

Legal Opinion: GCH-0030

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Subject: PH Due Process Determination: North Dakota

December 17, 1991

HUD DUE PROCESS DETERMINATION

for the

STATE OF NORTH DAKOTA

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ANALYSIS

I. Jurisdiction: State of North Dakota

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;

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- (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 upon HUD's analysis of the laws of the State of North Dakota 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 North Dakota law governing an action for eviction in the district and county courts under N.D Cent. Code 33-06-01 to -04 include all the elements of basic due process as defined in 24 CFR 966.53(c). This conclusion is based upon requirements contained in the North Dakota code, case law and court rules.

III. Overview of North Dakota Eviction Procedures

Under North Dakota law, a tenant may be evicted by an action for eviction (N.D Cent. Code 33-06-01 to -04).

An eviction action can be brought either in the North Dakota district court or in the North Dakota county court. District courts have power to hear all civil actions. N.D. Cent. Code 27-05-06.2. The county courts have jurisdiction over eviction proceedings if unpaid rents and profits or damages do not exceed \$10,000. N.D. Cent. Code 27-07.1-17.1.d and 33-06-01.

Except for any inconsistent or conflicting requirements in the statutes governing an eviction action, eviction actions are governed by the North Dakota Rules of Civil Procedure (N.D.R.C.P.). N.D.R.C.P. 1 and 81; N.D. Cent. Code 27-07.1-21. Such actions are also subject to the North Dakota Rules of Evidence (N.D.R.E.). N.D.R.E. 1101.

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IV. Analysis of North Dakota Eviction Procedures for Each of the Regulatory Due Process Elements

The following discussion will consider separately each element of the regulatory due process definition, and demonstrate that each element is satisfied in an action for eviction under North Dakota law.

- A. Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction
(24 CFR 966.53(c)(1))

A civil action under the North Dakota civil rules is commenced by the service of a summons. N.D.R.C.P. 3. The summons may be served with or without the complaint. If the complaint is not served with the summons, the complaint must be filed with the court and if the defendant requests a copy of the complaint after service of the summons, the complaint must also be served. N.D.R.C.P. 4(c)(2).

The complaint must contain "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled." N.D.R.C.P. 8(a).

Based on the foregoing, HUD has determined that North Dakota law requires that the tenant must be given adequate notice of the grounds for terminating tenancy and eviction.

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

While nowhere stated explicitly, the right to be represented by an attorney may be inferred from references throughout the North Dakota Rules of Civil Procedure. For example, N.D.R.C.P. 5(b) requires that whenever service is made upon a party represented by counsel, the service must be made upon the attorney unless the court orders otherwise.

- 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))

In general, in North Dakota courts, all relevant evidence is admissible unless admissibility is limited by statute or court rules. N.D.R.E. 402; N.D.R.C.P. 43(a). Evidence which is not relevant is not admissible. N.D.R.E. 202. Relevant evidence may only be excluded if probative value of the evidence is

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substantially outweighed on grounds of prejudice, confusion or waste of time. N.D.R.E. 403.

Except for opinion testimony by expert witnesses, a witness must have personal knowledge of a matter on which the witness testifies. N.D.R.E. 602. In general, the testimony of witnesses must be taken orally in open court. N.D.R.C.P. 43(a). To a limited extent, depositions and interrogatories may be used at trial (pursuant to N.D.R.C.P. 32 and 33). See, In Interest of Gust, 345 N.W.2d 42 (N.D. 1984).

Under the North Dakota rules, a party, including the defendant in an eviction action, has the opportunity to confront and cross-examine witnesses for the opposing party. A party may interrogate any unwilling or hostile witness by leading questions. N.D.R.C.P. 43(b). A witness may be cross-examined on the subject matter of the direct examination and matters affecting credibility of the witness. N.D.R.E. 611(b). Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, the witness may be interrogated by leading questions. N.D.R.E. 611(c); N.D.R.C.P. 43(b). A party may interrogate an adverse party witness by leading questions, and may contradict and impeach the witness. N.D.R.C.P. 43(b).

A defendant-tenant may refute credibility of the plaintiff's witnesses. The credibility of plaintiff's witness may be attacked by evidence of opinion or reputation. N.D.R.E. 608(a). A party may introduce evidence relevant to weight or credibility of testimony. N.D.R.E. 104(e) (jury case). Credibility of a witness may be attacked by evidence of criminal acts. N.D.R.E. 609(a). A witness may be examined concerning prior statements of the witness. N.D.R.E. 613(a).

Under North Dakota law, the tenant 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 CFR 966.53(c)(3))

The North Dakota Rules of Civil Procedure provide for one form of action known as a "civil action." N.D.R.C.P. 2. The rules abolished the distinction between actions at law and suits at equity. *L.W. Wentzel Implement Co. v. State Finance Co.*, 63 N.W.2d 525 (N.D. 1954). Rules 8(b) and (c) require the defendant to state defenses to each claim asserted. In addition, when

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responding to the complaint, the defendant must set forth all of defendant's affirmative defenses. Rule 8(c) lists a number of affirmative defenses, many of which are equitable in nature.

North Dakota law does not limit the right of the defendant in an eviction action to present any available legal or equitable defense.

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

In a jury trial, the jurors are sworn to "try the matters in issue" and to render a true verdict "according to the evidence." N.D. Cent. Code 28-14-08 (1974). The court is required to instruct the jury as to the law of the case. N.D.R.C.P. 51(a). In a bench trial, the court must make findings of fact and

conclusions of law. N.D.R.C.P. 52(a). See also, All Seasons Water Users Ass'n v. Northern Imp. Co., 399 N.W.2d 278 (N.D. 1987).

The Rules of Evidence are construed "to the end that the truth may be ascertained and proceedings justly determined." N.D.R.E. 102. Similarly the Rules of Civil Procedure are construed to secure a "just" determination of the action. N.D.R.C.P. 1. The incidents of the North Dakota rules of procedure and evidence are designed to lead to a determination on the merits, i.e., a determination based on the law and the facts.

The North Dakota court rules and statutes require a decision on the merits.

V. Conclusion

North Dakota law governing an action for eviction (in the district and county courts) require 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 under section 6(k) of the U.S. Housing Act of 1937, a PHA in North Dakota may evict a public housing tenant pursuant to a district or county court decision in an eviction proceeding 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 public housing agency 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.