

Legal Opinion: GCH-0023

Index: 2.245

Subject: PH Due Process Determination: New Mexico

December 3, 1991

Honorable Bruce King
Governor of New Mexico
Santa Fe, NM 87501

Dear Governor King:

I am happy to advise you of a new public housing "due process determination" for the State of New Mexico.

Under Federal law, if the Secretary of the Department of Housing and Urban Development (HUD) determines that law of the jurisdiction requires a pre-eviction court hearing with the basic "elements of due process" (42 U.S.C. 1437d (k), as amended in 1990), a public housing agency (PHA) is not required to provide an administrative grievance hearing before evicting a public housing tenant for:

1. 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
2. Any drug-related criminal activity on or near such premises.

In accordance with the law, HUD has recently issued a regulation which revises HUD's definition of due process elements at 24 CFR 966.53(c) (56 Federal Register 51560, October 11, 1991).

Pursuant to the revised regulation, HUD has determined that the law governing a summary action for possession in the New Mexico district and magistrate courts requires that the tenant have the opportunity for a pre-eviction hearing in court containing the elements of due process as defined in 24 CFR 966.53(c) of the HUD regulations. The basis of this determination is explained in the legal analysis enclosed with this letter.

In accordance with HUD's determination, a PHA operating public housing in the State of New Mexico may exclude from its administrative grievance procedure any grievance concerning an eviction or termination of tenancy which involves 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 any drug-related criminal activity on or near such premises.

When a PHA evicts a tenant pursuant to a New Mexico summary

action for possession in the district or magistrate court, for the reasons set forth above, the PHA is not required to afford the tenant the opportunity for an administrative hearing on the eviction under 24 CFR Part 966, and may evict a public housing tenant pursuant to a decision in such judicial action.

Very sincerely yours,

Jack Kemp

Enclosure

HUD DUE PROCESS DETERMINATION

for the

STATE OF NEW MEXICO

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ANALYSIS

- I. Jurisdiction: State of New Mexico.
- 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 CFR 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

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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 upon HUD's analysis of the laws of the State of New Mexico to determine if a summary action for possession requires a hearing which comports with all of the regulatory "elements of due process," as defined in 966.53(c).

HUD finds that the requirements of New Mexico law governing a summary action for possession in the district and magistrate courts under New Mexico Statutes Annotated include all of the elements of basic due process, as defined in 24 CFR 966.53(c). This conclusion is based upon requirements contained in the New Mexico statutes, case law and court rules.

III. Overview of Eviction Procedures in the State of New Mexico.

In New Mexico, a tenant may be evicted in a summary action for possession under the Uniform Owner-Resident Relations Act (Sections 47-8-1 to 47-8-51 New Mexico Statutes Annotated 1978) (NMSA 1978). As used in the Uniform Owner-Resident Relations Act the term "action" "includes . . . any . . . proceeding in which rights are determined, including an action for possession." Under the Uniform Owner-Resident Relations Act (Section 47-8-10 NMSA 1978) the district and magistrate courts have jurisdiction over a summary action for possession.

In addition to specific rules governing possessory actions under the Uniform Owner-Resident Relations Act, proceedings in the district court are also governed by the "Rules of Civil Procedure for the District Courts," and in the magistrate court by the "Rules of Civil Procedure for the Magistrate Courts." 1

SCRA Rule 1-001 for the district court states that:

these rules govern the procedure in the district courts of New Mexico in all suits of a civil nature . . . except to the extent that . . . existing rules applicable to special

1New Mexico rules of civil procedure are contained in the New Mexico Supreme Court Rules of Civil Procedure Annotated

(SCRA), which is divided into separate rules for the district, magistrate, metropolitan and municipal courts of New Mexico.

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statutory or summary proceedings are inconsistent herewith (emphasis added).

An action for possession under the Uniform Owner-Resident Relations Act is a summary proceeding within the meaning of SCRA Rule 1-001. Thus in some instances (e.g., the time to answer a complaint) the procedural rules of the Act, and not the rules of civil procedure, govern in the district court. (See *Holman v. Oriental Refinery*, 75 N.M. 52, 400 P.2d 471 (1965), in which the court found that in a special statutory proceeding where existing rules are inconsistent with the rules of civil procedure, the special statutory proceeding is specifically excepted from the operation of inconsistent requirements in the district court rules of civil procedure.)

In the rules of civil procedure for the magistrate courts, there is no provision similar to that in SCRA 1-001. SCRA Rule 2-101(A) states that "these rules shall govern the civil procedure in all magistrate courts." However, it appears that requirements for a possessory action under the Owner-Resident Relations Act would override inconsistent requirements of the general rules of civil procedure for the magistrate court.

New Mexico Constitution -- Due Process Clause.

The New Mexico State Constitution (Article II, Section 18) contains a due process clause in the same language as the due process requirement of the Federal Constitution:

No person shall be deprived of life, liberty, or property without due process of law . . .

IV. Analysis of New Mexico 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 CFR 966.53(c)(1)).

Under the Uniform Owner-Resident Relations Act, notice requirements, with specific time limits, are specified for a termination of the rental agreement because of breach of the agreement, or other tenant acts or omissions.

Section 47-8-33(A) NMSA 1978 provides that:

. . . upon the initial material noncompliance by the resident with the rental agreement . . . the owner may deliver a written notice to the resident specifying the acts

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and omissions constituting the breach and that the rental agreement will terminate upon a date not less than seven days after receipt of the notice if the breach is not remedied in seven days. Upon the second material breach, the owner may deliver a written notice to the resident specifying the acts and omissions constituting the breach and that the rental agreement shall terminate upon a date not less than seven days after receipt.

Section 47-8-13 NMSA 1978 states that a person has notice of a fact if the person has actual notice, has received notice or notification of it, or from all facts and circumstances known to the person has reason to know it exists. A resident receives notice if it is "delivered in hand . . . or mailed to the person at the place held out by him as the place for receipt of communication, or . . . to his last known place of residence" (Section 47-8-13 NMSA 1978).

If a tenant remains in possession after expiration of the term of the rental agreement, the owner may bring an action for possession (Section 47-8-37 NMSA 1978). An action for possession may also be brought by the owner for breach of the rental agreement. (Section 47-8-40 NMSA 1978).

An action for possession is initiated by filing a petition for restitution in district or magistrate court. The "petition" (or "complaint")² shall state:

the facts, with particularity . . . a reasonably accurate description of the premises; and the requisite compliance with the notice provision of the Uniform Owner-Resident Relations Act 47-8-1 to 47-8-51 NMSA 1978 .

Section 47-8-43 NMSA 1978 provides that once the complaint is filed, a summons is issued and is served on the defendant/tenant with a copy of the petition. The summons states the cause of the complaint, and notice that if the defendant fails to appear judgment shall be entered against the defendant. Section 47-8-43 NMSA 1978 of the Uniform-Resident Relations Act provides that a trial of an action for possession shall be not less than seven nor more than ten days after service of summons.

²The Uniform Owner-Resident Relations Act uses the term "petition" while the rules of civil procedure for both the district and magistrate courts use the term "complaint." Both terms refer to the pleading filed in either the district or magistrate court to commence an action. (Section 47-8-42 NMSA 1978, SCRA Rules 1-003 and 2-201). The term complaint is used in this analysis.

The rules of civil procedure for the district court (SCRA Rule 1-008) provides that a pleading shall contain:

. . . a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for the relief to which he deems himself entitled.

Upon the filing of the complaint in the district court, a summons is issued. A copy of the summons with a copy of the complaint attached are served together. A summons may be served personally, or if the defendant refuses to receive it, by leaving a copy at the place where the defendant is found. Service may also be made by leaving a copy with a person at least fifteen (15) years of age who resides at the defendant's dwelling or usual place of abode, or by posting or mail (SCRA Rule 1-004).

The rules of civil procedure for the magistrate court provide that "a civil action is commenced by filing . . . a complaint consisting of a written statement of a claim or claims setting forth briefly the facts and circumstances giving rise to the action" (SCRA Rule 2-201).

SCRA Rule 2-202 provides that upon the filing of a complaint in the magistrate court, a summons is issued directing the defendant to file an answer and appear in court within twenty days from the date the summons is served. If service is by mail, three (3) days are added to the time for answer. Service may be made personally, by leaving a copy with a person at least fifteen (15) years of age residing at the defendant's dwelling or last place of abode, by posting, or by mail.

The due process clause of the New Mexico Constitution (Article II, Section 18) also guarantees adequate notice. In *State ex rel. Reynolds v. Lewis*, 84 N.M. 768, 508 P.2d 577 (1973), the Supreme Court of New Mexico found that due process requires that all who may be bound or affected by a decree are entitled to notice and hearing, so that they have their day in court.

In view of the above, New Mexico law provides adequate notice of the grounds for eviction.

B. Right to be represented by counsel
(24 CFR 966.53(c)(2)).

There is an implied right to counsel in eviction proceedings in the district court - e.g., SCRA Rule 1-005 (service and filing of pleadings), SCRA Rule 1-011 (signing of pleadings, motions and other papers; sanctions), and Section 47-8-48 NMSA 1978

In the magistrate court, the rules of civil procedure specifically afford a party the right to be represented by counsel. SCRA Rule 2-107 provides that "a party may appear, prosecute, defend and appeal any proceeding by an attorney."

The State due process clause guarantees the right to counsel for eviction proceedings in district or magistrate court (Article II, Section 18).

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

A party's right to refute evidence of the opposing party, including the right to confront and cross-examine witnesses is implied by the rules of procedure and the rules of evidence governing possessory actions in the district or magistrate court.

The rules of civil procedure in the district court make reference to cross-examination of witnesses with respect to limiting one counsel on a side the right to examine or cross-examine (SCRA 1-040(B)(7)).

SCRA Rule 1-030 for the district court provides that:

after commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination . . . Examination and cross-examination of witnesses may proceed as permitted at trial under the New Mexico Rules of Evidence.

SCRA Rule 1-032 for the district court permits the use of depositions at trial, so far as admissible under the rules of evidence, against any party who was present or represented at the taking of the deposition for the purpose of contradicting or impeaching the testimony of a deponent as a witness.

The rules of civil procedure for the magistrate court provide that "each party shall be permitted to present his position amply and fairly" (SCRA 2-601).

The rules of evidence (SCRA Rule 11-607) provide that "the credibility of a witness may be attacked by any party . . ." The rules of evidence also provide that the credibility of a witness may be attacked or supported by evidence (SCRA 11-608). In New Mexico, the courts have held that the right to impeach a witness is basic to fair trial (see *Mac Tyres, Inc. v. Vigil*,

In the district court a subpoena may be issued to:

command each person to whom it is directed to attend and give testimony and to . . . command the person to whom it is directed to produce books, papers or documents or other tangible things . . . (SCRA Rule 1-045).

In the magistrate court a subpoena may command attendance of witnesses and the production of documentary evidence (SCRA Rule 2-502).

The due process clause of the New Mexico Constitution guarantees a party the opportunity to refute an opposing party's evidence. In *In re Downs*, 82 N.M. 319, 481 P.2d 107 (1971), the court held that due process insures that a litigant will have a chance to present litigant's side of a case. See also *In re Miller*, 88 N.M. 492, 542 P.2d 1182 (Ct. App.), cert denied, 89 N.M. 5, 546 P.2d 70 (1975), in which the court found that embodied in the term "procedural due process" is the opportunity to be heard and to present any defense.

D. Opportunity to present any affirmative legal or equitable defense which the tenant may have (24 CFR 966.53(c)(3)).

Section 47-8-45 NMSA 1978 of the Uniform Owner-Resident Relations Act provides that "on or before the day fixed for his appearance, the defendant may appear and answer and assert any legal or equitable defense . . ." (emphasis added).

In the district court the rules provide that a defendant may assert defenses. SCRA Rule 1-008 states that a party shall:

state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.

SCRA Rule 1-008 further states that in pleading to a "preceding pleading" a party shall:

set forth affirmatively accord and satisfaction, arbitration and award, contributory negligence, discharge in bankruptcy duress . . . and any other matter constituting an avoidance or affirmative defense.

In the magistrate court, upon service of the summons and complaint the defendant may answer. The defendant's answer shall:

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describe in concise and simple language the reasons why the defendant denies the claim of the plaintiff as well as any defenses he may have to the claim of the plaintiff (SCRA Rule 2-302(B)).

E. A decision on the merits (24 CFR 966.53(c)(4)).

Section 38-1-1 NMSA 1978 states that the rules of civil procedure for the district court and magistrate court are for the ". . . purpose of simplifying and promoting the speedy determination of litigation upon its merits." The incidents of a possessory action under the Uniform Owner-Resident Relations Act, the applicable civil procedure rules and the rules of evidence are designed to lead to a decision on the merits, based on the application of the law to the facts presented at trial. The right to a decision on the merits is also guaranteed by the due process clause of the New Mexico Constitution (Article II, Section 18).

V. Conclusion.

New Mexico law governing a summary action for possession in the New Mexico district and magistrate courts under the New Mexico Statutes Annotated 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 CFR 966.53(c) of the HUD regulations.

By virtue of this due process determination by HUD under section 6(k) of the U.S. Housing Act of 1937, a PHA in New Mexico may evict a tenant pursuant to a decision by the district or magistrate court in a summary action for possession for any grievance involving 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 any drug-related criminal activity on or near such premises, and is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.