

Legal Opinion: GCH-0024

Index: 2.245

Subject: PH Due Process Determination: Maine

December 3, 1991

Honorable John R. McKernan
Governor of Maine
Augusta, Maine 04333

Dear Governor McKernan:

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

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 Maine law governing a forcible entry and detainer action in the Maine district court 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 Maine 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 Maine forcible

entry and detainer action in Maine district 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 MAINE

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ANALYSIS

- I. Jurisdiction: State of Maine
- 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;

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- (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 upon HUD's analysis of the laws of the State of Maine to determine if eviction procedures under those laws require 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 Maine law governing an action for eviction in the Maine district court under 14 Maine Revised Statutes Annotated (M.R.S.A.) 6001 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 M.R.S.A., case law and court rules.

III. Overview of Maine Eviction Procedures

In Maine, a landlord may prosecute a claim for the possession of property occupied by a tenant by commencing an action for forcible entry and detainer pursuant to Chapter 14 of the M.R.S.A. 6001, which provides that:

Process of forcible entry and detainer may be maintained against . . . a tenant holding under a written lease or contract. . . .

The Maine district court has exclusive original jurisdiction of forcible entry and detainer actions (14 M.R.S.A. 6003).

Maine Rules of Civil Procedure (M.R.C.P.) 80D(a) provides that the M.R.C.P. governs procedure in forcible entry and detainer actions "except as otherwise provided" in M.R.C.P. 80D. Rule 80D sets forth a number of rules pertaining solely to actions of forcible entry and detainer. The Maine Rules of Evidence (M.R.E.) also govern proceedings in the Maine State courts. M.R.E. Rule 101.

Maine law for a forcible entry and detainer action pursuant to 14 M.R.S.A. 6001 et seq. includes all of the elements of due process as defined by HUD at 24 C.F.R. 966.53(c).

IV. Analysis of State 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))

Termination of Tenancy

Maine case law requires that a written lease must be formally terminated. " Section 6001 requires expiration or forfeiture of term as a condition to maintenance of a forcible entry and detainer action against a tenant holding under a written lease." Rubin v. Josephson, 478 A.2d 665, 668 (1984).

14 M.R.S.A. 6002(1) requires seven-day notice of termination of tenancy where there is a "nuisance within the premises" or where the tenant has "violated or permitted a violation of the law regarding the tenancy." Moreover, 14 M.R.S.A. 6002(2) provides that a "notice of termination issued pursuant to subsection 1 shall indicate the specific ground claimed for issuing the notice."

Commencement of Action

14 M.R.S.A. 6004 provides that the "process of forcible entry and detainer shall be commenced and service made in the same manner as other civil actions." M.R.C.P. 80D(b) requires that the forcible entry and detainer action is returnable "not less than 7 days from the date of service of the summons."

M.R.C.P. 8 requires that all pleadings which set forth a claim for relief, including a complaint, must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Such pleadings must also contain "a demand for judgment for the relief which the pleader seeks." It is thus evident that a tenant-defendant in a forcible entry and detainer action will be informed of the grounds for eviction.

The summons must also inform the defendant of the date on which the action is returnable. M.R.C.P. 80D(b).

Notice - Conclusion

Maine law requires that a tenant must be given "adequate notice," as required by 24 C.F.R. 966.53(c)(1), of the action and of the grounds for termination of tenancy and eviction.

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

A tenant-defendant's right to be represented by counsel is implied by various provisions of the Maine Rules of Civil Procedure, including M.R.C.P. 11, which cites the role of counsel in signing pleadings, M.R.C.P. 43(i), which refers to the role of counsel during the examination and cross-examination of witnesses, and M.R.C.P. 51, which governs the role of counsel for each party in closing argument.

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))

Proceedings in Maine State courts are subject to the Maine Rules of Evidence (M.R.E.). M.R.E. Rule 101. The M.R.E are intended to promote the development of the law of evidence in order to attain the truth in a judicial proceeding. M.R.E. 102.

Generally, all relevant evidence is admissible unless limited by constitutional requirements, by statute, or by rules of the State courts. M.R.E. 402. All evidence "which is admissible" must be admitted. M.R.C.P. 43(a). Relevant evidence may only be excluded if probative value of the evidence is substantially outweighed on grounds of prejudice, confusion, or waste of time. M.R.E. 403. The court must determine the qualifications of a witness and the admissibility of evidence based on the court's determination of relevance. M.R.E. 104(a); cf. M.R.E. 104(e).

The testimony of witnesses must be taken orally in open court (unless otherwise provided by the M.R.C.P., the M.R.E., or other rules adopted by the Supreme Judicial Court). M.R.C.P. 43(a). A witness must generally have personal knowledge of a matter on which the witness testifies (other than opinion testimony by expert witnesses). M.R.E. 602.

A defendant-tenant may refute the credibility of the plaintiff's witness. The credibility of a witness may be impeached by any party. M.R.E. 607. The credibility of a

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witness may be attacked by evidence of untruthfulness, including an attack by evidence of a witness' reputation. M.R.E. 608(a). A witness' credibility may be attacked by evidence of a prior conviction of a crime which involved dishonesty or was punishable by death or imprisonment for a year or more. M.R.E. 609. A witness' prior statement is subject to examination. M.R.E. 613.

The M.R.C.P. grants the tenant-defendant the right to impeach or contradict the plaintiff's case through cross-examination. M.R.C.P. 43(i). A witness may be cross-examined on any matter relevant to issues in the case, including cross-

examination on issues of credibility. M.R.E. 611(b). Ordinarily, leading questions are permitted on cross examinations of an adverse witness. M.R.E. 611(c).

At a trial or hearing, a pretrial deposition may only be used against a party who had the opportunity to be present at the taking of the deposition. M.R.C.P. 32(a). At the taking of a deposition, the witness may be cross-examined in the same manner as permitted at trial. M.R.C.P. 30(c). A deposition may only be used at trial in specific and restrictive circumstances stated in the rules. M.R.E.C.P. 32(a). Provisions which allow the use of a deposition at trial under "exceptional circumstances" note the importance of presenting the testimony of witnesses orally in open court. M.R.C.P. 32(a)(3).

A party has a right to inspect writings or recorded statements used in court by the adverse party. M.R.E. 106.

A defendant tenant has the right to present evidence and witnesses to refute the case presented by the PHA, subject to reasonable judicial control as to the method of interrogating witnesses and of presenting evidence on direct and cross-examination. M.R.E. 611(a).

The Maine rules of evidence and civil procedure give a defendant-tenant a full opportunity to defend against and refute the PHA's evidence, 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 CFR 966.53(c)(3))

M.R.C.P. 8(b) states that a party "shall state in short and plain terms the party's defenses to each claim asserted." This rule places no restrictions on a defendant's right to raise any available defenses. Since M.R.C.P. 80D does not add any

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limitations on a tenant's right to present a defense, it is clear that a tenant-defendant in a forcible entry and detainer action may present any available affirmative legal or equitable defenses.

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

The entire structure of the trial and hearing requirements of a forcible entry and detainer action under the M.R.C.P. imply that the decision of the Maine district court must be a decision on the merits -- a decision based on the evidence presented in the case which bears upon the legal and factual issues framed by the complaint and answer. M.R.C.P. 38 - 54.

M.R.C.P. 52 also expressly provides that in all actions

tried upon the facts, the district court must, "upon the request of a party made as a motion within 5 days after notice of the decision" or "upon its own motion, find the facts specially and state separately its conclusions of law thereon." Since the district court may be requested to find the facts specially, and to state its conclusions of law, it is evident that the decision itself must be based on the evidence and the law. Consequently, the tenant in such an action is clearly entitled to a decision based on the merits of the case.

V. Conclusion

Maine law governing a Chapter 14 6001 forcible entry and detainer action in the Maine district court 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 HUD's due process determination under section 6(k) of the U.S. Housing Act of 1937, a PHA in Maine may evict a public housing tenant pursuant to a district court decision in a eviction proceeding 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 any drug related criminal activity on or near the premises, and is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.