Ct. 2008) (finding owner's failure to comply with notice procedure provided the tenant a defense to an eviction action, and that "the HUD Handbook procedures are mandatory, and must provide the tenant with specific information on the recertification process, requirements and time lines"); *Lower E. Side I Assoc. LLC v. Estevez*, 787 N.Y.S.2d 636 (N.Y. Civ. Ct. 2004) (declining to evict tenant because the owner was not permitted to charge market value rent when he failed to comply with the notice requirements established in the HUD Handbook).

tenants to explain a failure to follow the recertification process prior to a termination of housing, subsidy, or voucher benefits. PHAs and owners must give those explanations due consideration.

Reasonable Accommodations, LEP, and Domestic Violence Issues Constitute Extenuating Circumstances

Included in the analyses of both “extenuating circumstances” and the “totality of circumstances,” are protections afforded persons with limited English proficiency (LEP), persons with disabilities who require reasonable accommodations, and survivors of domestic violence. These tenants may require different types of recertification notices, modified policies, or additional time to comply with recertification obligations. PHAs and owners administering multifamily housing, public housing and the Section 8 Voucher Program must comply with fair housing and anti-discrimination laws that provide reasonable accommodations and LEP considerations to tenants, and with federal protections for survivors of domestic violence.

Reasonable Accommodation

The recertification process can be daunting for tenants who experience disabilities, particularly when symptoms impair a tenant’s ability to understand recertification notices and forms, or to gather, interpret, and report the financial information required by the owner or PHA. Owners and PHAs are obligated to provide tenants a reasonable accommodation if more time is needed to complete a recertification as a result of the tenant’s disability.³⁹ While there is an independent basis for this duty under fair housing and anti-discrimination laws, a disability-related reason for failure to timely recertify is also an extenuating circumstance that an owner must consider prior to an adverse action.

LEP

An extenuating circumstance may include the need for a tenant to have notices and forms provided in a language other than English. Advocates working with LEP persons should determine whether the recertification forms and notices have been made adequately accessible and, if not, raise this as an extenuating circumstance that excuses the tenant’s failure to timely recertify. Similar to the obligation to provide a reasonable accommodation, owners of HUD multifamily housing and PHAs have a separate and distinct duty to provide meaningful language access to the public, including translating vital housing documents.⁴⁰

³⁹See 42 U.S.C.A. § 3604, *et seq.* (2015); 29 U.S.C.A. § 794 (2014).

⁴⁰Generally, whether a document (or the information it contains or solicits) is “vital” depends upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner. Final Guidance to Federal Financial Assistance Recipients

This duty arises under Title VI of the Civil Rights Act and the August 11, 2000 Executive Order 13166 (Improving Access to Services for Persons with Limited English Proficiency). While HUD has not produced a list of each document that is considered “vital,” it has identified several vital documents: consent and complaint forms, application forms for housing, written notices of eligibility criteria, rights, denial, loss, or decreases in benefits or services, and notices advising LEP persons of free language assistance.⁴¹

Recertification forms and notices are vital documents as the recertification process directly implicates the right to, and amount of, benefits received and the failure to properly adhere to the recertification process may result in the loss or denial of benefits. Thus, recertification notices and forms must also be made available in languages other than English for LEP individuals in accordance with HUD guidance. If an owner or PHA has failed to comply with its obligations to LEP persons, advocates should raise this defect as an extenuating circumstance to any adverse consequences that arose from the failure to timely recertify, along with any potential Title VI claim.

Domestic Violence, Dating Violence, Sexual Assault, and Stalking

Advocates should consider whether there are extenuating circumstances caused by acts of domestic violence, dating violence, sexual assault, or stalking that have been committed against a household member. For example, when a lease is bifurcated due to domestic violence such that the abuser is removed from the lease and the survivor remains in the unit, the survivor may need extra time to establish his or her status as head of household for recertification purposes. Under the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), housing providers of many programs administered by HUD are prohibited from evicting or terminating assistance from a survivor of domestic violence, dating, sexual assault, or stalking because of the abuse committed against the survivor.⁴² Therefore, a housing provider can violate VAWA 2013 by evicting or terminating assistance for a survivor who fails to recertify for reasons related to the abuse.

Regarding Title VI Prohibition Against National Origin Discrimination affecting Limited English Proficient Purposes, 72 Fed. Reg. 2,732 (Jan. 22, 2007).

⁴¹*Id.* As evidence that HUD considers recertification documents “vital,” the Office of Fair Housing and Equal Opportunity (FHEO) website, available at <http://www.hud.gov/offices/fheo/lep.xml>, provides translations of various documents (notices) associated with the recertification process (MF Housing), including: Annual Recertification Reminder Notice (HUD Handbook 4350.3, Exhibit 7-3), Annual Recertification Third Reminder Notice/Notice of Termination (HUD Handbook 4350.3, Exhibit 7-4), Model Form of Notification of Rent Increase Resulting from Recertification Processing, Interim Adjustment Initial Notice (HUD Handbook 4350.3, Exhibit 7-7), and Interim Adjustment Termination of Assistance (HUD Handbook 4350.3, Exhibit 7-8).

⁴²42 U.S.C.A. § 14043e-11(b)(1) (2015).

Conclusion

A tenant's failure to timely recertify can have serious consequences, including the imposition of market rent, termination of public assistance, and eviction. Fortunately, there are safeguards and defenses which advocates may use to assist tenants who have failed to comply with their obligations or to prevent adverse action when a property owner or PHA administrator fails to follow their obligations in the recertification process. Advocates should explore whether circumstances beyond the tenant's control provide a defense, whether the PHA or owner followed its obligation to consider such circumstances prior to taking adverse action, and whether the tenant's rights to reasonable accommodation, VAWA protections, or language access have been met in the recertification process. ■