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Subject: PH Due Process Determination

June 2, 1993

DUE PROCESS DETERMINATION

for the

STATE OF OHIO

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ANALYSIS

- I. Jurisdiction: State of Ohio.
- II. Elements of due process

Section 6(k) of the United States Housing Act of 1937 (42 U.S.C. 1437d(k), as amended by section 503(a) of the National Affordable Housing Act of 1990, Pub. L. 101-625, approved November 28, 1990), provides that:

For any grievance concerning an eviction or termination of tenancy that involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any drug-related criminal activity on or near such premises, the agency may . . . exclude from its grievance procedure any such grievance, in any jurisdiction which requires that prior to eviction, a tenant be given a hearing in court which the Secretary determines provides the basic elements of due process

The statutory phrase "elements of due process" is defined by HUD at 24 C.F.R. Section 966.53(c) as:

. . . an eviction action or a termination of tenancy in a State or local court in which the following procedural safeguards are required:

- (1) Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction;
- (2) Right of the tenant to be represented by counsel;
- (3) Opportunity for the tenant to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense which the tenant may have; and
- (4) A decision on the merits.

HUD's determination that a State's eviction procedures satisfy this regulatory definition is called a "due process determination."

The present due process determination is based on HUD's analysis of the laws of the State of Ohio to determine if an action for forcible entry and detainer (FED action) under those laws requires a hearing with all of the regulatory "elements of due process," as defined in Section 966.53(c).

HUD finds that the requirements of Ohio law governing a FED action in the Ohio municipal or county courts under sections 1923.01-1923.15 of the Ohio Revised Code (FED statute) include all of the elements of basic due process, as defined in 24 C.F.R. Section 966.53(c). This conclusion is based on requirements contained in the State Constitution, Ohio Revised Code, Ohio Rules of Civil Procedure (Civ. R.), Ohio Rules of Evidence (Evid. R.) and case law.

III. Overview of Ohio eviction procedures

In Ohio, an action for unlawful detainer may be brought in county or municipal court or a court of common pleas. Ohio Rev. Code Ann. Section 1923.01(A) (Anderson 1992). The Ohio Rules of Civil Procedure apply generally to all civil actions. Civ. R. 1(A). The Civil Rules apply to an FED action except "to the extent that they would by their nature be clearly inapplicable." Civ. R. 1(C).

Article I, section 16 of the Ohio State Constitution states that "every person . . . shall have remedy by due course of law." The Ohio Supreme Court has construed this provision as affording due process protections equivalent to those afforded by the United States Constitution. *Cody v. Jones*, 456 N.E. 2d 813 (1983).

The following analysis shows that Ohio law governing a FED action requires a pre-eviction hearing which meets all elements of HUD's regulatory due process definition.

IV. Analysis of Ohio eviction procedures for each of the regulatory due process elements

A. Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction
(24 C.F.R. Section 966.53(c)(1))

A civil action, including a FED action, is commenced by filing a complaint with the court. Civ. R. 3(A). A civil action complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Civ. R. 8(A). In a FED action, the complaint must "particularly describe the premises" and set forth the unlawful detention. Ohio Rev. Code Ann. Section 1923.05 (Anderson 1992). Thus, the complaint must state the cause of action in sufficient terms to allow the defendant to prepare a defense.

Pursuant to the FED statute and the Civil Rules, a summons must be served on the tenant. Ohio Rev. Code Ann. Section 1923.06(A) (Anderson 1992); Civ. R. 4. The summons may not be issued until the complaint has been filed. Ohio Rev. Code Ann. Section 1923.05 (Anderson 1992). A copy of the complaint must be attached to the summons. Civ. R. 4(B). The summons is prepared by the Clerk of Courts, and must be in the form specified. Ohio Rev. Code Ann. Section 1923.06 (Anderson 1992). The summons notifies the tenant of the opportunity to appear and defend. Civ. R. 4(B). In a FED action, the summons must contain the following language printed in a conspicuous manner:

A complaint to evict you has been filed with this court. No person shall be evicted unless his right to possession has ended and no person shall be evicted in retaliation for the exercise of his lawful rights .

Ohio Rev. Code Ann. Section 1923.06(B) (Anderson 1992).

Service of the summons and complaint in accordance with the FED statute and the Civil Rules provides adequate notice of the FED action, and of the grounds for terminating the tenancy and for eviction. Adequate notice is also presumably required by Article I, section 16 of the Ohio Constitution, since that provision is construed to provide due process protections.

B. Right to be represented by counsel
(24 C.F.R. Section 966.53(c)(2))

The summons in a FED action must inform the defendant of the defendant's right to employ counsel. Ohio Rev. Code Ann. Section 1923.06(B) (Anderson 1992). The summons must contain the following language:

You have a right to seek legal assistance. If you cannot afford a lawyer, you may contact your local legal aid or legal service office.

If none is available, you may contact your local bar association. Id.

Thus, a tenant has the right to be represented by counsel in a FED action. The due process clause of the Ohio State Constitution also affords the right to be represented by counsel. Article I, section 16.

- C. Opportunity for the tenant to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses
(24 C.F.R. Section 966.53(c)(3))

The Ohio Rules of Evidence govern court proceedings in a FED action. Evid. R. 101(A).

All relevant evidence is admissible, except as otherwise provided by the United States Constitution, the Ohio State Constitution, statute or the rules applicable to the Ohio courts. Evid. R. 402. "Relevant evidence" is defined as "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid. R. 401.

The tenant has the right to confront and cross-examine witnesses. Ohio Rule of Evidence 611(B) provides that "cross-examination shall be permitted on all relevant matters and matters affecting credibility." In addition, "when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." Evid. R. 611(C).

Rule 32 of the Ohio Rules of Civil Procedure permits the use of a deposition at trial in specified circumstances, but only against a party who had an opportunity to appear at the taking of the deposition. This limitation is evidently designed to prevent the use of deposition evidence where a party has not had the opportunity to confront and cross-examine the witness. In addition, the Civil Rules severely limit the purposes for which a deposition may be offered at trial. These limitations are intended to restrict the presentation of evidence by a deponent not present for cross-examination at trial. Rule 32(A)(3) explicitly notes "the importance of presenting the testimony of witnesses orally in open court."

Article I, section 16 of the Ohio State Constitution also appears to require that a tenant must have the opportunity to refute PHA evidence, and to confront and cross-examine witnesses. Such opportunity is a fundamental aspect of procedural due process in a proceeding to determine whether the tenant has a right to remain in an assisted unit. Article I, section 16 of the Ohio Constitution is construed to provide due process protections equivalent to the United States Constitution.

Based on the foregoing, a tenant in a FED action has the opportunity to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses.

- D. Opportunity to present any affirmative legal or equitable defense which the tenant may have
(24 C.F.R. Section 966.53(c)(3))

The FED statute expressly provides that "any defense" may be asserted at trial. Ohio Rev. Code Ann. Section 1923.06.1 (Anderson 1992). There is no restriction on presentation in the FED action of any affirmative defense

available under State landlord and tenant law.

The general rules of pleading under section 8 of the Ohio Civil Rules are applicable in a FED action. Rule 8(B) provides without restriction that a party shall state the party's defenses to each claim asserted. Rule 8(C) provides that the party may present "any . . . matter constituting an avoidance or affirmative defense." There are no restrictions under Ohio law on the tenant's right to raise any affirmative defense in the FED action, whether the affirmative defense is equitable or legal in character.

E. A decision on the merits
(24 C.F.R. Section 966.53(c)(4))

An eviction action may be tried before a judge or jury. Ohio Rev. Code Ann. Sections 1923.09, 1923.10 (Anderson 1992); see also Title VI of the Civil Rules (Trials). Even if a defendant fails to appear at the trial, the plaintiff must present evidence to the court sufficient to prove the allegations contained in the complaint. Ohio Rev. Code Ann. Section 1923.07 (Anderson 1992). The FED statute provides that whether the trial is to the court or to the jury, judgment is entered at the conclusion of the hearing. Ohio Rev. Code Ann. Sections 1923.09, 1923.11 (Anderson 1992).

If the facts are tried to a jury, the court must instruct the jury on the law. Civ. R. 51(A). When questions of fact are tried by the court without a jury, the court must, at the request of a party, state in writing separate conclusions of fact and of law. Civ. R. 52. As in the FED statute, the Civil Rules provide that judgment is entered after the trial. Civ. R. 58.

The specific provisions noted above, as well as the general structure of the FED statute, the Civil Rules and the Rules of Evidence, clearly imply that the purpose of the trial is a just determination on the facts and law as found by the court. As noted above, the purpose of the evidence rules "is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined." Evid. R. 102.

A just determination on the merits is also required by Article I, section 16 of the Ohio Constitution.

V. Conclusion

Ohio law governing a FED action in the municipal or county courts requires that the tenant have the opportunity for a pre-eviction hearing in court which provides the basic elements of due process as defined in 24 C.F.R. Section 966.53(c) of the HUD regulations.

By this HUD determination under section 6(k) of the U.S. Housing Act of 1937, a PHA in Ohio may evict a public housing tenant pursuant to a municipal or county court decision in a FED action, for any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the PHA, or for any drug-related criminal activity on or near the premises. The PHA is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.