

CHAPTER 6
FEDERALLY SUBSIDIZED
HOUSING

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1. TRADITIONAL/CONVENTIONAL PUBLIC HOUSING

1.1 INTRODUCTION

The oldest and most widely known federal housing program is the conventional public housing program which originated with the United States Housing Act of 1937. See generally 42 U.S.C. § 1437d; 24 C.F.R. Parts 960, 966. Under this program, the housing is owned and administered by a local Public Housing Authority (PHA). The United States Department of Housing and Urban Development enters into an annual contributions contract with the local PHA. HUD must also provide operating subsidies. These contracts are for a term of forty years.

PHAs are public corporations created under La. R.S. 40:381 et seq. A PHA is a governmental actor within the meaning of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. Due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution and the Louisiana Constitution apply to PHA actions. As recipients of federal funding, PHAs are subject to Title VI of the Civil Rights Act and § 504 of the Rehabilitation Act. Many of their actions are also subject to the Fair Housing Act. The state APA is not applicable to a housing authority unless it elects to be governed by it. La. R.S. 40:406.

In many areas, traditional public housing has been phased out in favor of newer programs such as the Section 8 Housing Choice Voucher Program and Tax Credit housing. Also, mixed income communities are on the rise, in which only a portion of the units at a particular site are traditional public housing.

1.2 ELIGIBILITY

Families, the elderly (62 years or older), disabled persons, the remaining members of a tenant family, other singles, and displaced persons are eligible for public housing provided that their income does not exceed 80% of the area median income and that they do not have assets in excess of the limits set by the local PHA. Some of HUD's housing programs, including Public and Indian housing, are now limited to citizens and certain categories of immigrants. 24 C.F.R. § 5.506.

Recent income targeting and poverty deconcentration regulations also affect who is eligible for public housing. The law now requires 40% of new admissions to public housing be restricted to families with incomes below 30% of the area median income. 42 U.S.C. § 1437n(a)(2)(A). PHAs may reduce that 40% target under "fungibility provisions." Under the fungibility rules, a PHA can reduce families admitted to public housing by one, for each family admitted to the Section 8 Voucher programs with income below the income targeting rules for the Voucher program. Lower-income families must not be concentrated into a certain development. 42 U.S.C. § 1437n(a)(3). Each PHA must develop an admission policy that will provide for the deconcentration of poverty by encouraging higher income applicants to move into lower income projects and allow for the admission of lower income applicants at higher income projects. 42 U.S.C. § 1437n(a)(3)(B). A housing authority can offer incentives for higher income families to move to lower income projects. It may skip over applicants on the waiting list until it reaches a family that will accept the incentives. Skipping may be mandatory if it is necessary to achieve deconcentration.

1.3 ADMISSIONS ISSUES

1.3.1 Preferences

Congress has now permanently repealed all of the former federal preferences for public housing. 24 C.F.R. § 5.415-5.430 and 24 C.F.R. § 5.410(b) and (d), have been removed from the regulations. Housing authorities are now allowed to develop and implement local preferences such as for disabled or elderly persons, including residency preferences. *But see Langlois v. Abington Housing Authority*, 207 F.3d 43 (D. Mass. 2002), where a local residency preference was found to violate the Fair Housing Act under a disparate impact theory. Any preferences utilized by a housing authority should be consistent with the local area's Consolidated Plan and be based upon local housing needs and priorities. Common preferences include for domestic violence victims, the homeless, elderly, disabled, and working families. However, if a preference for working families is given, this preference must be extended to families where the head (and spouse when applicable) are elderly or disabled. 24 C.F.R. § 960.206(b)(2).

1.3.2 Denials of Admission

Housing authorities often reject applicants for admission to public housing. If an applicant is rejected, the housing authority must give the applicant written notification of the factual grounds for the denial and notification of their right to an informal hearing to contest the denial. This notification must contain enough detail so that the applicant understands the reasons for the denial. Any informal hearing must be heard before a person other than the individual who made the decision to reject the applicant. This type of hearing is not included in the PHA's grievance procedure—it is strictly an informal review. 24 C.F.R. § 960.208(a). Some common reasons for rejection of an applicant include the following:

1.3.2.1 Criminal Record

A prior criminal record or activity may be grounds for denial of admission to public housing. The regulations provide that a history of criminal activity involving crimes of physical violence to persons or property and other criminal acts may be used to reject an applicant. 24 C.F.R. § 960.205(3)(d) further provides that if a PHA receives unfavorable information with respect to an applicant, consideration shall be given to the time, nature, and extent of the applicant's conduct and to factors which might indicate a reasonable probability of favorable future conduct such as evidence of rehabilitation, the family's willingness to participate in social service or other appropriate counseling programs, or the family's willingness to increase family income. Additionally, recent HUD policies are encouraging a more lenient interpretation in favor of giving ex-offenders more opportunities to access public housing. On June 17, 2011 HUD Secretary Shaun Donovan issued a letter to all PHAs encouraging them to allow ex-offenders to rejoin their families when possible. See http://www.nationalreentryresourcecenter.org/documents/0000/1126/HUD_letter_6.23.11.pdf.

If contesting whether a criminal conviction should be grounds for denying admission, be sure to bring evidence of mitigating factors to the Informal Hearing including but not limited to letters from probation or parole officers, employers, ministers, certification of completion of a drug rehabilitation or recovery program, etc. *See also* One-Strike Policy Admissions, § 6.1.8, below.

But PHAs must prohibit admission to *all* persons currently illegally using drugs as well as persons who have been either convicted of production of methamphetamines or are on the lifetime sex offender list. See 24 C.F.R. § 960.204(a)(3) and (4). Louisiana has, however, placed persons on the lifetime sex offender list who do not belong on it.

1.3.2.2 Eviction From Any Federal Housing For Drug Related Criminal Activity Within Three Years Of Application

Federal law now requires housing authorities to reject applicants for admission to public housing if the applicant has been evicted from other federally funded housing programs for criminal drug-related activity for a three-year period beginning on the date of such eviction. There are two exceptions to this under 24 C.F.R. § 960.204: a) if the evicted household member has completed a rehabilitation program or b) the circumstances leading to the eviction no longer exist (for example, evicted household member has died or is in prison).

1.3.2.3 Prior Debt Owed to PHA

PHAs will often reject applicants for prior debts owed to the housing authority. It should be noted that the debt must be currently owed in order to be a valid basis for rejection. Under state law, rent and debts on an open account have a 3 year prescriptive period. La. Civ. Code art. 3494. If an applicant formerly lived in public or Section 8 housing and has a debt older than 3 years, the debt is now prescribed, no longer owed and therefore cannot be a valid basis for rejection.

1.4 RENT COMPUTATION

Until changes were made to federal law discussed in § 6.1.5, below (“Minimum Rents And Flat Rents”), a public housing tenant’s portion of rent was calculated based upon 30% of her annual adjusted income. “Annual income” for federal housing programs is defined at 24 C.F.R. § 5.609. Most public housing tenants are still charged rent based on 30% of their income. Rent changes in between regular recertifications due to a tenant’s loss of income must be processed and are generally effective the month after the decrease in income is reported. 24 C.F.R. § 960.257. The only exception is if income is lost due to failure to comply with welfare work requirements.

A public housing tenant is not entitled to have her rent reduced due to welfare work sanctions. (Please note however, that she may ask for a grievance or an exemption to minimum rent if applicable.) A rent reduction may not be withheld until the welfare department notifies the PHA in writing that the loss of income was due to work sanctions and until the tenant has a chance for a grievance. If the loss of welfare arises from the exhaustion of time limits or despite the fact that the tenant complied with the welfare agency’s requirements but could not find a job, the tenant must be allowed the rent reduction. 42 U.S.C. § 1437j(d)(2).

You should closely scrutinize the deductions and exclusions provided in federal law at 24 C.F.R. §§ 5.603-634 when computing rent. Check to see if the PHA gave the proper credits or deductions for medical expenses, child care expenses, allowances for elderly, disabled, or minors, training income, and earned income exclusions. Because there are so many deductions and exclusions and HUD knows PHAs make many mistakes, there is a movement to change the way rents are done. This movement is called “Rent Simplification.”

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Under the current rent rules, a public housing tenant's rent is calculated in the following way:

- STEP 1 — Compute all non-exempt income for the entire family for the year
- STEP 2 — Subtract all eligible deductions for the family to get adjusted annual income
- STEP 3 — Divide the adjusted annual income figure by 12 to get a monthly adjusted income
- STEP 4 — Multiply the monthly adjusted income by 30% if the family pays income-based rent. This is how much the family pays for their share of rent IF they do not pay for their own utilities. If the family pays for their own utilities, go to STEP 5
- STEP 5 — Subtract the utility allowance which the PHA uses for the family's bedroom size and utility type from the number in STEP 4. This is what the family pays as its share of rent when they are responsible for their own utilities.

It can be very costly for a low income tenant if her rent is not calculated correctly. The most commonly missed deductions are for childcare and medical expenses. This is best shown by doing rent calculations with and without deductions for hypothetical families as shown below.

1.4.1 Childcare Expense Deduction

Childcare expenses may be deducted in a rent calculation if the childcare is needed so that a member of the household can work. Even if there are other members of the household available to watch the child, this deduction can still be taken. Receipts or other documentation from the childcare provider may be requested. Check your local PHA's administrative plan for clarification on this.

Example: Mary is a public housing tenant making \$800 per month at her minimum wage job. She lives in a unit where she does not pay for any of her own utilities. She has two minor children ages 3 and 6. She pays childcare expenses of \$75 per week. Example A shows that her tenant share of rent would be \$216 per month without the childcare deduction. Example B shows that properly calculated her rent would only be \$119, resulting in a monthly savings to her of \$ 97 per month.

EXAMPLE A

ANNUAL INCOME	\$ 800 X 12	=	\$9,600
SUBTRACT MINOR DEDUCTIONS(2)	\$ 480 X 2	=	<u>960</u>
ADJUSTED ANNUAL INCOME			\$8,640
ADJUSTED MONTHLY INCOME(AMI)	\$8,640/12	=	\$720
MULTIPLY AMI x 30%	\$720 x .30	=	\$216

EXAMPLE B

ANNUAL INCOME	\$800 x 12	=	\$9,600
SUBTRACT MINOR DEDUCTIONS(2)	\$480 x 2	=	\$960
SUBTRACT CHILDCARE DEDUCTION	\$75x 52	=	<u>\$3,900</u>
ADJUSTED ANNUAL INCOME			\$4,740
ADJUSTED MONTHLY INCOME(AMI)	\$4740/12	=	\$395
MULTIPLY AMI x 30%	\$395 x .30	=	\$119

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1.4.2 Medical Expense Deduction

Mary is a disabled grandmother raising two minor grandchildren in public housing. Her income is \$862 per month from SSDI. Over the next year, she projects to have unreimbursed medical expenses of approximately \$200 per month for doctor co-pays, prescription copays, medical transportation, and health insurance (over \$100 a month often withheld for the latter from Social Security payments). Example C shows what her rent would be without the medical expense deduction and Example D shows that her rent would be lowered by \$48 per month with this deduction. The medical expense deduction only applies if the annual expected medical expenses exceed 3% of the tenant's annual income with the deduction being the difference between the expenses and 3% of annual income.

EXAMPLE C

ANNUAL INCOME	\$862 x 12	=	\$10,344
SUBTRACT DISABLED DEDUCTION			\$400
SUBTRACT MINOR DEDUCTIONS	\$480 x 2	=	<u>\$960</u>
ADJUSTED ANNUAL INCOME			\$8984
ADJUSTED MONTHLY INCOME(AMI) (rounded to nearest dollar)	\$5384/12	=	\$749
MULTIPLY AMI x 30%	\$449 x .30	=	\$225

EXAMPLE D

ANNUAL INCOME	\$862 x 12	=	\$10,344
SUBTRACT DISABLED DEDUCTION			\$200
SUBTRACT MINOR DEDUCTIONS	\$480 x 2	=	\$960
SUBTRACT MEDICAL DEDUCTION (\$200 x 12 = \$2400)			\$998/
Compare to 3% of gross Income \$10,344 x .03 = \$310 \$2400 - \$310 = \$2,090			
Medical Expense Deduction Here			\$2,090
ADJUSTED ANNUAL INCOME			\$7,094
ADJUSTED MONTHLY INCOME (AMI)	\$7,094/12	=	\$591
MULTIPLY AMI x 30%	\$591 x .30	=	\$177

1.5 MINIMUM RENTS AND FLAT RENTS

As mentioned above, changes to federal law now allow for rents to be set at levels other than at the traditional 30% of adjusted income. The law requires PHAs to impose minimum rents of up to \$50 per month. Hardship exemptions are allowed. Exemptions from the minimum rent include:

- a household's inability to pay the minimum rent due to a loss of government assistance;
- a household's facing eviction due to an inability to pay the minimum rent;
- other reasons as determined by the PHA. PHAs are required to notify households of the possible exemptions and to suspend charging minimum rents to households who request an exemption. If there is hardship which is long-term (over 90 days), an exemption should be granted. If the hardship is only temporary, the PHA should offer the tenant a reasonable repayment plan for any suspended rents or missed payments. 42 U.S.C. § 1437a(a)(3), 24 C.F.R. § 5.630.

Legislation enacted in 1998 allowed PHAs to charge a flat rent based upon the “rental value” of the unit instead of the tenant’s income. This type of rent is called a “flat rent”. The reason for implementing flat rents was to discourage higher income families from moving out of public housing. A tenant is given an annual choice to either pay a flat rent or an income based rent. PHAs must advise tenants in writing of the amount of the income based rent or the flat rent. If a flat rent is chosen and the resident has a loss of income, they can request a switch to income based rent. 24 C.F.R. § 960.253(f). Flat rent payers are not allowed the benefit of a utility allowance. 24 C.F.R. 960.253.

1.6 GRIEVANCE PROCEDURE

The right to a grievance procedure is one of the most important advantages which a public housing tenant has over other federally subsidized tenants and private tenants. All PHAs must establish a grievance procedure by which a tenant gets a hearing if she disputes any PHA action or failure to act, except for certain types of evictions (e.g. drug-related or criminal activity terminations) and class grievances. 24 C.F.R. § 966.51. A tenant must present her grievance to the project manager or someone else at the main office and discuss the grievance informally. The manager is then to prepare a summary of the discussion and give a copy to the tenant. If the tenant is not satisfied with the result, she may request a Formal Hearing within a reasonable time after receipt of the decision. You should consult the individual PHA plan or administrative plan for specific rules governing the grievance hearing process. The written request must state the reason for the request and the specific relief sought by the tenant. 24 C.F.R. § 966.55. Tenants are not entitled to use the PHA grievance process to contest proposed evictions for criminal or drug-related activity, if the PHA has decided to exclude such matters from the grievance process and local eviction court procedures satisfy due process. 24 C.F.R. § 966.51(a)(2)(i).

If the grievance concerns a dispute over a change in rent, the tenant must deposit into the PHA escrow account, an amount equal to the amount of rent which the PHA claims is now due as of the first of the month preceding the month of the change. In cases where a tenant is being evicted and still has the opportunity for a grievance hearing, the PHA must inform the tenant of her right to a hearing, if applicable. The PHA may not continue with the eviction process until the time for requesting a hearing has elapsed. If the tenant timely requests a grievance, the eviction is indefinitely suspended until the completion of the hearing process. A tenant has the right to review all relevant PHA documents prior to the hearing, to have an advocate assist her at the hearing, and a right to a public or a private hearing depending upon the tenant’s request. The tenant has a right to confront and cross-examine witnesses. The tenant is entitled to a written decision and the PHA is in general bound by the decision. 24 C.F.R. §§ 955.56 and 955.57.

You should use the Informal and Formal Grievance Hearing process when available for eviction proceedings, disputes over rent or other charges such as maintenance fees, transfer disputes, and for repairs. You may often experience lengthy delays in getting an Informal Hearing, getting a written decision from the Informal Hearing, and getting a date set promptly for a Formal Hearing. The grievance process can be used in conjunction with a request for rent abatement.

1.7 EVICTIONS FROM PUBLIC HOUSING

A public housing tenant may only be evicted for a serious or repeated violation of the dwelling lease. Good cause is always required to evict or refuse to renew a lease for public housing tenants except in the case of a tenant's refusal to comply with Community Service Work requirements. 24 C.F.R. § 966.4(l)(2), 42 U.S.C. § 1437d(l)(1). Congress has specifically provided that criminal activity, drug-related activity, and the illegal use of drugs or abuse of alcohol may be grounds for eviction.

In order to evict, a PHA must give proper written notice as required by federal and state laws. *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268 (1969). The notice shall not be less than a reasonable time but shall not exceed 30 days if the health or safety of other tenants, PHA employees, or other persons residing in the immediate vicinity of the premises is threatened; 14 days in the case of nonpayment of rent; and 30 days in any other case, except that if state law allows a shorter period, such shorter time may apply. In Louisiana, this means that eviction proceedings against a public housing tenant for any violation other than nonpayment of rent could be instituted upon a 5 day notice to vacate. 24 C.F.R. § 966.4(3), 42 U.S.C. § 1437d(l)(4). Any notice of lease termination required by state law may be combined with or run concurrently with the PHA's notice of lease termination. The notice must be served by delivering a copy to an adult member of the household residing in the dwelling or by prepaid first class mail properly addressed to the tenant. 24 C.F.R. § 966.4(k)(1)(l). Service by tacking of a notice of lease termination to a public housing tenant could be challenged as inadequate notice and a violation of due process. See the Louisiana Landlord-Tenant section of this Poverty Law Guide.

The notice to the tenant shall state specific grounds for lease termination with enough detail for the tenant to understand the reason for eviction and must inform the tenant of her right to make a reply, the right to examine PHA documents, the right to a grievance hearing if applicable, and the right to representation. When a PHA is not required to have a grievance hearing, such as in certain criminal or drug-related evictions, the PHA must nevertheless: (1) advise the tenant whether the eviction is for criminal activity or drug-related activity and it must: (2) advise the tenant of the specific judicial procedure to be used by the PHA for eviction; and (3) state that HUD has determined that such procedure complies with due process. 24 C.F.R. § 966.4(l)(3)(v).

The regulations further provide that in deciding whether to evict for criminal or drug-related activity, a housing authority still has discretion not to evict and to consider all of the circumstances of the case, such as the seriousness of the offense, the extent of participation by the leaseholder in the offense, the effects of an eviction on those not involved in the offending activity, and the steps the family has taken to accept personal responsibility and to prevent the action from occurring in the future. 24 C.F.R. § 966.4(l)(5)(vii)(B). A PHA may also allow continued occupancy for certain family members provided that those family members who engaged in the proscribed criminal activity are no longer allowed in the unit.

After the time allowed for in the notice expires, the PHA must file a rule for possession in the appropriate court. The regulations mandate that a PHA may only evict a tenant by court action. 24 C.F.R. § 966.4(l)(4). At the hearing, the PHA has to prove the existence of a lease and that the lease was violated. The PHA must prove a violation by the preponderance of the evidence. Prior to trial, you

should request and review the tenant's folder, subpoena documents and/or witnesses as necessary, file a verified answer with any applicable affirmative defense, and supporting memorandum, and take advantage of the grievance process if available. In the case of an eviction for criminal activity, an advocate should check the criminal case as charges are frequently dropped or not prosecuted, or the party charged with criminal activity may actually have been found not guilty. The PHA often continues to proceed with the eviction for illegal activity even when under these circumstances it is unlikely that it will prove its case.

1.7.1 Practice Tips

Request a meeting with the PHA's legal or other representative. Often they are willing to negotiate and either remove the problematic household member from the lease, allowing the other household members to remain or allow a probationary period for the tenant during which the tenant cannot violate any of their obligations. A probationary period agreement can be entered into the court record as a consent agreement.

While the case is pending, you should have the tenant deposit the rent into the PHA escrow account or into escrow client trust account. PHAs will usually not accept rent from a tenant once a decision has been made to evict. Particularly with drug or criminal activity evictions which may last several months, it is important that the funds for rent be deposited into a safe place in the event that a settlement is reached or a favorable judgment obtained. If the tenant has not been putting the rent aside pending the eviction case, you may have won the lease violation eviction but then the tenant will be evicted for nonpayment of the accrued rent.

1.8 ONE STRIKE CRIMINAL ACTIVITY EVICTIONS

PHAs have been directed by Congress to use leases which provide that a public housing tenant may be evicted for criminal activity which threatens the health, safety or right to peaceful enjoyment of the premises by other tenants, or for drug-related criminal activity on or off the premises. 42 U.S.C. 1437d(l)(6). LSC-funded attorneys may not represent in public housing evictions persons convicted of or charged with drug crimes when the evictions are based on threats to health or safety of public housing residents or employees. 45 C.F.R. § 1633. However, such attorneys may represent a person facing eviction because a family member was convicted of or charged with drug crimes.

The United States Supreme Court ruled that such lease provisions are constitutional and that there is no requirement that a tenant have knowledge of the alleged criminal activity for it to be a lease violation. *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002). The court did not hold that eviction is required when this lease provision is violated. Note that criminal activity must threaten other tenants' well-being; drug-related criminal activity does not have to do so. The criminal or drug-related activity which exposes the tenant to eviction must have been engaged in by the "public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control." 42 U.S.C. 1437d(l)(6). The last four words of this provision have been interpreted to apply only to "other person". See also *Housing Authority of New Orleans v. Green*, 657 So.2d 552 (La. App. 4th Cir. 1995), writ denied 661 So.2d 1355, cert. denied 517 U.S. 1169 (1996).

The theory behind making tenants guarantors of third parties' conduct and establishing a one-strike and you're out policy is that it will promote the general welfare of public housing tenants by motivating tenants to prevent criminal activity and ridding the developments of criminals. The 5th Circuit U.S. Court of Appeals has held that the eviction of tenants for criminal activities of their household members (or guests) does not violate federal constitutional rights. *Chavez v. Housing Auth. of El Paso*, 973 F.2d 1245 (5th Cir. 1992). However, a tenant cannot be evicted for the criminal activity of a guest which occurred prior to the tenant's current lease term. *Wellston Housing Authority v. Murphy*, No. ED 83156, 2004 Mo. App. Lexis 399, 2004 WL 555610 (Mo. Ct. App. Mar. 23, 2004). See also *Boston Housing Authority v. Bruno*, 58 Mass. App. Ct 486, 790 N.E. 2d 1121 (2003) where the court held that a PHA cannot shift on appeal to a theory that the offender was a guest after losing on its claim that the offender was a member of the household.

The housing authority must prove the criminal activity occurred. This does not require that there has been a conviction or even an arrest. Some courts have even granted evictions based upon One-Strike grounds when there was no arrest. See *Housing Authority of Los Angeles v. Vargas*, No. 89 U34272 (Cal. Mun. Ct. Los Angeles Cnty. June 15, 1990). If the PHA seeks to terminate the tenancy for criminal activity based upon a criminal conviction, the PHA must provide the tenant a copy of the criminal record in advance of the grievance hearing or court trial. 24 C.F.R. § 966.4(l)(5)(iv).

The fact that a person has been arrested is not itself evidence of criminal activity. *Housing Authority of New Orleans v. Sylvester*, 2012-CA-1102 (La. App. 4 Cir.2/27/13); *U.S. v. Johnson*, 648 F.3d 273 (5th Cir. 2011); *U.S. v. Labarbera*, 581 F.2d 107 (5th Cir. 1978); *Landers v. Chicago Housing Authority*, 404 Ill.App.3d 568, 936 N.E.2d 735 (Ill.App. 1 Dist.,2010); *Bratcher v. Housing Authority of City of Milwaukee*, 327 Wis.2d 183, 787 N.W.2d 418 (Wis.App.,2010); *Pratt v. Housing Authority For City of Camden*, 2006 WL 2792784 (D.N.J.,2006). But evidence that led to such arrest may be used against the tenant. Police reports alone should not fulfill the PHA's evidentiary burden. La. C.E. Art. 803(8)(b)(i,iv); *State v. Robinson*, 02-1253 (La.App. 5 Cir. 4/8/03), 846 So.2d 76, 84 writ denied 860 So.2d 1131, 2003-1361 (La. 11/26/03), 860 So.2d 1131, reconsideration denied 2003-1361 (La. 3/12/04), 869 So.2d 806; *Deville v. Aetna Ins. Co.*, 191 So.2d 324, 328 (La. App. 3 Cir.1966), writ refused 250 La. 13, 193 So.2d 527. See also *State v. Cockerham*, 522 So.2d 1245, 1247 (La. App. 4 Cir. 1988).

Drug-related criminal activity is defined as "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance." 42 U.S.C. § 1437d(l). Previously, only drug-related activity "on or near the premises" was a required basis for eviction. Many existing leases will not have been updated to conform to the new statutory requirement, and will still be governed by the previous limitation that the offense must be "on or near the premises."

HUD regulations include as good cause for eviction criminal or other activity which threatens the health or safety of people who reside in the immediate vicinity of the premises, even if they are not public housing residents. 24 C.F.R. § 966.4(l)(2)(iii)(A). This appears contrary to the controlling statutory language, except with respect to drug-related criminal activity. Under the statute, criminal activity is grounds for eviction if it threatens the "health, safety or right to peaceful

enjoyment of the premises by other tenants.” 42 U.S.C. § 1437d(l)(6). Given this language, it does not appear that Congress intended to protect non-public housing residents residing in the immediate vicinity of the premises.

The Personal Responsibility and Work Opportunity Act of 1996 requires public housing authorities to provide in their leases that tenancies can be terminated if a member of the household is fleeing from a felony prosecution or conviction, or is violating probation or parole. 42 U.S.C. § 1437d(l)(9); 24 C.F.R. § 966.4(l)(5)(ii)(B). Since passage of the Quality Housing and Work Responsibility Act of 1998, PHA leases have also been required to provide that the tenancy may be terminated for any household with a member who is illegally using a controlled substance, or whose illegal use of a controlled substance or abuse of alcohol interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents. See 42 U.S.C. § 13662; 24 C.F.R. § 966.4(l)(5)(vi). In determining whether to terminate a tenancy for illegal drug use or alcohol abuse under this provision, the PHA may consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated, and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol. 24 C.F.R. § 966.4(l)(5)(vi).

Although strict responsibility for the acts of other household members, guests and persons under the tenant's control has been upheld by some courts, many courts have refused to grant such evictions. HUD's own regulation, codified at 24 C.F.R. 966.4(l)(5)(vii)(B), provides as follows:

In a manner consistent with such policies, procedures, and practices, the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity, and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action. The PHA may require a tenant to exclude a household member in order to continue to reside in the unit where that household member has participated in or been culpable for action or failure to act that warrants termination. (Emphasis added)

This equitable approach is supported by the legislative history of the 1990 amendments to this statute in the Cranston-Gonzales Affordable Housing Act. For example, the accompanying Senate Report specified that criminal activity is grounds for eviction of public housing residents only if that action is appropriate in light of all the facts and circumstances. The report states that each case should be judged on its merits, with the exercise of wise and humane judgment by the housing authority and the eviction court. The report gives as an example that eviction would be inappropriate if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity. S. Rep. No. 316, 101st Cong., 2d Sess. 179 (June 8, 1990). It should be noted that even after the United States Supreme Court decision in the *Rucker* case holding “One-Strike” evictions are constitutional, the United States Department of Housing and Urban Development issued two letters to all public housing agencies informing them that PHAs still did not have to evict even when

the lease is violated. To quote from the April 16, 2002 letter, “such evictions often do more harm than good” and “eviction should be a last resort.” (See April 16, 2002 Letter from HUD Secretary Mel Martinez and June 6, 2002 Letter from Asst. Secretary of HUD Micheal Liu, both at www.nhlp.org.) Also, state and federal law prohibit public housing authorities from evicting or terminating any other assistance to a tenant based upon criminal activity when the alleged criminal activity is domestic violence and the tenant was the victim of the crime. La. R.S. 40:506(D); see also Violence Against Women And Department of Justice Reauthorization Act of 2005 P.L. 109-162 § 607.

As discussed above, tenants are not entitled to use the PHA grievance process to contest proposed evictions for criminal or drug-related activity, if the PHA has decided to exclude such matters from the grievance process. 24 C.F.R. § 966.51(2)(a).

1.9 COMMUNITY SERVICE WORK REQUIREMENT

Each public housing authority must require all adult public housing tenants, not just heads of household give 8 hours per month of service to the community in which they reside, unless they meet one of several exceptions (set out below). 42 U.S.C. § 1437j(c). Residents can also perform “economic self-sufficiency” activities instead of community service. 24 C.F.R. § 5.603. Housing authorities must address the community service work requirement in their PHA plan. Leases must be changed to have a 12 month term with automatic renewal except if a nonexempt family member has violated community work requirements. 24 C.F.R. § 966.4(a)(2).

Exempt tenants include but are not limited to: those aged 62 or over, blind or disabled, primary caretakers of persons who are blind or disabled, engaged in “work activities” under TANF definition, or exempt from work requirements under state TANF program. Noncompliance with community work requirements at lease expiration can lead to eviction unless the tenant and noncomplying family member sign an agreement to cure within subsequent 12 months or noncomplying adult leaves household. 24 C.F.R. § 960.601(b), 960.607(b). The head of household cannot make-up hours for the noncompliant household member. A family retains its rights to an administrative grievance if found to be noncompliant.

The PHA must provide a general notice to all residents of the Community Service requirement along with a description of the exemptions and permissible work activities. It must also state in the notice the date by which a resident must start doing community service. This date is generally the recertification date.

2. SECTION 8 HOUSING CHOICE VOUCHER PROGRAM

2.1 INTRODUCTION

The Section 8 Housing Choice Voucher Program, like other federal assistance programs, traces its origins to the New Deal legislation of the 1930's. The mission to provide affordable, habitable housing would move from the National Housing Act of 1934 to the Housing Act of 1937 and with the Housing and Community Development Act of 1974 Section 8 became the primary vehicle for the federal government's efforts to provide an adequate supply of low-income housing.

In the HUD Section 8 Housing Choice Voucher Program (HCVP), the eligible families receive a federal rental subsidy to assist them in locating and being able to afford decent, safe and sanitary housing. The program is generally administered by local governmental entities called public housing agencies (PHAs). See generally 24 C.F.R. Part 982, 42 U.S.C. § 1437f.

It is important when embarking on any representation or advocacy involving the HCVP to determine and locate the local PHA which has jurisdiction over the region in which your work is directed. The PHA must adopt a written administrative plan that establishes local policies for administration of the program in accordance with HUD requirements. The administrative plan is a supporting document to the federal PHA plan and must be made available for public review; contact your local PHA and get a copy of their administrative plan to keep as a reference for all disputes you may have under the HCVP program.

The PHA administrative plan will address the selection and admission of new tenants, establishing and administration of the waitlist, extensions and suspensions of the voucher search period, occupancy policies, termination/denial of assistance based on criminal activity and other grounds, promotion of new areas for low-income housing, assisting families that claim to have been illegally discriminated against in housing, disapproval of owners, absence of members of the family, informal review procedures, repayment of monies owed by family back to PHA, Housing Quality Standards, inspection guidelines, and more. See 24 C.F.R. § 982.54.

2.2 ELIGIBILITY

In order to be eligible for Section 8 subsidies, a participant must be "income-eligible." Income-eligibility is defined in 24 C.F.R. § 982.201(b). Of those who are deemed income-eligible, a PHA must reserve no less than 75 percent of families admitted in any fiscal year to those who qualify as extremely low income (30% Area Median Income for local area). A PHA may admit a lower percent of extremely low income families during a PHA fiscal year only with HUD approval.

Admission is usually done by wait list due to the overwhelming need for affordable housing and the desirability of the Section 8 program due to its allowing the tenant some measure of control in choosing where to live. A person may be on multiple PHA waiting lists in different areas and is not barred from applying if they are already receiving some housing subsidy. (If they are granted admission to HCVP, they must then relinquish any other housing subsidy they are otherwise receiving.) The PHA must delineate the system of admission preferences that the PHA uses to select applicants from the waiting list, including any residency preference or other local preference.

Admission can also be granted through special "non-wait list" admissions when funds are made available for a specific population. This can occur when HUD awards special funding to target specific families for admission to the HCVP program. When this happens, the PHA may admit these families regardless of their wait list position or if they were ever on the wait list. Generally, this occurs when other HUD action would result in a family rendered homeless due to the demolition, destruction, transfer and/or sale of otherwise assisted housing.

2.3 ADMISSIONS

When a family's position is reached on the wait list, the PHA will make a determination as to the family's eligibility. If the family is found to be eligible, the PHA will then admit that family to the program. As part of the admission procedures, the PHA must provide an oral briefing including a description of the program, the various responsibilities of the tenant and the owner, where a family can look for housing, and how portability works. 24 C.F.R. § 982.301(a) If the family is currently living in a high poverty census tract in the PHA's jurisdiction, the briefing must explain the advantages of moving to an area that does not have a high concentration of poor families. 24 C.F.R. § 982.301(a)(3).

Along with the oral briefing, the family is to receive an information packet which explains in-depth the nature of rent calculation, the lease addendum that HCVP requires, information to assist the family in finding a home, and the all important Request for Tenancy Approval. This information packet is separate from the actual HCV voucher but they are generally issued at the same time.

2.3.1 Denial of Admissions

An applicant may be denied admission only for very specific reasons. 24 C.F.R. § 982.552 and § 982.553 list both the mandatory and discretionary reasons why a PHA must or may deny admission to an eligible family. Issues dealing with criminal/drug behavior will be discussed below.

The PHA must deny admission to the program for an applicant if any member of the family fails to sign and submit required consent forms; fails to provide required evidence of citizenship or eligible immigration status; fails to meet the eligibility requirements concerning individuals enrolled at institutions of higher education.

The PHA must give an applicant prompt written notice of a decision denying admission to the program (including a decision that the applicant is not eligible, or denying assistance for other reasons). The notice must give a brief statement of the reasons for the decision. The notice must also state that the applicant may request an informal review of the decision, and state how to arrange for the informal review. 24 C.F.R. § § 982.201(f), 982.554(a).

The PHA must state the specific procedures for conducting the informal review in its administrative plan but the PHA's procedures must comply with three provisions: 1) it may be conducted neither by the person who made or approved the decision to deny, nor a subordinate of this person; 2) the applicant must have opportunity to present written or oral objections to the decision; 3) the PHA must issue the decision in writing after the informal review, including a brief statement of the reason for the final decision. 24 C.F.R. § 982.554(b).

The PHA is not required to provide the applicant an opportunity for an informal review when the denial of assistance relates to (1) Discretionary administrative determinations by the PHA; (2) General policy issues or class grievances; (3) A determination of the family unit size under the PHA subsidy standards; (4) A PHA determination not to approve an extension or suspension of a voucher term; (5) A PHA determination not to grant approval of the tenancy; (6) A PHA determination that a unit selected by the applicant is not in compliance with Housing Quality Standards. See 24 C.F.R. § 982.554(c). This "informal review" differs from the

“informal hearing” available when assistance is terminated. *Compare* 24 C.F.R. § 982.555 (Example: The “informal hearing” specifically provides for the right of discovery, 24 C.F.R. § 982.555(E)(2), whereas the “informal review” does not.).

It is important to act quickly when a family has received notice of a denial of assistance. The informal review process is usually time sensitive with hard deadlines set by the PHA. When assisting a client who has been denied assistance quick action to notify the PHA of the request for an informal review should be your first step. If possible, include with this notification a request to review the file of the family to determine what information the PHA is using as the basis for its determination. Many denials of assistance stem from the PHA making its determination of eligibility or issues on information that is bad/wrong/not up-to-date. Sometimes the PHA will have correct information but you can nonetheless take action that will allow the problem to be rectified before the review occurs, such as when a denial is due to an expunge-able criminal record.

2.4 USING THE VOUCHER

Vouchers are issued for at least a sixty day search period; the PHA may extend this time in accordance with their administrative plan or at their discretion but the term for the search period must be in writing and usually is placed on the voucher itself. 24 C.F.R. § 982.303(a). During this time, a tenant must locate a new residence and new landlord who is willing to rent to them while on the program and can meet Housing Quality Standards. Except for a few restrictions, private Louisiana landlords are not required to accept the vouchers, even if they currently have Section 8 HCV tenants or they have rented to Section 8 HCV tenants in the past. However, Louisiana landlords who participate in other federal programs cannot discriminate against Section 8 voucher holders.

Those other federal programs include:

- a) 12 U.S.C. § 1701z-12; 24 C.F.R. § 290.19 and 290.39 prohibit the unreasonable refusal to “lease a vacant dwelling unit” in “a multifamily housing project purchased from HUD” to a holder of a Section 8 certificate “solely because of such prospective tenant’s status as a certificate holder;”
- b) 26 U.S.C. § 42(h)(6)(B)(iv) and 26 C.F.R. § 1.42-5(c)(1)(xi) require owners of low-income housing tax credit projects to certify at least annually that they have in place an “extended low-income housing commitment” that prohibits, inter alia, “the refusal to lease to a holder of a Section 8 voucher or certificate...because of the status of the prospective tenant as such a holder;”
- c) 42 U.S.C. § 1437o note, § 1437o(c)(2)(G)(I) and (d)(4)(D)(I) state that owners of rental rehabilitation projects and HODAG buildings “shall not discriminate against prospective tenants because of their receipt of or eligibility for housing assistance under any federal, state, or local housing assistance program.”

2.4.1 Extensions and Suspensions

If a tenant has not located a new potential residence within the initial search term, the voucher will expire, jeopardizing the tenant’s future participation in the program. Extensions can be granted, consistent with the PHA’s Section 8 Admin-

istrative Plan and PHA Plan. Extension of search time beyond 120 days is now mandatory when it is necessary as a reasonable accommodation for a disabled family. 24 C.F.R. § 982.303(b). A progress report showing the addresses of potential residences that the tenant reviewed may be required by the PHA. Such reports may be required at such intervals or times as determined by the PHA. § 982.303(d)

A PHA may allow for a suspension of the voucher term upon family submission of a request for tenancy approval. 24 C.F.R. § 982.303(c). The terms for any suspension are required to be detailed in the PHA's administrative plan. Suspensive periods are critical as tenants may not be aware that the voucher can expire if the tenancy approval is rejected and the tenant is forced to locate a new potential home. This is of great importance when engaging in interstate porting; voucher search periods do not naturally incorporate the delays and resources needed for travel. A tenant wanting to port should begin their search before completion of their lease term and should notify their PHA in writing of their plans.

2.4.2 Request for Tenancy Approval

Once a suitable home is found with an agreeable landlord, the tenant must submit a Request for Tenancy Approval which, among other things, will trigger the PHA to perform a Housing Quality Standards (HQS) inspection of the unit. See § 982.401 for a general review of the purpose of the HQS inspection. Important to note that in addition to all internal aspects of the home, HQS requires that the external site and neighborhood be free from adverse environmental conditions, free from disturbing noises, and other dangers to health, safety, and general welfare of the occupants. 24 C.F.R. § 982.401(l).

2.5 UTILITY ALLOWANCES

If a tenant is required to pay all of a utility, they are entitled, in the computation of their tenant portion of the rent, to an allowance for the reasonable level of consumption to be deducted from their tenant portion of rent. The amount of this allowance is determined by the utility allowance schedule, which must be created by the PHA with a copy delivered to HUD. The utility allowance schedule must be determined based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality. In developing the schedule, the PHA must use normal patterns of consumption for the community as a whole and current utility rates. A HUD contractor has generated a spreadsheet off a national consumption study to guide Low Income Housing Tax Credit landlords in setting utility allowances. At least one PHA in the state has used this to generate its Section 8 utility allowances. Some of the assumptions in, and so allowances projected by, this tool are questionable.

The utility allowance sadly does not usually equal the actual amount of a voucher tenant's utility bills. PHAs are required to review the adequacy of their utility allowances and to increase the allowances when utility rates have increased by at least 10% since the utility allowance was last adjusted. 24 C.F.R. § 982.517(c)(1).

Because the tenants are responsible for excess rent if the gross rent (including utilities) is higher than the payment standard, only tenants whose gross rents are below the payment standard will reap the benefits of the utility allowance. 24

C.F.R. § 982.555(a)(1)(ii) states that opportunity for an informal hearing is required if a family disputes whether their utility allowance is correctly calculated under the PHA utility allowance schedule.

On request from a family that includes a person with disabilities, the PHA MUST approve a utility allowance which is higher than the applicable amount on the utility allowance schedule if a higher utility allowance is needed as a reasonable accommodation in order to make the program accessible to and usable by the family member with a disability. 24 C.F.R. § 982.517(e).

2.6 RENT COMPUTATION

HUD annually publishes the fair market rents (FMR) for each market area in the United States. See <http://www.huduser.org/portal/datasets/fmr.html> for official fair market rent data sets. The PHA must adopt a schedule that establishes voucher payment standard amounts for each unit size in each FMR area in the PHA jurisdiction. 24 C.F.R. § 982.503. PHA's must set the payment standard at between 90-110% of FMR, the "basic range."

This payment standard is the maximum monthly subsidy payment and is used to calculate the monthly housing assistance payment (HAP) for a family. The PHA pays a HAP payment that is equal to the lower of either the payment standard or the gross rent minus the total tenant payment. The tenant should negotiate with her landlord for lowest possible gross rent to benefit more from the HCVP assistance. At the family's request, the PHA must help the family negotiate the rent to owner. 24 C.F.R. § 982.506.

Where the gross rent is larger than the payment standard, the tenant is required to pay the excess amount, provided the total gross rent is determined to be a reasonable rent for comparable units in the area. 24 C.F.R. § 982.507. For the initial lease on the unit, gross rent cannot exceed 40% of the tenant's income. 24 C.F.R. § 982.508. This sets the tenant's share of rent somewhere between 30-40% of the tenant's income. Following the initial term of the lease, the tenant's share of rent is no longer capped at 40%. At this time, if a landlord wishes to raise the rent to an amount that would result in the tenant's share exceeding 40% of tenant's income, the tenant can elect to remain in the unit if, and only if, the PHA agrees that the new gross rent is still reasonable in the housing market. At all times the rent for the unit must still be reasonable as determined by the housing authority. 24 C.F.R. § 982.503. Once the rent has been established by the PHA, the owner may not demand or accept any rent payment from the tenant in excess of this maximum, and must immediately return any excess rent payment to the tenant. 24 C.F.R. § 982.451(b)(4)(ii). Such payments are considered illegal side payments and are totally disallowed under the program; in some cases, a tenant may offer to pay out of pocket an amount above the maximum rent as set by the PHA in order meet the demands of a landlord/owner for a particular unit; you must advise your client against such action as it will seriously jeopardize their future participation in the program.

Tenants under the HCVP program are entitled to a decrease in their share of rent when they timely report a decrease in income. The decrease should take effect in the month after the reporting of the income change. See Chapter 6, Calculating Rent and HAP Payments of the Housing Choice Voucher Program Guidebook, http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11750.pdf

Tenants are also entitled to an informal review of the determination of the family's annual or adjusted income and the use of such income to compute the HAP payment. A family seeking an informal review can seek representation by a lawyer or other representative. 24 C.F.R. § 982.555(e)(3). Before the hearing, the family and/or their representative must be given the opportunity to examine any PHA documents directly relevant to the hearing. If the PHA does not make the document available for examination on request of the family, the PHA may not rely on the document at the hearing. 24 C.F.R. § 982.555(e)(2)(i).

2.6.1 Issues for Families with One or More Disabled Members

24 C.F.R. § 5.617, "Self-sufficiency incentives for persons with disabilities" requires that the PHA exclude from rent calculation the income of a disabled family member who was previously unemployed for one or more years, whose income increases as part of an economic self-sufficiency or other job training program, or annual income increases as a result of new employment or increased earnings of a family member, during or within six months after receiving assistance or services from any state program for temporary assistance for needy families funded under Part A of Title IV of the Social Security Act. (In Louisiana IV-A funds at least the Family Independence Temporary Assistance Program (FITAP) and Kinship Care Subsidy Program (KCSP))

Under this provision, for the first twelve month accumulative period, the increase of income is wholly disallowed in the rent calculation. After the initial 100% disallowed period, the returning to work disabled family member is then allowed a 50% disallowance of the increase of income from the rent calculation. See 24 C.F.R. § 5.617(c)(1)(2)

2.6.2 Reasonable Accommodation

PHAs can grant a higher payment standard for a family as a reasonable accommodation for a disability. If the family includes a person with disabilities and requires a higher payment standard for the family, as a reasonable accommodation for such person, the PHA may establish a higher payment standard for the family within the basic range, 90-110% of FMR. See 24 C.F.R. § 982.505(d).

2.7 NON-RENT CHARGES

Federal law only mandates that the lease between tenant and owner comply with State and local Law. 24 C.F.R. § 982.308(c). This means, that thanks to Louisiana's generous freedom to contract, tenant and owner are free to enter into agreements that may obligate a tenant to pay late fees, scheduled maintenance, and/or other charges/fees. The only protection a tenant has lies in 24 C.F.R. § 982.308(b)(2), which requires that if an owner uses a standard lease for other non-assisted tenants the owner must use the same standard lease for assisted tenants.

The collection of a security deposit is authorized by 24 C.F.R. § 982.313. The PHA may prohibit security deposits in excess of private market practice, or in excess of amounts charged by the owner to unassisted tenants. The owner is allowed to use the deposit for payment of any unpaid rents or damages but the regulation requires that the owner give the tenant an itemized list of any charges and refund promptly the full amount of the unused balance.

2.8 VOUCHER TERMINATIONS AND DENIALS

The PHA must give opportunity for an informal hearing of the PHA decision to terminate assistance to a participant. 24 C.F.R. § 982.555(a) & (c)(2). When a hearing is requested, the PHA must proceed with the hearing in a reasonably expeditious manner upon request of the family. 24 C.F.R. § 982.555(d). If the Section 8 participant timely requests a hearing, then the PHA must provide continued program assistance if the participant has an active HAP contract. 24 C.F.R. § 982.555(a)(2).

The PHA must give an applicant for participation prompt notice of a decision denying assistance to the applicant. The notice must contain a brief statement of the reasons for the PHA decision. The notice must also state that the applicant may request an informal review (which can differ from an informal hearing) of the decision and must describe how to obtain the informal review. 24 C.F.R. § 982.554(a).

The PHA must state the specific procedures for conducting the informal reviews and hearings in its administrative plan but the PHA's procedures must comply with three provisions 1) It may not be conducted by the person who made or approved the adverse decision nor a subordinate of this person; 2) the applicant or recipient must have the opportunity to present written or oral objections to the decision; 3) The PHA must issue in writing the decision after the proceeding, including a brief statement of the reason for the final decision. § 982.554(b).

2.8.1 Hearing Requirements

24 C.F.R. § 982.555(e) lays out the basic requirements for PHA hearings for HCVP participants. A family facing a proposed termination from the program can seek representation by a lawyer or other representative. 24 C.F.R. § 982.555(e)(3). Before the hearing, the family and/or their representative must be given the opportunity to examine any PHA documents directly relevant to the hearing. If the PHA does not make the document available for examination on request of the family, the PHA may not rely on the document at the hearing. § 982.555(e)(2)(i).

Grounds for program termination include any act or failure to act by a family member which results in failing to fulfill the Family Obligations. See 24 C.F.R. § 982.551. This includes, but is not limited to, family member's absence from the unit, failing to notify the housing authority of an eviction notice and/or subsequent eviction from their unit, abandoning the unit (including constructive abandonment due to being vacant for more than 180 days), subletting the unit, failure to give the housing authority notice before vacating the unit, failing to provide proof of citizenship or immigration status, failure to allow HQS inspections, committing bribery or fraud in connection with the program, and not promptly informing the housing authority of additions to the household. 24 C.F.R. § 982.551 and 24 C.F.R. § 982.552(e).

The hearing can be conducted by any person, other than the person or a subordinate of this person who made or approved the decision to propose termination, as appointed by the PHA. The person who conducts the hearing is to regulate the conduct of the hearing in accordance with the PHA hearing procedures, but the rules of evidence are lax in comparison to most judicial proceedings. Nonetheless,

general rules of due process must be obeyed. The PHA and the family must be given the opportunity to present evidence, and may question any witnesses. Following the hearing, the person who conducts the hearing must issue a written decision, stating briefly the reasons for the decision. A copy of the hearing decision shall be furnished promptly to the family. 24 C.F.R. § 982.555(e).

The PHA is not bound by a hearing decision if it involves a matter for which the PHA is not required to provide an opportunity for an informal hearing [See 24 C.F.R. § 982.555(b) for a list of eight circumstances] or is contrary to HUD regulations or requirements, or otherwise contrary to federal, State, or local law. 24 C.F.R. § 982.555(f). If the PHA determines that it is not bound by a hearing decision, the PHA must promptly notify the family of the determination, and of the reasons for the determination.

Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing. 24 C.F.R. § 982.555(e)(6). Remember: the PHA bears the burden of proving the alleged violation. See *Basco v. Machin*, 514 F.3d 1177 (2008).

2.8.2 Reasonable Accommodations

If the family includes a member with a disability, the PHA decision concerning termination is subject to a request for a reasonable accommodation. 24 C.F.R. § 982.552(c)(2)(i) and (iv).

2.8.3 Practice Tips

- 1) It is advisable to submit a pre-hearing memorandum to the Hearing Officer or Panel prior to the hearing, spelling out the facts, giving an analysis under the regulations as to why the PHA should not take the proposed action, and providing supporting documentation. If there is countervailing or exculpatory evidence, submit a copy with hearing memo but be sure to bring it along with the memo to the actual hearing.
- 2) Always remind the PHA it bears the burden of proving the alleged program violation by a preponderance of the evidence under the law and, if applicable, that the termination is not mandatory but discretionary under Federal Law. Discretionary grounds are listed in 24 C.F.R. § 982.552(c), as opposed to the mandatory grounds in § 982.552(b). Confirm, though, that the local PHA administrative plan does not make discretionary grounds mandatory, before making the argument. The PHA administrative plan may also have language creating additional protections for the client. Argue that all pertinent circumstances and alternatives should be taken into account in determining whether to uphold a discretionary termination. 24 C.F.R. § 982.552(c)(2).
- 3) In some cases, a post hearing memo should also be forwarded or may be requested by the hearing officer depending upon what transpires at the hearing. In situations where evidence will potentially become available only after the hearing, note this in the prehearing memo and at the hearing. If the hearing goes forward, supplement as soon as possible.
- 4) There is no formal hearing after the Informal Hearing but the participant is entitled to a judicial review of the decision. The hearing officer's decision may be reversed if there is a determination that the decision is contrary to

HUD regulations or federal, state, or local law. Terminations may be challenged in court under 42 U.S.C. § 1983 when the PHA decision violates specific federal statutory entitlements or constitutional requirements. Not all statutory requirements can be enforced through § 1983. See *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

- 5) Federal law requires that the person who conducts the hearing be neither the person who proposed termination nor a subordinate of that person. This is very helpful if termination notices are sent out under the signature of the PHA program director, since every Section 8 employee is a subordinate of that person. The PHA must designate a non-subordinate and/or insure that executive level heads do not participate in the decision to terminate.
- 6) PHAs often overreach and assert grounds when no underlying facts support the termination. For example, PHAs frequently allege fraud when only tenant omission or error exists.
- 7) The PHA is restricted to conducting a hearing only as to those issues delineated in the termination notice given to the participant.
- 8) Review the PHA file immediately and make note via memo or otherwise to the PHA/Hearing Officer/Panel in the event the determinative evidence is not located in the file.
- 9) While this is an informal review, prepare your client as you would normally for any civil hearing. Many clients become nervous and emotions run high. Do your best to put your client at ease and maintain control during the hearing.
- 10) Many times the only witnesses available to the PHA are the client's case-worker and client's landlord. You have the right to question all witnesses. Be prepared to ask questions if necessary. Even for violations specifically related to a client and landlord interaction, the PHA or Hearing Officer may neglect to have the landlord present for hearing.
- 11) Bring a copy of all case law, statutes, and even a copy of sections of the administrative plan to the hearing along with extra copies of any and all documents that you wish to use to make your case.

2.9 EVICTIONS AND HCVP

A tenant/participant of the HCVP program can only be evicted by the landlord in compliance with Louisiana Landlord-Tenant Law; in addition to any protections afforded in the lease and standard eviction law, the Section 8 HCVP program places additional restrictions and obligations upon a landlord seeking to evict a tenant. During the initial term of the lease, a Section 8 landlord may only evict for serious and/or repeated lease violations or violations of federal, state, or local law in connection with the occupancy/use of the premises. 24 C.F.R. § 982.310.

Following the initial term of the lease, inaction on the part of the tenant/landlord/both will cause the lease to naturally enter into a month-to-month tenancy; during a month-to-month tenancy, the HCVP requires a landlord only assert a diluted "good cause" to evict a tenant. 24 C.F.R. § 982.310(d) defines "good cause" rather loosely to include, but is not limited to: failure by the family to accept the offer of a new lease or revision; family history of disturbance of neighbors or destruction of property, or of living or housekeeping habits resulting in damage to

the unit or premises; the owner's desire to use the unit for personal or family use, or for a purpose other than as a residential rental unit; or a business or economic reason for termination of the tenancy including the desire to lease the unit at a higher rent. As this list is non-exhaustive, it will fall to the adjudicator of the eviction to make a determination if the landlord's cause for eviction is "good"; sadly, experience shows that Louisiana Judges and Justices of the Peace have been willing to accept "Owner wants possession of property following termination of initial lease term" as bonafide good cause allowing eviction of a Section 8 HCVP program tenant. *See Khamnei v. Behrman* 2009 WL 2413622, 2 (Vt., 2009) (holding that Section 8 landlord can choose not to renew at end of lease term, without restriction, and collecting authorities). If the landlord's cause may not be adequate and the tenant needs more time to complete a program move consider filing a suspensive appeal and seek determination by the applicable appellate body. Further, proactive measures may be necessary to insure that the PHA does not attempt to hold such an eviction as a violation of a tenant's family obligations, risking termination of assistance.

As the HCVP participant is afforded all protections at law and in lease, it is important to remember all Section 8 HCVP participants and landlord/owners are bound not only by the lease produced by the landlord but also the standard HUD Tenancy Addendum which by law is incorporated in all HCVP leases. Chief amongst the protections provided is the requirement that notice of eviction be granted in accordance with state law. While Louisiana law allows for the waiver of notice before the commencement of eviction action, the HUD Tenancy Addendum expressly forbids such waivers. 24 C.F.R. § 982.310(e)(1)(i). A Section 8 landlord must give a written notice of lease termination to his or her tenant which specifically states the grounds for the eviction. The notice must be given prior to the commencement of the eviction action. For lease violations, the notice must be at least a five-day notice to vacate under state law, but the length of the notice for a lease non-renewal will depend upon the time stated for non-renewal in the lease. Failure to provide this notice will result in a premature eviction action, allowing the dismissal of the action.

2.9.1 Nonpayment and Payment by the PHA as Defenses to Eviction

Both the HUD tenancy addendum and the owner's housing assistance payment contract explicitly state that nonpayment of the housing authority's portion of the rent is not a lease violation and that the tenant is only responsible for her share of the rent. 24 C.F.R. § 982.310(b). This is very important in cases where the PHA has abated the housing assistance payments because of landlord non-compliance with program requirements.

La. R.S. 9:3259.2 states that the application for and/or the receipt of any federal or state rent subsidy shall not be considered as payment of rent and shall not be a defense to an eviction. Ergo, landlord's acceptance of the rent subsidy cannot be used to dismiss an eviction suit on the basis of acceptance of rent.

If a tenant loses her eviction hearing and a suspensive appeal is properly sought under Louisiana law, the PHA should not take action to terminate the tenant from participation or cancel future HAP payments on the basis of the eviction. 24 C.F.R. § 982.311(b). (A tenant is still liable for the fulfillment of all other family obligations under the HCVP program.)

2.9.2 Termination from HCVP Following Court Eviction

The federal regulations require that participants can be terminated from the HCVP program if evicted for “serious violation of the lease.” 24 C.F.R. 982.551(b)(2). Defenses may include:

- whether the eviction was for a lease violation
- whether the eviction was due to tenant fault
- whether the lease violation was serious
- whether the eviction was legal under applicable law
- whether another statutory protection should preclude the eviction (e.g., Violence Against Women and Reasonable Accommodation protections)
- if the local administrative plan so provides, consideration of whether other circumstances argue against terminating assistance.

In proving these elements, the PHA should not be able to rely simply on the fact that the eviction judgment was issued. For the PHA to rely on the judgment as concluding the matter is a use of “offensive collateral estoppel” by a non-party. This is an extreme use of preclusion concepts, and unsupported by precedent in this state. See *Alonzo v. State ex rel. Dept. of Natural Resources*, 2002-0527 *8 (La.App. 4 Cir. 9/8/04) 884 So.2d 634, 638-39.

2.10 PROGRAM MOVES AND TENANT RIGHT TO TERMINATE LEASE

Once a tenant has found a new home, had it inspected, signed the lease, signed the HAP contract, and moved in, the tenant is obligated, except in special circumstances, to remain in the unit as a tenant until the PHA approves them to move from the unit. Failure to follow proper “program move” procedure exposes a tenant to a range of risks ranging from a period of non-assistance (meaning the tenant will be responsible for the entire lease amount to a new landlord), to proposed termination from the program. Following the initial lease term when the lease reverts to a month-to-month arrangement, a tenant can request a program move by giving advance notice to both the landlord and the PHA of their desire to move. It is important that the tenant has satisfied any outstanding issues/defaults with the landlord, as many PHAs use form documents to request information as to the current status of a tenant before they will approve a move; not only will the PHA delay the move process but if the issues/defaults violate a Family Obligation (24 C.F.R. § 982.551), a proposed termination may result. Further, many landlords wait until this time to specifically “speak their side” knowing it is their best chance to obstruct the move or obstinately receive assistance from the PHA to solve any problems they had with the tenant.

A PHA may, through its administrative plan, enact rules that prohibit a tenant from conducting a program move during the initial term of a lease (first year). 24 C.F.R. § 982.314(c)(2)(i). This leads to a particularly troubling situation when the landlord/tenant relationship has so deteriorated that the landlord is willing to do anything to get an eviction and force the tenant out of the unit. While you may be able to successfully defend against the eviction, rarely does even educating the landlord of the legal rights and obligations in the program have the effect of repairing a damaged tenant/landlord bond. Tenants, faced with an angry, motivated landlord who wants them out, are forced to choose between continuously

fighting off eviction actions or moving in violation of the program rules. Without experience and knowledge of the bureaucratic practices of the PHA, it is impossible to know which option is best for your client. Your first move in these situations must be to contact the PHA and hope that you can successfully convey the true nature of what is going on. The sooner the PHA is made aware of the total circumstances, the better chance your client will have to move assisted. You must remain active and prepared, however, as an improper program move will almost assuredly trigger a proposed termination and the need for an informal hearing.

2.10.1 Portability

A HCVP participant has the option of not only moving within their home PHA's jurisdiction but also to areas in the jurisdiction of another PHA under a process known as "Portability" or porting. Under this process, a HCVP participant can have their voucher ported to a new PHA jurisdiction which will issue the voucher and allow them to look and apply their voucher in this new area.

The procedures for this are spelled out in 24 C.F.R. § 982.355(c). In brief, the "initial" PHA informs the participant on how to reach the "receiving" PHA in the area they want to move to. The participant must then contact the receiving PHA. If the receiving PHA intends to "bill" the voucher, they will only administer the voucher, billing the costs back to the initial PHA. Under this method the initial PHA remains financially liable for the voucher and retains, along with the receiving PHA the right to deny or terminate assistance to the family in accordance with 24 C.F.R. § 982.552 and 982.553. If the receiving PHA intends to "absorb" the voucher, the receiving PHA assumes the full financial liability and becomes the sole PHA able to deny or terminate assistance to the family. The "absorbing" process essentially transforms the receiving PHA into a new initial PHA for the participant.

2.11 EFFECTS OF CRIMINAL ACTIVITY

As part of admission into the HCVP program, the PHA must perform a criminal background check. Certain criminal acts have the effect of banning a person from receiving federal housing assistance. Registered lifetime sex offenders and persons convicted of methamphetamine manufacturing or production are permanently banned. See 24 C.F.R. § 982.553(a)(2)(i) and 24 C.F.R. § 982.553(a)(1)(ii)(c). If a PHA proposes to deny admission for criminal activity as shown by a criminal record, the PHA must provide the subject of the record and the applicant with a copy of the criminal record. The PHA must give the family an opportunity to dispute the accuracy and relevance of that record, in the informal review process in accordance with § 982.554.

24 C.F.R. § 982.553(a) expressly prohibits a PHA from granting admission of a person for three years following an eviction from a federally assisted housing unit for drug-related criminal activity. The three-year ban can be lifted if the person who engaged in the criminal activity completes a PHA approved drug treatment program or if "the circumstances leading to eviction no longer exist (for example, the criminal household member has died or is imprisoned)." Further, the PHA must bar admission to any person whom the PHA can establish is currently engaging in illegal drug use/pattern of drug use, or alcohol abuse/pattern of abuse that may threaten the health, safety or right to peaceful enjoyment by other resi-

dents. A household member is “currently engaged in” criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current. (a)(2)(ii)(c)(2). See the law set out in § 6.1.8, *supra*, establishing that arrests and police reports are not sufficient to meet the PHA’s burden of proving criminal activity.

The exceptions provided for completing a treatment program and/or change in circumstances can be invaluable in overcoming a denial of admission. Some local municipalities are turning to rehabilitative programs as part of sentences for drug use, allowing applicants to take advantage of this exception. In many cases you will find removing the offending person from an application is an acceptable solution to allow the rest of the family a chance to secure housing.

The HCVP program becomes very unforgiving when it comes to criminal activity once a person becomes a participant. Where federal law mandates that each PHA establish rules that allow it to terminate assistance if it makes a determination that a family is currently engaged in or has a pattern of illegal drug use or drug-related criminal activity, engaged in violent criminal activity, or engaged in alcohol abuse that may threaten others, the PHA must prove any such action by preponderance of evidence. As with a denial of assistance, any criminal record relied upon by the PHA must be presented to the family for an opportunity to review and dispute the accuracy and/or relevance of that record.

2.12 NEED FOR REPAIRS TO UNIT

The owner of a unit is bound by the warranty of habitability and other landlord-tenant laws concerning maintenance and repairs, including tenant’s right to perform a “repair and deduct.” In addition to these obligations, the owner must comply with the Housing Quality Standards (HQS) of the HCVP program. If the owner fails to maintain the dwelling unit in accordance with HQS, the PHA must take prompt and vigorous action to enforce the owner obligations. PHA remedies for such breach of the HQS include termination, suspension, or reduction of housing assistance payments and termination of the HAP contract. 24 C.F.R. § 982.404(a)(2). The owner is not responsible for a breach of the HQS that is not caused by the owner, and for which the family is responsible (as provided in 24 C.F.R. § 982.404(b) and 24 C.F.R. § 982.551(c)).

2.12.1 Practice Tips

You should or you should advise your client to promptly notify the PHA of any damage or fault in the unit. This should trigger the PHA to perform a special inspection of the unit. (The PHA will make at least annual HQS inspections separate from any client-triggered special inspection.) See 24 C.F.R. § 982.405. If after inspection the unit is deemed to fail to meet the standards of HQS, the PHA will grant the owner a certain period of time to remedy the issue: usually 30 days; federal law allows only 24 hours if the defect is life threatening. See 24 C.F.R. § 982.404(a)(3). If the owner fails to make the required repairs in the required time the PHA shall “abate” the HAP contract and not pay its housing assistance portion to the landlord; during this time, the tenant is still liable for their tenant share of rent, if any. Once the property has entered abatement, the tenant can request a program move to a new residence; NOTE: if the HAP contract is abated for 180 days, it is automatically terminated. 24 C.F.R. § 982.455.

3. OTHER FEDERALLY SUBSIDIZED PROGRAMS

3.1 OTHER FEDERALLY ASSISTED SECTION 8 PROGRAMS

3.1.1 Introduction

Many federally subsidized housing programs provide housing assistance to tenants in multifamily complexes owned by private owners. These programs are usually subsidized by having insured, assigned, or noninsured below-market interest rate mortgages, or project based Section 8 assistance under Section 202 programs for the elderly or disabled. Other programs are the Section 236 program, the Section 221(d)(3) program, Rent Supplement, Rental Assistance Payments, Section 202 Projects, Section 8 Set Aside, Section 8 New Construction, Moderate Rehabilitation and Substantial Rehabilitation. The subsidies for these programs are tied to the unit, unlike the Section 8 tenant-based voucher program where the subsidy travels with the tenant. If the tenant is evicted or moves from the unit, they no longer receive a subsidy. The HUD Handbook 4350.3 for multifamily housing issued in June 2009 provides for how these varied programs operate.

3.1.2 Eligibility and Admissions

In these programs, the private owners select the tenants and may use a preference for working families. The tenant's income eligibility is basically the same as for the upper limit of public housing and tenant-based Section 8. The owner is responsible for developing reasonable selection criteria and may consider house-keeping habits, credit history, a demonstrated ability to pay rent, and prior landlord references.

The HUD Handbook 4350.3 Rev 1, Part 4-9, states that a rejected applicant must be provided the right to respond in writing with an opportunity to request a meeting within 14 days if he disputes a rejection. The person holding the meeting with the applicant may not have participated in the decision to reject the applicant. The most common reasons for rejection include poor credit history, prior criminal history, or negative rental history.

Some federally-assisted projects may be designated specifically for the elderly or handicapped. This does not violate the Fair Housing act if the designation was done properly.

See HUD Handbook 4350.1 Rev.1 at Part 3 and Part 4 for more information

3.1.3 Rent Computation

If a tenant lives in housing under Section 236, 221(d)(3), or Section 202 housing that does not receive a Section 8 subsidy, the tenant will have to pay at least the minimum base rent established for the complex. If the tenant lives in federally assisted housing and also receives a Section 8 subsidy to help pay the rent, the rent is determined in the same manner as the rent for a public housing tenant. It is very important to determine which fact pattern the tenant falls under in order to determine how the rent is calculated. For information on rent computation for the various programs, make sure to check the regulations for the particular type of program.

3.1.4 Evictions from Multifamily Housing

Owners of multifamily federally assisted housing are required to have good cause for non-renewal of lease or to evict a tenant. Under 24 C.F.R. § 247.3, ten-

ants may only be evicted for material noncompliance with the rental agreement, material failure to carry out obligations under any state or local law, criminal activity or drug-related criminal activity on or near the premises, or other good cause. Material noncompliance is defined by the regulations as including one or more substantial violations of the lease, repeated minor violations of the lease which disrupt the livability of the project, adversely affect the health, safety or right to peaceful enjoyment of the premises, interferes with management of the project or have an adverse financial impact on the project, nonpayment of rent or other charges, criminal or drug-related activity, and failure to comply with the recertification process.

The owner must serve a termination notice upon the tenant by sending a letter properly addressed and stamped to the tenant at his address in the project with a proper return address and serving a copy of the notice on the tenant by delivering it to any adult person answering the tenant's door, or if no adult responds, by placing the notice under the tenant's door or affixing the notice to the door. Service is not deemed effective until both methods of service are effectuated. 24 C.F.R. § 247.4(b). The notice of termination must be in writing and must:

- State the tenancy is terminated on a date which is specified therein;
- State the reasons for the eviction with enough specificity for a tenant to prepare a defense (*See Versailles Arms Apts. v. Pete*, 545 So. 2d 1193 (La. App. 4th Cir. 1989));
- Advise the tenant that if they remain in the premises on the date specified for termination, the landlord may seek to enforce the termination by bringing court action, at which time the tenant may present a defense;
- Be served properly

The HUD Multifamily Handbook 4350.3 Rev. 1 cites the additional requirement for notices of lease termination, that the landlord must advise the tenant of his right to request a meeting to discuss the proposed lease termination. It states that the notice of the lease termination must advise the tenant he can meet with the landlord to discuss the proposed lease termination and that if he requests such meeting within ten (10) days of his receipt of the notice, the owner must meet with him. Many leases which federally assisted landlords use contain this requirement but not all of them. Always check the lease to see if this additional protection is required between the parties as such a meeting is a good discovery or mediation tool. If it is not in the current lease, you should always asks for the meeting citing HUD Handbook requirement at 4350.3 Rev. 1, Part 8-13 (B)(2). This will help you get a chance to negotiate or get discovery prior to trial if a compromise cannot be reached.

The time period for the notice of termination depends upon the reason for the eviction. In material noncompliance terminations, state law and the lease determine the length of notice required. A thirty (30) day notice of lease termination is required in terminations which are based upon other good cause. A landlord under the federally assisted multifamily housing programs may not rely upon any grounds at trial which were not stated in the notice of lease termination unless the owner had no knowledge of those grounds at the time he gave the notice to vacate.

3.1.5 Repairs or Abatement for Multifamily Housing

Private owners who participate in the HUD multifamily housing programs, such as Section 236, Section 211(d)(3), etc., have agreed to rent their complex or a portion of their complex to low income families for a given term, usually at least 20 years. When operating costs for the units rise and the subsidized owners run short of money, they usually reduce services and maintenance at the complexes. Residents of HUD multifamily complexes cannot use the local PHA to try to get the owner to make repairs or abate their rent since the landlord's contract for subsidy payment is directly with HUD. In 1997, HUD announced a "Get Tough" partnership with the Justice Department. This initiative targeted fifty cities, including Greater New Orleans, and was designed to crack down on landlords who are guilty of offenses such as fraud, filing false claims, equity skimming and not providing safe, affordable and decent housing. HUD has taken remedial action such as prison sentences, civil fraud judgments, mortgage foreclosures, bans on doing business with HUD, recoupment of misused housing assistance funds, fines and appointment of new management. In addition, HUD has published a pamphlet for families living in Multifamily Housing called "Resident Rights and Responsibilities". This pamphlet, available from HUD and the local HUD field office, describes the tenant's right to decent, safe and sanitary housing.

First, tenants should report maintenance concerns to management of the complex. If the problem is not rectified in a timely fashion, the tenant should make a complaint to their local HUD field office. The tenant may also call the HUD National Multifamily Clearinghouse at 1-800-685-8470 or the HUD Office of the Inspector General Hot Line to report fraud, waste or mismanagement at 1-800-347-3735. This approach may be successful in getting the repairs made to the premises. If HUD cancels its contract with the owner or forecloses on a HUD insured mortgage, the tenant may then be eligible for replacement housing in the form of relocation vouchers and relocation assistance payment.

3.2 SECTION 515 RURAL RENTAL HOUSING PROGRAM (7 C.F.R § 3560 et seq)

Section 515 Rural Rental Housing is a U.S. Department of Agriculture (USDA) rural rental housing program authorized under Section 515 of the Housing Act of 1949 (42 U.S.C. § 1485). The Rural Housing Service (RHS) is authorized to make loans to provide rental housing for low- and moderate-income families in rural areas. Though rarely used for this purpose, Section 515 loans may also be used for congregate housing for the elderly and handicapped. Many rural residents face the dual problem of limited incomes and a chronic lack of affordable housing. The Section 515 program provides loans with interest rates as low as one (1) percent to developers of affordable rural rental housing. The housing built must be modest in design and the builder must have been unable to obtain conventional credit. Tenant rent in this program is capped at 30% of adjusted annual income and 75-97% of admissions to the housing must be to very low-income persons.

3.2.1 Tenant Eligibility

In order to be eligible for occupancy the tenant must be a United States citizen or qualified alien, qualify as a very low-, low- or moderate income household or be eligible under the requirements established to qualify for housing benefits provided by sources such as HUD Section 8 assistance or Low Income Housing Tax Credit (LIHTC), when a tenant receives such housing benefits.

3.2.2 Important Lease Requirements

Borrowers must use a lease approved by USDA. It must be in compliance with 7 C.F.R. § 3560.156, and state law. The lease requirements are:

- Lease must be in writing;
- Initial leases must be for a one (1) year term;
- If the tenant is not subject to occupancy termination according to § 3560.158 (change in tenant eligibility) and § 3560.159 (termination of occupancy), a renewal lease or lease extension **MUST** be for a one (1) year period;
- Lease must contain procedures that the borrower and the tenant must follow in giving notice required under terms of the lease including lease violation notices;
- Lease must contain procedures for resolution of tenant grievances consistent with the requirements of § 3560.160 (tenant grievances);
- Lease must have terms under which a tenant may, for good cause, terminate their lease, with 30 days notice, prior to lease expiration

3.2.3 Termination of Occupancy

The only grounds for termination or non-renewal of the lease are material noncompliance or other good cause. Under those circumstances the borrower must give written notice of the violation and an opportunity to correct it. A tenant's occupancy may not be terminated by a borrower when the lease expires unless there has been a lease violation or the tenant is no longer eligible for occupancy. *See* 7 C.F.R. § 3560.158. Borrowers may terminate tenancy for criminal activity or alcohol abuse by household members in accordance with provisions of 24 C.F.R. 5.858, 5.859, 5.860 and 5.861. The borrower must first give the tenant a notice of lease violation or occupancy agreement violation. The notice must be sent either first class mail to the tenant at her address or by serving a copy of the notice to any adult persons answering the door at the dwelling, or if no adult answers the door, by affixing the notice to the door or under the door. The notice must:

- Refer tenant to relevant portions of the lease or occupancy agreement
- State the violation with specificity to enable the tenant to understand and correct the problem
- State that the tenant will be expected to correct the violation by a certain date
- State that the tenant may informally meet with borrower to attempt to resolve the violation before the deadline corrective action
- Advise the tenant that if violation has not been corrected by date specified, the borrower may seek to terminate the lease by filing a judicial action at which the tenant may present her defense

If the tenant timely requests access to the grievance process, the borrower cannot continue with the eviction process until the grievance and appeal process is completed. Pending the court determination including appeals, the tenant is still entitled to rental assistance while occupying the unit.

3.2.4 Grievances

Grievances and appeals were established to ensure that there is a fair and equitable process for addressing tenant or prospective tenant concerns and ensure fair treatment of tenants in the event that an action or inaction by a borrower, including anyone designated to act for a borrower, adversely affects the tenants of a housing project. There are some exceptions to the grievance and appeals procedure, including RH authorized rent or rule changes, discrimination complaints, disputes between tenants and some evictions. Applicants to Rural Rental Housing are entitled to appeal their rejection.

When a borrower proposes to take an adverse action against a tenant, he must notify the tenant in writing by certified mail or hand delivery giving the specific reasons for the proposed action. The notice must advise the tenant of the right to respond within ten (10) calendar days of receipt and of the right to a hearing. If the applicant or tenant wants a hearing, she must make a written request within ten (10) calendar days. If the tenant requests this meeting timely, the owner is required to meet with the tenant informally within five (5) days of the request. If grievance is not resolved to the tenant's satisfaction, the borrower must prepare a written summary of the meeting including the borrower's position, the tenant's position and results of the meeting within ten (10) calendar days.

The tenant then has ten (10) days calendar days to make a request for a hearing to the owner. A hearing panel is then selected and a hearing is scheduled within fifteen (15) calendar days after receipt of the tenant's request for a hearing. A tenant has a right to examine and copy records and regulations. At the hearing, the tenant has the right to be represented by a lawyer or another representative, the right to present written and oral evidence, the right to present witnesses or refute and cross-examine witnesses and a right to a decision based solely upon the facts presented at the hearing. A written decision from the formal hearing is to be prepared within ten (10) calendar days from the date of the formal hearing. The decision must be sent to the RHS who shall review it and ensure that it is in compliance with USDA regulation, and the owner and the tenant shall take the necessary action or refrain from the action as necessary to carry out decision.

3.3 SPECIAL FEDERAL HOUSING PROGRAMS FOR THE HOMELESS

3.3.1 Supportive Housing

This program allows nonprofit organizations to receive funding for many services to the homeless including transitional housing or permanent housing for handicapped homeless persons. Transitional housing assistance for homeless persons is designed to facilitate movement of homeless individuals to independent living within 24 months or longer period as determined by HUD to be necessary to make transition. Residents may be required to pay up to 30% of their adjusted income as determined by HUD guidelines as their share of rent. Participants in this type of program may be required to leave the program at the end of the period or they may be required to leave the program if they violate program rules. Termination is to be viewed as last resort and the termination process requires that the residents be given written notice with a clear statement of the reasons for the termination. Residents are entitled to appeal the decision with an opportunity to present oral or written objections to a person other than the person who made the adverse decision or a subordinate of that person. Under 24 C.F.R. 583.300(I), a prompt written notice of the final decision is required.

3.3.2 Shelter Plus Care

Since 1992, HUD has awarded Shelter Plus Care funds to state and local governments and public housing agencies (PHA) to serve homeless persons with disabilities such as serious mental illness, chronic substance abuse and/or AIDS and related diseases. The program was created on the premise that housing and services need to be connected in order to ensure stability of housing for this population. The funds can be used to provide rental assistance in four ways: tenant-based rental assistance, sponsor-based rental assistance, project-based rental assistance and moderate rehabilitation for single room occupancy dwelling. Only tenant-based rental assistance may travel with the participant. Residents may leave a project or sponsor-based rental assistance program and be readmitted. The resident's share of the rent is set at 30% of her adjusted income as determined by HUD rules. The occupancy agreement is automatically renewable upon expiration, except on prior notice by either the tenant or the landlord. Residents may be terminated from the program if they violate program requirements but termination is viewed as a last resort. 24 C.F.R. § 582.320(a) and (b). There must be a termination process and eviction if the resident refuses to leave, which includes the same requirements as the termination process described above s to the Supportive Housing Program.

3.4 LOW-INCOME HOUSING TAX CREDIT PROGRAM

The Low-Income Housing Tax Credit program (LIHTC) was created to provide the private market with an incentive to invest in affordable rental housing. The LIHTC program was created in the Tax Reform Act of 1986, modified in 1988, substantially modified in 1990, extended by the Tax Extension Act of 1991, and again modified and made permanent by Omnibus Budget Reconciliation Act of 1993. Federal housing tax credits are awarded to developers of qualified projects. Developers then sell these credits to investors to raise capital (equity) for their projects, which reduces the debt that the developer would otherwise have to borrow. Since the debt is lower, a tax credit property can in turn offer lower, more affordable rents. If the property maintains compliance with program requirements, investors receive a dollar-for-dollar credit against their Federal tax liability each year over a period of 10 years.

The owner must agree to rent at least 20% of the units for a period of 15 years to families with incomes at or below 50% of area median income or 40% of the units to families with incomes at or below 60% of area median income. Created by Act 408 of the 2011 Regular Legislative Session, the Louisiana Housing Corporation is a new agency that will run Louisiana's housing programs which includes the LIHTC properties. LIHTC units are rent-restricted. The gross rent of tenants including utility allowances cannot exceed 30% of the tenant's income limitation. It is important to note that the LIHTC program restricts only the portion of the rent paid by the tenant, not the total rent. As a result, certain rental assistance programs can be used to raise the total rent above the LIHTC rent limit. Unless a tenant has a Section 8 subsidy, she can usually only afford the rents in a LIHTC program if her income is more than 30% of area median income. Owners who participate in the program cannot refuse to provide housing to Section 8 voucher holders merely because of their status as voucher holders. 26 C.F.R. § 42-5(c)(1)(xi). For a list of Low-Income Housing Tax Credit properties in your area, check the HUD website at www.hud.gov.

Court cases across the country have held that the LIHTC regulations require good cause for lease termination or non-renewal of lease. The requirement is based on 26 U.S.C. § 42(h)(6)(B)(i) and 26 U.S.C. § 42(h)(6)(E)(ii). For example, in *Cimarron Village Townhomes Ltd. v. Washington*, 659 N.W.2d 811 (Minn.App. 2003) the court held that an owner of a LIHTC project may not terminate a resident's lease at the end of a term without good cause, even where the tenant has no other subsidy such as a Section 8 voucher. The IRS issued a formal ruling requiring all owners of LIHTC properties to place good cause eviction requirements in the recorded property restrictions. IRS Rev. Rul. 2004-82, Q & A 5 (2004). There is very little case law on what is considered good cause under the program.

4. OTHER ISSUES IN SUBSIDIZED HOUSING

4.1 VAWA—HOUSING PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT AND THE PROTECTION FOR DOMESTIC VIOLENCE SURVIVORS

Title VI of VAWA 2005 (Pub. L. 109-162; Stat. 2960; HR 3402) sets out provisions protecting tenants who are in public housing (42 U.S.C. § 1437d), participants of the Section 8 Housing Choice Voucher program (42 U.S.C. § 1437f(o)), Section 8 Project Based housing (42 U.S.C. § 1437f(c), (d)) and supportive housing for the elderly or disabled (73 Fed. Reg. 72,338). It does not include provisions for other HUD housing subsidy programs, Low income Housing Tax Credit program, or the Department of Agriculture Rural Housing program. It also does not cover private market housing without any type of rental subsidy. *Tenants in these other types of housing may be able to claim similar protection by alleging that adverse actions have an adverse impact based on gender, and therefore violate fair housing laws or state law.* For VAWA, protected tenants must be victims of actual or threatened domestic violence, dating violence, or stalking, or an immediate family member of the victim.

Public housing agencies (PHAs) administering the public housing and section 8 voucher programs and landlords, owners and managers participating in those programs must comply with VAWA. Among the requirements:

- *Admissions to Federally subsidized housing:* an individual's status as a victim of domestic violence, dating violence or stalking is not basis for denial of admission or denial of housing assistance. See 42 U.S.C. § 1437d(c)(3); 42 U.S.C. § 1437f(c)(9)(A); 42 U.S.C. § 1437f(o)(6)(B). However, VAWA does not require PHAs to create a preference for victims of abuse when making admissions decisions.
- *Safety Moves:* 1. Portability of Section 8 voucher- a PHA may permit a family with a section 8 voucher to move to another jurisdiction if they are in compliance with other obligations of the program and are moving to protect the health or safety of an individual who is or has been the victim of domestic violence, dating violence, or stalking. See 42 U.S.C. § 1437f(r)(5). The move may be permitted even if the family's lease has not expired. A tenant may incur liability from the owner for breaking the lease. 2. Transfers in Public Housing- VAWA does not explicitly address a PHA obligation to transfer a public housing tenant to another unit due to domestic violence, dating violence, or stalking. HUD has urged PHAs to implement policies to ensure tenants can move if they are experiencing domestic violence. See U.S. Department of Housing and Urban Development, Public Housing Occupancy Guidebook § § 19.2, 19.4 (2003).

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- *Evictions*: 1. Related directly to abuse- VAWA establishes an exception to the federal “one-strike” criminal activity rule. Criminal activity that is directly related to domestic violence, dating violence, or stalking does not constitute grounds for terminating assistance, tenancy or occupancy rights of the victim or an immediate family member of the victim. See 42 U.S.C. § 1437d(l)(5); 42 U.S.C. § 1437f(c)(9)(B); 42 U.S.C. § 1437f(d)(1)(B); 42 U.S.C. § 1437f(o)(7)(C); 42 U.S.C. § 1437f(o)(20)(A). 2. Exception to the Exception- a PHA or owner may still evict a tenant if the PHA or owner can demonstrate an “actual or imminent threat” to other tenants or employees of the property if the tenant is not evicted. See 42 U.S.C. § 1437d(1)(6)(E); 42 U.S.C. § 1437f(o)(7)(D)(v) and (o)(20)(D)(iv). 3. Unrelated to abuse-VAWA does not protect tenants for acts for which they are being evicted if those acts are unrelated to domestic violence, dating violence or stalking. See 42 U.S.C. § 1437d(1)(6)(D); 42 U.S.C. § 1437f(c)(9)(C)(iv) and (o)(20)(D)(iii). 4. Removing abuser from unit- a PHA or owner may bifurcate a lease to evict, remove or terminate assistance to any tenant who is a participant in public housing or section 8 programs who engages in criminal acts of violence against family members or others. See 42 U.S.C. § 1437d(1)(6)(B); 42 U.S.C. § 1437f(o)(7)(D).

PHAs and owners may, but are not required to, ask an individual for certification that he or she is a victim of domestic violence, dating violence or stalking if the individual seeks to assert VAWA’s protection. Any request for certification must be in writing. See 42 U.S.C. § 1437d(u)(l); 42 U.S.C. § 1437f(ee)(1).

- *Types of Certification permitted*- the individual can self certify with form HUD-50066, documentation signed by victim and a victim service provider, an attorney or medical professional in which the professional attests that the victim has experienced incidents of abuse or a federal, state, tribal, territorial or local police or court record. 42 U.S.C. § 1437d(u)(1)(D); 42 U.S.C. § 1437f(ee)(1)(D).
- *Time Limit*-after receiving a written request to provide certification, an individual has fourteen (14) days to respond. If the individual fails to respond the owner or PHA may bring eviction proceedings or terminate assistance. However, the PHA or owner may extend the timeframe to respond to the written request. 42 U.S.C. § 1437d(u)(1)(A), (B); 42 U.S.C. § 1437f (ee)(1)(A), (B).

PHAs must inform tenants and owners of their rights and obligations under VAWA. 42 U.S.C. § 1437d(u)(2)(B); 42 U.S.C. § 1437f(ee)(2)(B).

- Resources to enforce housing rights under VAWA
- 75 Fed. Reg. 66, 246 (Oct. 27, 2010)
 - HUD Notices PIH 2006-23, PIH 2006-42
 - Form HUD-50066
 - Form HUD-91066, certification form for project based Section 8 program
 - 72 Fed. Reg. 12, 696 (March 16, 2007)
 - Louisiana Rev. Stat. Ann. § 46:2136
 - Louisiana Rev. Stat. Ann. § 44:52

— Cases

- Metro North Owners, LLC v. Thorpe, 870 N.Y.S.2d 768 (N.Y. Civ.Ct. 2008)
- Brooklyn Landlord v. RF (N.Y. Civ. Ct. 2007)
- Tenant v. Housing Authority of Salt Lake County (D. Utah 2006)

—Other Resources

- National Housing Law Project www.nhlp.org
- ACLU, www.aclu.org/fairhousingforwomen

4.2 FAILURE TO GIVE EARNED INCOME EXCLUSIONS

In 1990, Congress enacted a provision which required that public housing tenants who were formerly on welfare and who become employed after participating in a government-funded employment training program would not have their rent increased based upon the higher earned income for a period of 18 months after they get their job. HUD waited until 1994 before finally issuing regulations to implement that requirement. Many PHAs across the country, including many Louisiana PHAs, have not trained their staff and/or are refusing to follow the law, or are not following it properly. Many legal services programs have been successful in getting retroactive rent credits or rent reimbursements to residents who were entitled to but did not receive the benefit of the Earned Income Exclusion. The proper application of the Earned Income Exclusion can result in thousands of dollars of rent savings to public housing residents who are making the transition from welfare to work.

Congress tinkered with the Earned Income Exclusion rules in 1998 with the passage of the Quality Housing and Work Responsibility Act. Regulations at 24 C.F.R. § 5.617 implemented the new rules regarding income disregards. The law broadens the categories of public housing residents who may take advantage of the Earned Income Exclusion. The standard after October 1, 1999 covers residents: (1) Previously unemployed person with disabilities who has earned, in the twelve months previous to employment, no more than would be received for 10 hours of work per week for 50 weeks at the established minimum wage; 2) residents who are in a job training or self-sufficiency program; and (3) residents who have been on welfare within the previous 6 months before getting a job. The rule requiring participation in a government funded training program before getting the job is no longer present. In addition, the new standard provides for a 12 month delay in tenant rents being increased after getting a job, followed by only a 50% increase in rent based upon the higher earnings for one year. Earnings disregards are limited to one first year period in a lifetime for each qualified tenant. 24 C.F.R. § 960.255(b).

You should routinely evaluate all clients who live in public housing to see if they qualify for the Earned Income Exclusion. Make sure that you check for the Earned Income Exclusion if a public housing tenant appears at your office with an eviction for nonpayment of rent. If the resident is or was eligible for the exclusion but did not receive it, the advocate will want to try to get either a retroactive rent credit or reimbursement for the tenant. Southeast Louisiana Legal Services has obtained a retroactive \$1980 credit due to the PHA's failure to properly calculate a tenant's rent even though the 18 month delay period had already passed before she requested the credit.

In 2001, HUD extended the benefits of the Earned Income Exclusion to persons with disabilities who are participants in the Section 8 Voucher Program, the HOME Program, HOPWA, and Supportive Housing Program. 24 C.F.R. 5.617 (2003). This exclusion is virtually identical to the public housing disregard in operation except that it is limited to families where a disabled member begins employment. It requires a housing authority or other applicable housing provider to discount from an eligible family's income any increases due to:

- 1) increased income as a result of employment of a disabled family member who was previously unemployed;
- 2) if the family currently receives welfare or had received welfare during a six month period prior to getting employment;
- 3) if the family member's income increased during the member's participation in a self-sufficiency or job training program.

For more information about the Earned Income Exclusions, consult the following sources:

- Housing Law Bulletin, Earned Income Disregards for Public Housing Tenants, January 1998 issue
- HUD PIH NOTICE 98-2 Treatment of Income Received from Training Programs
- Mandatory Exclusion of Training Program Payments and Earned Income Increases in The Public Housing and Certificate and Voucher Program, NATIONAL HOUSING LAW PROJECT
- 42 U.S.C. § 1437(a),(c)
- 42 U.S.C. § 1437(a),(d)
- 24 C.F.R. § 5.612

4.3 PUBLIC HOUSING AUTHORITY PLANS

In the Quality Housing and Work Responsibility Act of 1998, Congress directed PHAs to submit annual and five-year plans to HUD. The plan must contain policies adopted by the PHA which were formerly made at the federal level. The PHA Plan is a comprehensive guide to public housing agency (PHA) policies, programs, operations, and strategies for meeting local housing needs and goals. There are two parts to the PHA Plan: the 5-Year Plan, which each PHA submits to HUD once every 5th PHA fiscal year, and the Annual Plan, which is submitted to HUD every year. This planning requirement is an important opportunity for legal services advocates, residents, and other community organizations to have an impact on PHA policy affecting both public housing and the Section 8 program.

The annual plan is a public document which must be prepared in consultation with residents through one or more Resident Advisory Boards (RAB). The RAB must represent both the interests of public housing residents and Section 8 residents. PHAs must make resources available to the RAB so that they may have meaningful input into the drafting of the plan. PHAs must hold public hearings to gather input from interested individuals and organizations. After the public hearings, the PHA is supposed to continue to work in partnership with the RAB in deciding whether to modify their plans after the hearings.

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The five-year plan describes the goals and objectives of the PHA for the next five years. It is a long-range plan which should help you determine the PHA's future directions. For example, you may be able to tell if your PHA is planning to shift its mission to providing housing for moderate income persons instead of using most of its resources to house extremely low income persons. The details of the PHA plan will be in the one year plans.

The annual plan is about the operations, programs, and services which the PHA will have for the upcoming fiscal year. It must contain 18 specific topics, describe discretionary policies that apply to public housing and Section 8 tenants, and describe all other rules and policies of the PHA. The one year plan must have all the information which HUD requires, must be consistent with information and data available to HUD and the PHA, must be consistent with the local Consolidated Plan, and be consistent with civil rights and other federal laws. The 18 specific topics which must be covered in the PHA plan under HUD rules are the following:

- 1) Housing Needs of the Area particularly for special populations
- 2) Financial Resources of the PHA
- 3) Eligibility and Admissions Policies
- 4) Rent Policies for Public Housing and Section 8
- 5) Maintenance and Management
- 6) Grievance Procedures
- 7) Capital Improvements
- 8) Demolition and Sale of Public Housing
- 9) Designation of Housing for Elderly and Disabled Population
- 10) Conversion of Public Housing to Section 8 Voucher
- 11) Homeownership Programs
- 12) Services, Job Training, and Community Work Requirement
- 13) Safety and Crime Prevention
- 14) Pet Policy
- 15) Civil Rights Certification
- 16) Annual Audit
- 17) Asset Management
- 18) Table of Contents and Executive Summary of the Plan and location of any materials not being submitted with the PHA plan

The PHA planning process is an important area for legal services advocates to become involved in since it controls and set so many major policies at the local level. After it is drafted, the PHA plan may also become an important enforcement tool for housing advocates. Legal services attorney involvement in the PHA planning process does not violate LSC rules regarding advocacy. It may be done with LSC funds. If you would like more information about the PHA plan, you may want to consult the following:

- PHA Plan Desk Guide available at: <http://www.hud.gov/offices/pih/pha/policy/pha-plan-guide.pdf>;

- HUD Form 50075 PHA Plans available at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/pha/templates;
- 24 C.F.R. § § 903.3–903.25 (PHA Plan process);
- 42 USC § 1437c–1 (PHA Plan process);
- 24 C.F.R. Part 964 (Resident Counsel and Resident Member on Board of Commissioners);
- HUD Housing Programs: Tenants’ Rights, 4th Ed. (National Housing Law Project, Sept., 2012) ;
- Resident’s Guide to the New Public Housing Authority Plans, Center for Community Change, June 1999;
- Bryson & Lindsey, The Annual Public Housing Plan: A New Opportunity to Influence Local Public Housing and Section 8 Policy, 33 Clearinghouse Review 87 (May/June 1999);
- A. Houseman, Memo to Legal Services Corporation Recipients and Advocates Regarding What Can and Can Not Be Done by LSC-Funded Programs in Advocating on the New Housing Bill (March 1, 1999);
- 24 C.F.R. § 903.

4.4 SECTION 8 MULTIFAMILY RESTRUCTURING/MARK TO MARKET

Over the past few years, the nation has lost more than 100,000 units from the privately owned but federally assisted HUD multifamily housing stock through prepayments of HUD backed mortgages and Section 8 opt-outs and termination. These units were originally subsidized with HUD-insured mortgage such as Section 236 or with project based Section 8 assistance to make the units affordable to low income persons. As long-term use restrictions to low income persons have expired, the crisis in preserving affordable housing has escalated. The owners decide whether to remain program or to refuse contract renewal and “opt-out”. In 1997, Congress adopted the Mark to Market (M2M) program to enable owners to renew their Section 8 contracts, since reducing rent levels to actual market levels might cause mortgage defaults. The program provides the owner with three options: opt-out of the Section program, renew the Section 8 contract and accept a lower rent subsidy, or renew the Section 8 contract with a full Mark to Market restructuring of the mortgage. The program provides a debt restructuring option for projects which have above-market rents at the end of the original Section 8 contract as well as a mortgage insured or held by the Federal Housing Administration (FHA).

There are four major areas where advocacy work can protect or improve the restructuring process: (1) a project in poor physical condition can be rehabilitated by the restructuring, (2) residents can influence any decision to convert from project-based Section 8 to tenant-based Section 8 vouchers, (3) the restructuring plan can include adequate funds for project operations, and (4) project management or ownership can be changed or improved. Some legal services programs have successfully challenged prepayments and Section 8 opt-outs to try to preserve low-income housing in their community. *215 Alliance v. Cuomo*, 61 F.Supp. 2d 879 (D.Minn. 1999). Some of the most common legal challenges include improper notice of prepayment, existence of state law mandating preservation of low-

income housing, and fair housing challenges. For more information on the crisis, consult the National Housing Law Project Green Book, HUD Housing Programs: Tenants' Rights (4th Ed. 2012) and/or the following:

- Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub. L. 105-65, Title V, 111 Stat. 1343 (Oct. 27 1998), Amended Pub. L. 106-74 § 531 (Oct. 20, 1999);
- 42 U.S.C. § 1437f;
- 24 C.F.R. Part 40;
- HUD PIH NOTICE 98-34;
- HUD PIH NOTICE 98-19;
- HUD PIH NOTICE 99-16.

4.5 STATE PUBLIC HOUSING AGENCIES LAW

In Act 1188 of 1997, the Louisiana legislature adopted a comprehensive revision of La. R.S. 40:381 et seq. which purports to regulate federally funded housing programs. The law, which is extraordinarily one-sided, tries to vest broad powers and maximum discretion with public housing authorities. Many of Act 1188's provisions appear to be unlawful because they conflict with federal housing law or the Fair Housing Act. See *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268 (1969) (federal law binding on housing authorities and state courts). Since federal law is supreme, contrary state laws cannot authorize a housing authority to violate federal law.

Housing authority actions based on R.S. 40:381 et seq. may require new advocacy strategies. A housing authority must follow its own rules even when it has discretion. *Government of Virgin Islands v. Brown*, 571 F.2d 767, 772 (3d Cir. 1978); *Simmons v. Block*, 782 F.2d 1545 (11th Cir. 1986). Actions that are "arbitrary" are still unlawful under R.S. 40:486. Arbitrary actions should be reviewable under the state constitutional right to judicial review.

There are a few provisions in R.S. 40:381 et seq. that protect tenants. For example, R.S. 40: 456, 508-10, protect domestic violence victims from the consequences of such abuse, and tenants in general from criminals who frequent nearby apartments or the project. The best protection is found at La. R.S. 40:506(D) which prohibits housing authorities from ending assistance to tenants for lease violations based upon criminal activity when the tenant or the tenant's family member is a victim of domestic violence.

4.6 UNIFORM RELOCATION ACT ASSISTANCE FOR DISPLACED FAMILIES

Demolition and large-scale "modernization" of public housing projects have resulted in the displacement and relocation of thousands of public housing residents. All too frequently, PHAs fail to notify residents of their rights under a federal law called the Uniform Relocation Act. Worse still, many PHAs do not pay adequate relocation benefits to eligible families. To help PHAs comply with the law, they can refer to the HUD Handbook 1378 and 49 C.F.R. 24.203. Some of the benefits to which residents are entitled include:

- active participation of residents in the revitalization effort;
- notices clarifying a resident's right to return;

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- notices clarifying that most displacements will be permanent, not temporary, and benefits should be paid for permanent moves;
- comparable replacement housing including other public housing, a Section 8 voucher or some other housing option;
- adequate counseling must be provided to residents regarding housing options;
- assistance in locating other housing must be provided by the housing authority;
- the housing authority must pay relocation benefits which may include payments up to \$125 per month for a maximum of 42 months after displacement. 42 U.S.C. 4624(a) See *Renfroe v. Housing Authority of New Orleans*, Case No. 2003-3613 (E.D.La. July 14, 2004) 2004 WL 1630496 and 34 Housing Law Bulletin 171 (August 2004);
- the housing authority must notify residents of appeal rights. If the displacing agency fails to notify the resident of their appeal rights, they are not required to exhaust administrative remedies when seeking enforcement of the Uniform Relocation Act prior to filing suit in court. See also *Renfroe v. Housing Authority of New Orleans*, Case No. 2003-3613 (E.D.La. July 14, 2004) and 34 Housing Law Bulletin 171 (August 2004).

4.7 SERVICE MEMBER CIVIL RELIEF ACT

One of the benefits for activated military members is protection from certain legal proceedings while serving on active duty. Coverage extends to all active duty service members in the armed forces including the National Guard. It sometimes covers dependents of service members. These protections are provided under the Service members Civil Relief Act (SCRA) (2003) which replaces the Soldier's and Sailor's Relief Act of 1940. 50 U.S.C. App. § 501 et. seq. Examples of benefits include the following:

- Stay of 90 days upon application in virtually all legal proceedings including administrative proceedings in which the service member has a pending case.
- Reduction of interest on any pre-service loan to 6% upon the service member's giving the creditor written notice and a copy of their military orders. Also amounts due under a higher interest rate are forgiven, not deferred, and the lender cannot accelerate repayment of the loan principal.
- For up to 90 days after activation, a landlord cannot evict a service member or his dependents during a period of military service from a premises used as a primary residence where the monthly rent is not more than \$2465 per month. The rent amount due is not forgiven. The law does allow eviction court discretion to shorten the 90-day stay if "justice and equity" require a shorter time.
- Foreclosures, forced sales, and seizure of property of service members are suspended during the 90-day period after termination of military service without a court order provided the security agreement was entered into before military service.

- A service member can terminate a pre-service lease of a rental premises if called to active duty during the lease term. The law also allows this for a lease entered into during active service if the service member has a permanent change of station. See generally “The Service members Civil Relief Act”, 52 La. Bar Journal 94 (2004).

4.8 CHOICE NEIGHBORHOODS GRANT (CNI)

Choice Neighborhoods is HUD’s replacement for its Hope VI grant. 2010 was the first year the Choice Neighborhoods grant was given. It is a grant that seeks to transform an entire distressed neighborhood, focusing on housing. These other areas of transformation include but are not limited to job training, after school programs, transportation and health initiatives. CNI has many protections for public housing tenants that were not part of its predecessor, Hope VI. The most important of these are a guaranteed right of return for public housing residents who are in good standing at the time of redevelopment and resident participation throughout the entire grant process, from the drafting of the application forward. See HUD website for more details: www.hud.gov/cn

4.9 MID-TERM LEASE CHANGES

Contracts have the effect of law between the parties; contracts must be performed in good faith. La. Civ. Code art. 1983. For a landlord to increase rent during the term of the lease or to otherwise try to change the terms and conditions of the lease would clearly violate this article. This is a helpful argument when a PHA or other subsidized landlord tries to implement changes to the lease agreement during the term of the lease.

This argument was used successfully to challenge the implementation of the new minimum rents required by federal law in 1996 to tenants who were in the middle of their lease terms. It could also be used to enforce a Section 8 tenant’s rights under an existing lease which may be in conflict with new federal law.

If a PHA wants to decrease its payment standards, it cannot do so right away. For each voucher holder, the lower payment standard can only go into effect at the voucher holder’s second annual lease recertification after the decrease in the standard. 24 C.F.R. 982.505(c)(3). Another systematic change many agencies are enacting is to give the smallest size voucher to each family irrespective of factors such as sex, age, or disability. For example, many agencies generally provide a three bedroom voucher to a mother with a boy and girl. But under subsidy standards, an agency could decide save money by only providing a two bedroom voucher for a three person household with this type of family composition. A voucher holder’s bedroom size cannot be decreased until the family’s annual recertification. Even then the family has to get a written notice informing them of the change and giving them an opportunity for a hearing to contest the change. 24 C.F.R. 982.555(a).

5. SELECTED LOUISIANA CASE LAW ON FEDERALLY SUBSIDIZED HOUSING

5.1 UTILTY CHARGES

Many states allow individual check metering. However, in Louisiana, PHAs are not permitted to institute surcharges based upon check metering. Federal regulations which govern public housing state that individual check metering shall

not be used if it is against local law or the policies of the public service commission. The Louisiana Supreme Court ruled in *LaNasa v. New Orleans Public Service Commission, Inc.*, 66 So.2d 332 (La. 1953), that the resale of electricity through check meters, even in the absence of profit, violated the contract between the customer and the utility company and was against New Orleans Public Service Commission policy which prohibited the resale of electricity.

From time to time, Louisiana PHAs try to impose charges for utility usage on tenants in master-metered complexes through the use of individual check metering. The reason PHAs may try to set surcharges for excess utility usage or try to use check metering is due to pressure from HUD and rising costs. Each PHA must submit a budget to HUD annually showing projected income and expenses for the rental of their complexes. Once HUD approves the budget, it pays the difference between expenses and income to the PHA. If there is less rent collected or if expenses are higher than anticipated due to high PHA-paid utility costs, for example, the amount of the operating subsidy is insufficient to cover the costs of running the development. Should a Louisiana PHA seek to impose excess utility charges or individual check metering, an advocate should be able to mount a successful legal challenge to such action.

5.2 UTILITY ALLOWANCES

Junior v. Housing Authority of New Orleans, USDC No.88-2172 (E.D.La.), 22 Clearinghouse Rev. 1302 (Mar. 1989)— In this Consent Judgment, HANO was required to increase the utility allowance schedules that the PHA used for its public housing tenants who had tenant-paid utilities. Also, any former tenant surcharged for electricity consumption after 1-1-82 and before 11-23-88 was entitled to a \$250 offset against any debt owed to HANO.

Sylvester v. HUD, USDC No.88-1134 (E.D.La.), 25 Clearinghouse Rev. 1382 (Feb. 1992)— HUD and the PHA agreed in this Consent Judgment to increase utility allowances for tenants participating in its Section 8 Moderate Rehabilitation program. \$500,000 in refunds were obtained for current and former tenants.

Desire Area Resident Council v. HANO, U.S. District Court, Case No. 01-1458(E.D.La)-Suit filed on behalf of public housing residents relocated from projects due to demolition or redevelopment under the Uniform Relocation Act. Basis of suit was that the displaced tenants estimated average utility costs had increased under the Section 8 programs or other housing to which they had been relocated because the PHAs utility allowances were too low. As a result of the litigation, the PHA raised its utility allowances to appropriate levels and provided monetary relief to tenants for the difference between the estimated average of utility costs and the inadequate utility allowances.

Johnson v. Housing Authority of Jefferson Parish, 442 F.3d 356 (5th Cir.), cert. denied 549 U.S. 821 (2006). Suit filed based on parish's failure to adjust utility allowances though utility costs had increased more than 10% since the last adjustment. Fifth Circuit reversed the District Court and held the HCV program rent provisions create enforceable rights. Case later settled with adjustments to allowances.

5.3 EVICTIONS

5.3.1 Notice of Lease Termination

Apollo Plaza Apts. v. Gosey, 599 So. 2d 494 (La. App. 3d Cir. 1992)— The court reversed an order evicting a federally subsidized tenant for an alleged lease violation. The court held that the notice to vacate served upon the tenant was vague in that it did not specify the grounds for the eviction with enough detail for the tenant to prepare her defense. This case is significant because the notice to vacate was more specific than most notices. It stated the tenant had failed to abide by the rules and regulations of her lease by “using loud and profane language, excessive visitors in and out of her apartment, unauthorized guest staying in the apartment, along with excessive noise coming from your apartment.”

The notice also failed to advise the tenant that she had ten days within which to meet with the landlord to discuss the termination or to advise the tenant of her right to defend the action in court. The lease required that these statements be contained in the notice of lease termination. Nevertheless, the court held that no prejudice to the tenant resulted due to these omissions. *But see Versailles Arms Apts. v. Pete*, 545 So. 2d 1193 (La. App. 4th Cir. 1986) where the court held that a landlord with the same notice provision in his lease, who fails to advise the tenant of her right to defend the action in court or her right to meet with the landlord, failed to comply with the lease. The notice was deemed to be insufficient and the rule for possession was dismissed. *Accord, Raintree Court Apts. v. Bailey*, No. 98-C-1138 [La. App. 5th Cir. 1998], *writ denied*, No. 99-CC-0408 (La. Sup. Ct. Apr. 1, 1999), 33 Clearinghouse Rev. 343 (Sept.-Oct.99).

Monroe Housing Authority v. Coleman, 46,307 (La.App. 2 Cir. 5/25/11) 70 So.3d 871— Housing Authority attempted to evict tenant for lease violations or other good cause, and claimed tenant’s lease had expired. Eviction was denied because supposedly expired lease was not entered into evidence and there was no evidence tenant had been offered a renewal of the lease and failed to sign.

Housing Authority of Sabine Parish v. Lynch, 2009-1293 (La.App. 3 Cir. 5/12/10) 2010 WL 1878639, upholding denial of eviction where tenant made angry statements to PHA employee, but did not threaten them, and refused one re-inspection but allowed another. Further, tenant refused to sign lease renewal documents, but apparently because suspicious because of PHA’s efforts to evict him; nothing showed he was not eligible to renew.

Housing Authority Of New Orleans v. Eason, 2009-992 (La. 6/26/09) 12 So.3d 970 (per curiam), federal statute prohibiting discriminatory treatment based on bankruptcy did not preclude evicting tenant for having violated lease by not paying rent, even though the back-rent obligation had been discharged in bankruptcy.

5.3.2 Waiver/Lease Modification

Numerous Louisiana courts have held that a landlord’s continued acceptance of late payment of rent without any advance notice that the lease will be strictly enforced in the future in regard to timeliness of rental payment, establishes a custom which has the effect of altering the lease. The landlord is not allowed to refuse late rent payments unless prior advance notice of strict compliance with the due date is given to the tenant prior to the month for which payment is sought. *Versailles Arms v. Pete*, 545 So. 2d 1193 (La. App. 4th Cir. 1989); *Housing Authority*

of Town of Lake Providence v. Burks, 486 So. 2d 1068 (La. App. 2d Cir.1986); *Housing Authority of City of Monroe v. Wheatley*, 478 So. 2d 569 (La. App. 2d Cir.1985); *Housing Authority of Town of Lake Providence v. Allen*, 486 So. 2d 1064 (La. App. 2d Cir. 1986).

5.3.3 Lease Violation

New Hope Gardens v. Latin, 530 So. 2d 1207 (La. App. 2d Cir.1988)— Court held that a tenant who lives in federally subsidized housing may also use state law remedy of repair and deduct. However, where tenant refused to pay rent without making repairs in an attempt to use economic pressure to force the landlord to make repairs, the tenant may be evicted for nonpayment of rent.

Raintree Courts Apts. v. Bailey, No. 98-C-1138 (La. App. 5th Cir. 1998), writ denied, No. 99-CC-0408 (La. Sup. Ct. 1999)— The Court of Appeal held that under the lease and federal law, a federally subsidized landlord must prove a lease violation or show other good cause to refuse to renew the lease in order to evict his tenant. The landlord had tried to evict the tenant on the ground that there was “no lease” because the term of the lease was indefinite. The Court held that even though the term of the lease had expired, the landlord was required by federal law to prove a lease violation in order to evict the tenant.

Beechgrove Apartments v. Demoe, No. 99-C-366 (La. App. 5th Cir. 1999)—The Court of Appeal held that a brief violation of the one pet lease rule did not constitute a material violation that was sufficient to terminate the lease of a federally assisted tenant. 24 C.F.R. § 247.

5.3.4 Appeal Bond

Gross v. Williams, No.99-C-1865 (La. App. 4th Cir. 1999)— The Court of Appeal reversed the trial court’s ruling that an appeal bond for a Section 8 tenant should be set at the full amount of the contract rent. An abuse of discretion was found because the PHA will continue to pay the housing assistance payment to the landlord. The bond was lowered to the tenant’s portion of the rent to be paid monthly into the registry of the court during the appeal.

Steward v. West, 449 F.2d 324 (5th Cir. 1971)—Payment of rent allowed as bond for subsidized tenant’s injunction against eviction.

5.4 RECERTIFICATION OF INCOME

Holly v. Housing Authority of New Orleans, 684 F. Supp. 1363 (E.D. La. 1988)—Section 8 termination reversed. Court found that tenant did not violate any obligations to inform Housing Authority of changes in family composition by failing to report short-lived marriage. Court ordered authority to provide tenant with new Section 8 certificate and pay compensatory damages.

Housing Authority Of New Orleans v. Jones, 470 So. 2d 144 (La. App. 4th Cir. 1985)— A public housing tenant who refuses to provide information about earning, family composition, or to otherwise cooperate with the annual recertification process was in violation of her lease and could be evicted.

Versailles Arms Apts. v. Granderson, 386 So. 2d 1039 (La. App. 4th Cir. 1980)— A HUD multifamily complex tenant who refused to recertify his income or family composition for the annual recertification process held to have engaged in material noncompliance with the lease and could be evicted for such noncompliance.

George v. Housing Authority Of New Orleans, USDC No. 88-461 (E.D.La.), 24 Clearinghouse Rev. 1291 (Mar. 1991)— While tenants must cooperate with the recertification process, this Consent Judgment established the right of Section 8 tenants not to have their rental assistance delayed or denied due to delays with third party verification of employment income during the recertification process

5.5 NON-RENT CHARGES

Housing Authority of the City of Monroe v. Wheatley, 478 So. 2d 569 (La. App. 2d Cir. 1985)— The Court held that a public housing resident was not responsible for damages assessed against her by the public housing authority as a result of damage done to her apartment by an intruder and therefore could not be evicted for nonpayment of these damage charges. The damage was caused by her ex-boyfriend, an intruder who was not a guest or otherwise authorized to be in her unit, and she had called the police twice to report the break-in.

5.6 GRIEVANCE HEARINGS

Wooden v. HANO, USDC No. 75-2610 (E.D.La.) (Settlement Agreement) — When a public housing tenant timely requests access to the administrative grievance process, eviction proceedings cannot be instituted or continued until the administrative process is complete

Housing Authority of the City of New Iberia v. Austin, 478 So. 2d 1012 (La. App. 3d Cir. 1985), *writ denied* 481 So. 2d 1334 (La. 1986) — A public housing tenant's failure to request a grievance under the authority's administrative grievance procedure, was held as a waiver of her right to defend herself in an eviction proceeding. This decision is clearly wrong in light of 24 C.F.R. § 966.55(c) which expressly provides that a tenant retains her right to defend herself in a judicial proceeding even if no grievance hearing is requested.

5.7 DEMOLITION

Anderson v. Jackson, 556 F.3d 351 (5th Cir. 2009) — After Hurricane Katrina, public housing residents sued HUD and their local housing authority to enjoin plan to demolish their housing projects and replace them with mixed income developments. The Fifth Circuit affirmed denial of a preliminary injunction, holding that 42 U.S.C. § 1437p, governing demolition of developments, did not create rights that residents could enforce by private suit. Residents also could not sue HUD for monetary damages. But the court did not rule on whether the statute would have supported a claim under the federal Administrative Procedure Act, if the court had been ruling before most of the demolition was complete.

