

Legal Opinion: GCH-0031

Index: 2.245

Subject: PH Due Process Determination: New Hampshire

December 20, 1991

Honorable Judd Gregg  
Governor of New Hampshire  
Concord, New Hampshire 03301

Dear Governor Gregg:

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

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 New Hampshire law governing an eviction by either of the following judicial proceedings 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:

- a summary action for eviction under Chapter 540 of the New Hampshire Revised Statutes Annotated.
- a civil action of ejection and entry.

The basis of HUD's 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 Hampshire 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 public housing tenant, for the reasons set forth above, pursuant to a summary action for eviction under Chapter 540 of the New Hampshire Revised Statutes Annotated, or a civil action of ejection and entry, 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 HAMPSHIRE

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#### ANALYSIS

- I. Jurisdiction: New Hampshire.
- 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:

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. . . 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 upon HUD's analysis of the laws of the State of New Hampshire 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).

In New Hampshire, the landlord may evict a tenant either by:

1. A summary action for eviction under Chapter 540 of the New Hampshire Revised Statutes Annotated (RSA).
2. A civil action of ejection and entry.

HUD finds that the requirements of New Hampshire law governing an action for eviction under Chapter 540, or a civil action of ejection and entry, 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 Hampshire RSA, case law and court rules.

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III. Overview of New Hampshire Eviction Procedures

A. Overview: Summary Process Action

In the State of New Hampshire, a person claiming the right to possession of real property may bring a summary process eviction action against a tenant under RSA Chapter 540 ("Actions Against Tenants").

Court Jurisdiction

A summary process action under Chapter 540 may be brought in the New Hampshire District Court or Municipal Court.<sup>1</sup>

RSA 540:13 gives the Municipal Court jurisdiction to hear a Chapter 540 landlord-tenant summary possession action:

a writ of summons may be issued, returnable before a municipal court, setting forth in substance that the plaintiff is entitled to the possession of the demanded premises, and that the defendant is in possession thereof without right . . . .

<sup>1</sup> In New Hampshire, any real property occupied by tenants is categorized as either "Nonrestricted property" or "Restricted property" (as described in RSA 540:1-a). Public housing units are considered "restricted property." The tenancy of a tenant who occupies restricted property may only be terminated for the following reasons (RSA 540:2(II)):

- (a) Neglect or refusal to pay rent due and in arrears, upon demand.
- (b) Substantial damage to the premises by the tenant, members of his household, or guests.
- (c) Failure of the tenant to comply with a material term of the lease.
- (d) Behavior of the tenant or members of his family which adversely affects the health or safety of the other tenants or the landlord or his representative.
- (e) Other good cause.

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RSA 502-A:34 provides that:

the district courts, except as otherwise provided herein,

shall have the jurisdiction, powers and duties conferred upon municipal courts by the Revised Statutes Annotated, and amendments thereto.

Both the District Courts and Municipal Courts are empowered to hear summary process actions. RSA 502-A:32 provides that District Court actions are subject to "all provisions of law, not inconsistent herewith with Chapter 502-A (concerning establishment and function of the District Courts) " relating to civil procedure in the Municipal Courts.

New Hampshire's Municipal Courts are being phased out and replaced by District Courts. RSA 502-A:35. However, where Municipal Courts still exist, both the District Courts and Municipal Courts possess jurisdiction to hear landlord-tenant cases under Chapter 540.

A Chapter 540 summary process action in the District Court or Municipal Court is subject to the District and Municipal Court Rules (DMCR). There are a few District and Municipal Court rules relating solely to landlord-tenant actions. DMCR Rule 5.1 to Rule 5.7.

B. Overview: Action of Ejection and Entry

In addition to a summary process action under Chapter 540, an individual claiming the right to possession of real property may also bring a common law action for ejection and entry in Superior Court. The New Hampshire Supreme Court has ruled that the civil action of ejection and entry continues to be available to New Hampshire litigants despite the existence of an alternative summary process remedy. *Cooperman v. MacNeil*, 123 N.H. 696, 465 A.2d 879 (1983).

In *Cooperman* the court ruled that the "jurisdictional and procedural requirements of RSA Chapter 540 the summary process statute do not apply" to ejection and entry. Moreover, RSA 540:26 provides that nothing in the chapter on "Actions Against Tenants" (Chapter 540) "shall be construed to prevent a landlord from pursuing his legal remedy at common law."

RSA 491:7 grants the Superior Court jurisdiction to hear "civil actions and pleas, real, personal and mixed, according to the course of the common law, except such actions as are required to be brought in the District courts under RSA 502-A. . . ." The

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jurisdictional and procedural requirements of an ordinary Superior Court civil action apply to an action for ejection and entry.

An action for ejection and entry in Superior Court is subject to the Superior Court Rules (SCR). Rules of the Superior Court are promulgated pursuant to the Supreme Court's grant of

authority at RSA 490:4 and the Superior Court's rule-making authority at RSA 491:10.

C. Rules of Evidence

The New Hampshire Rules of Evidence (NHRE) govern proceedings in New Hampshire courts. NHRE Rule 101.

IV. Analysis of New Hampshire Eviction Procedures for Each of the Regulatory Due Process Elements

A. Summary Process Action

The following discussion considers each of the elements of the regulatory due process definition at 24 C.F.R. 966.53(c). The analysis describes how each element is satisfied in a summary process action in the New Hampshire District or Municipal Court. HUD finds that the legal requirements for the commencement and maintenance of a summary process eviction action contain the elements of basic due process in 24 C.F.R. 966.53(c).

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

Notice to Quit

Under New Hampshire Law, public housing units are classed as "restricted property" (see footnote 1 of this due process determination). RSA 540:1-a. Before commencing a summary eviction action, a landlord of restricted property must give the tenant notice to quit in accordance with RSA 540:3 ("Notice to Quit") and RSA 540:5 ("Service of . . . Notice to Quit"). RSA 540:2.

The landlord must give notice to quit for a minimum period of time. The notice period depends on the reason for the termination. RSA 540:3.II.

The notice to quit "shall state with specificity the reason for the eviction." RSA 540:3.III.

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Commencement of Action

After completing the notice to quit, a writ of summons must be issued and served on the tenant. RSA 540:13 provides that:

A writ of summons may be issued, returnable before a municipal court, setting forth in substance that the plaintiff is entitled to the possession of the demanded premises, and that the defendant is in possession thereof without right, after notice in writing to quit the same . . . .

The landlord/tenant writ must include notice that the tenant has the right to appear and be heard in the action. DMCR 5.7.

DMCR Rule 3.7 requires that:

All writs at the time of service upon the defendant shall have attached thereto a specification setting forth the particulars of the claim or a special declaration, but the Court, for good cause shown, may waive this requirement on motion of the plaintiff, which must be filed at the time of entry of the writ and accompanied by such specification or special declaration and a statement that copies of the same have been mailed or delivered to the defendant or his attorney, but the Court for good cause shown upon motion also filed with the writ may extend the time for filing specification or special declaration.

Under DMCR Rule 3.7, the defendant must be served with the specification or special declaration at service of the writ, or before the writ is entered. (We assume this refers to entry of the writ in the court docket prior to trial.) With good cause shown, upon motion filed with the writ, the specification or special declaration may be filed at a later time (but presumably in time to permit an adequate opportunity for defense of the action).

The preeminent case in New Hampshire on the detail necessary in court pleadings is *Morency v. Plourde*, 96 N.H. 344, 76 A.2d 791 (1950). In this case, the New Hampshire Supreme Court stated:

Pleadings ought to be simple, concise and indicate the theory on which the plaintiff has proceeded so that the opposing party can adequately defend. The defendant is

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entitled to be informed of the theory on which the plaintiffs are proceeding, and the redress that they claim as a result of the defendant's actions . . . .  
76 A.2d at 792.

Notice: Conclusion

Under New Hampshire law, the tenant must be given "adequate notice," as required by HUD's due process definition at 24 C.F.R. 966.53(c)(1), of the grounds for termination and eviction. Such notice is provided in the notice to quit prior to commencement of the action, and in the pleadings for commencement of the action.

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

The right of a tenant to be represented by counsel is implied by DMCR Rule 1.3. This rule regulates practice by attorneys before the District and Municipal Courts, and specifically addresses the manner in which "either party" may "change attorneys during the pendency of the action." Other references to counsel also assume that the parties have a right to representation by counsel. E.g., DMCR Rule 1.7 (headed "Arguments of Counsel"), DMCR Rule 1.8-A.D (motions for continuance "by counsel"), DMCR Rule 3.1 (issuance of writs to attorneys).

3. 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))

#### Rules of Evidence

The New Hampshire Rules of Evidence (NHRE) govern proceedings in the New Hampshire courts. NHRE Rule 101. The NHRE apply therefore to a summary process eviction action in the New Hampshire District or Municipal Court.

The NHRE are intended to promote the development of the law of evidence in order to attain the truth in a judicial proceeding. NHRE 102. Generally, all relevant evidence is admissible unless limited by constitutional requirements or by statute or by rules of the State courts. NHRE 402. Relevant evidence may only be excluded if probative value of the evidence is substantially outweighed on grounds of prejudice, confusion, or waste of time. NHRE 403.

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The court shall determine the qualifications of a witness and the admissibility of evidence based on the court's determination of relevance. NHRE 104(a). The rules do not limit the right of a party to present relevant evidence before the jury. NHRE 104(e). Generally, every person is deemed competent to be a witness unless specifically disqualified due to prescribed incapacities. NHRE 601(a), (b). A witness may not testify unless the witness has personal knowledge of the matter (other than opinion testimony by expert witnesses). NHRE 602.

A witness may be cross-examined on any matter relevant to issues in the case, including cross-examination on issues of credibility. NHRE 611(b). Ordinarily, leading questions are permitted on cross examinations of an adverse witness. NHRE 611(c).

The defendant-tenant may seek to refute the credibility of plaintiff's witness. The credibility of a witness may be impeached by any party. NHRE 607. The credibility of a witness may be attacked by evidence of untruthfulness. The truthful



character of the witness may be attacked by reputation evidence. NHRE 608(a). A witness' credibility may also 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. NHRE 609. A witness' prior statement is also subject to examination. NHRE 613.

A party has a right to inspect writings or recorded statements utilized in court by the adverse party. NHRE 106. This enables the defendant-tenant to refute evidence presented by the PHA.

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. NHRE 611(a).

The New Hampshire rules of evidence and 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.

#### District and Municipal Court Rules

DMCR Rule 3.20(c) provides that a defendant may "put in his whole defense," and thereafter introduce evidence "in reply to

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the rebutting evidence." We believe the rule implies that the defendant has the right to confront and cross-examine plaintiff witnesses in order to "put in" a defense, as well as the right to present defense witnesses.

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

The District and Municipal Court Rules do not restrict a tenant's right to present any legal or equitable defenses the tenant may have as a matter of substantive law. DMCR Rule 3.20 provides that:

In all trials . . . the defendant shall, before resting, put in his whole defense . . .

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

RSA 540:14 provides that (other than on a defendant's default):

if on trial it is considered by the court that the plaintiff has sustained his complaint, judgment shall be rendered that the plaintiff recover possession of the demanded premises

and costs . . . .

DMCR 3.26, which is captioned "Rendition of Decision," provides as follows:

A decision on the merits shall be rendered within sixty days following the hearing and submission of briefs or memoranda, if any. (Emphasis added.)

Under the New Hampshire rules, the defendant has a right to a decision on the merits - based on the facts and the law as developed in the case.

B. Action of Ejection and Entry

The following discussion considers each of the elements of the regulatory due process definition at 24 C.F.R. 966.53(c). The analysis describes how each element is satisfied in a Superior Court ejection and entry proceeding. HUD finds that the State law requirements for the commencement and maintenance of a Superior Court ejection and entry proceeding contain the elements of basic due process stated in 24 C.F.R. 966.53(c).

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

RSA 509:4 requires that "original process in the courts shall be summons and attachment and shall be in the form prescribed by law." More specifically, RSA 509:6 also provides that "in real actions and actions of ejection, the original writ shall be summons or attachment only."

Pursuant to Superior Court Rule 23:

All writs at the time of service upon the defendant shall have attached thereto a specification setting forth the particulars of the claim or a special declaration, but the Court, for good cause shown, may waive this requirement on motion of the plaintiff, which must be filed at the time of entry of the writ and accompanied by such specification or special declaration and a statement that copies of the same have been mailed or delivered to the defendant or his attorney, but the Court, for good cause shown upon motion also filed with the writ, may extend the time for filing specification or special declaration.

Consequently, a tenant who is the defendant in an ejection and entry action receives adequate notice of the grounds for termination of the tenancy and for eviction. This rule insures that a tenant defendant in an ejection and entry action must be served with the specification and special declaration (see

analysis above of parallel notice requirement in a summary proceeding under DMCR 3.7).

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

Superior Court Rule 14, which governs appearances by representatives of the parties, provides for the appearances of attorneys on behalf of Superior Court litigants. The rule states that:

n o person who is not a lawyer will be permitted to appear, plead, prosecute or defend any action for any party, other than himself, unless of good character and until there is on file with the Clerk a power of attorney signed by the party for whom he seeks to appear . . . .

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This rule signifies that Superior Court litigants have a right to representation by counsel.

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

The New Hampshire Rules of Evidence (NHRE) govern proceedings in the New Hampshire courts. NHRE Rule 101. The NHRE apply therefore to an eviction by action of ejection and entry in the New Hampshire Superior Courts.

The NHRE are intended to promote the development of the law of evidence in order to attain the truth in a judicial proceeding. NHRE 102. Generally, all relevant evidence is admissible unless limited by constitutional requirements or by statute or by rules of the courts in the state. NHRE 402. Relevant evidence may only be excluded if probative value of the evidence is substantially outweighed on grounds of prejudice, confusion, or waste of time. NHRE 403.

The court shall determine the qualifications of a person to be a witness and the admissibility of evidence based on the court's determination of relevance. NHRE 104(a). The rules do not limit the right of a party to present relevant evidence before the jury. NHRE 104(e). Generally, every person is deemed competent to be a witness unless specifically disqualified due to prescribed incapacities. NHRE 601(a),(b). A witness may not testify unless the witness has personal knowledge of the matter (other than opinion testimony by expert witnesses). NHRE 602.

A witness may be cross-examined on any matter relevant to issues in the case, including cross-examination on issues of credibility. NHRE 611(b). Ordinarily, leading questions are permitted on cross-examination of an adverse witness. NHRE

611(c). See also Superior Court Rule 67 concerning re-examination of a witness after cross-examination, indicating therefore that witnesses are subject to cross-examination.

A defendant-tenant may seek to refute the credibility of plaintiff's witness. The credibility of a witness may be impeached by any party. NHRE 607. The credibility of a witness may be attacked by evidence of untruthfulness. The truthful character of the witness may be attacked by reputation evidence. NHRE 608(a). A witness' credibility may also be attacked by evidence of a prior conviction of a crime which involved dishonesty or was punishable by death or imprisonment for a year

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or more. NHRE 609; see also, Superior Court Rule 68. A witness' prior statement is also subject to examination. NHRE 613.

A party has a right to inspect writings or recorded statements utilized in court by the adverse party. NHRE 106. This right of inspection enables the tenant-defendant to refute evidence presented by the PHA.

A tenant-defendant 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. NHRE 611(a). The defendant may "put in his whole defense." Superior Court Rule 70.

The New Hampshire rules of evidence and 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.

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

Superior Court Rule 133, which governs the form and content of answers, allows the defendant to:

answer fully and specifically every material allegation in the bill, libel or petition and set out his defense to each claim asserted by the bill, libel or petition. . . . The answer of the defendant may state as many defenses as the defendant deems essential to his defense.

Superior Court Rule Rule 70 states:

In all trials . . . the defendant shall, before resting, put in his whole defense.

The New Hampshire rules do not restrict the ability of the

defendant-tenant to raise any available legal or equitable defense which the tenant may have as a matter of substantive law.

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

The overall structure of the trial and hearing requirements before the New Hampshire Superior Court, as well as the Legal Remedies clause of the New Hampshire Constitution, imply that the

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Superior Court's decision is to be based on the law and the evidence presented which bear upon the legal and factual issues in the case. N.H. Constitution. pt.1, art. 14; RSA 500-A:18; 491:15 - 16; 519:23; 524:1-C; Superior Ct. Rules 55 and 74; Supreme Ct. Rule 7; Riendeau v. Municipal Court of Milford, 104 N.H. 33, 177 A.2d 396 (1962).

In a non-jury case, requests for findings and memoranda of law are generally submitted by the close of the evidence. Superior Court Rule 72. Such submission expresses the views of the parties on the facts and the law, so that the court may render a decision on the merits. RSA 491:15 provides:

The court or justice trying causes under RSA 491:13 and 491:14 shall, if either party requests it, give his decision in writing, stating the facts found and his rulings of law, which shall be filed and recorded.

See Howard v. Howard, 469 A.2d 1318, 1320 (N.H. 1983) (" . . . this court has repeatedly recognized the need for basic findings supported by the record . . ."), and Cote v. Elden, 403 A.2d 419, 420 (1979).

In a jury case the facts are determined by the jury pursuant to instruction of the court. Superior Court Rule 72. In this manner the jury determination is also based upon the facts and the law.

Whether the facts are tried to a jury or to the court, State law requires that a determination be issued upon the merits, upon the facts and the law in the case.

#### V. Conclusion.

New Hampshire law governing a Chapter 540 summary proceeding in the New Hampshire District Court or Municipal Court requires that the tenant have the opportunity for a pre-eviction hearing in court which provides the basic elements of basic due process as defined in 24 CFR 966.53(c) of the HUD regulations.

New Hampshire law governing a Superior Court civil eviction action for ejection and entry also requires that the tenant have the opportunity for a pre-eviction hearing in court which contains the elements of basic 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 New Hampshire may

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evict a public housing tenant pursuant to a District or Municipal court decision in a Chapter 540 summary proceeding, or in a Superior Court civil action of ejection and entry under c. 491:7 of the Revised Statutes Annotated, 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. The PHA is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.

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