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Subject: PH Due Process Determination: West Virginia

February 20, 1992

HUD DUE PROCESS DETERMINATION

for the

STATE OF WEST VIRGINIA

TABLE OF CONTENTS

- I. Jurisdiction.
- II. Elements of Due Process.
- III. Overview of West Virginia Eviction Procedures.
- IV. Analysis of West Virginia Eviction Procedures for Each of the Regulatory Due Process Elements.
- V. Conclusion.

ANALYSIS

I. Jurisdiction: West Virginia

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;

WEST VIRGINIA: DUE PROCESS DETERMINATION

- (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 West Virginia to determine if eviction procedures under those laws require a hearing with all of the regulatory "elements of due process," as defined in 966.53(c).

HUD finds that the requirements of West Virginia law governing an action for unlawful detainer (W.Va. Code, Chapt. 55, Article 3) or an action for wrongful occupation (W.Va. Code, Chapt. 55, Art. 3A-1) 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 West Virginia Constitution, Code, case law and court rules.

### III. Overview of West Virginia Eviction Procedures

#### A. Eviction Procedures

In West Virginia, a landlord may evict a tenant by:

- (1) an action for unlawful detainer. W.Va. Code, Chapt. 55, Article 3, or
- (2) a summary eviction action for wrongful occupation of residential property. W.Va. Code, Chapt. 55, Art. 3A-1.1

1A landlord may also evict by bringing an action for ejection. W.Va. Code 55-4-1 et seq. Dispossession by an action for ejection is not considered in this due process determination.

WEST VIRGINIA: DUE PROCESS DETERMINATION

#### B. Jurisdiction

A tenant may be evicted by an action for unlawful detainer, or by a summary eviction action for wrongful occupation. Either form of action may be brought in the Magistrate Court or the

Circuit Court. W.Va. Code 55-3-1 (unlawful detainer);  
55-3A-1(a) (summary eviction). If brought in the Magistrate  
Court, either form of action may be removed to the Circuit Court  
if more than \$300 is involved. W.Va. Code 50-8-4.

C. Action for Unlawful Detainer

An action for unlawful detainer is brought under the West  
Virginia Code Chapter 55, Article 3. W. Va. Code 55-3-1 states  
that:

If any forcible or unlawful entry be made upon any land,  
building, structure, or any part thereof, or if, when the  
entry is lawful or peaceable, the tenant shall detain the  
possession of any land, building, structure, or any part  
thereof after his right has expired, without the consent of  
him who is entitled to the possession, the party so turned  
out of possession . . . may within three years after such  
forcible or unlawful entry, or such unlawful detainer, sue  
out of the clerk's office of the circuit court, or any court  
of record empowered to try common-law actions . . . .

In addition, W.Va. Code 37-6-19 states that:

any person who shall have the right of re-entry into the  
lands by reason of rent issuing thereout being in arrear, or  
by reason of the breach of any covenant or condition, may  
. . . commence an action of unlawful detainer.

A landlord initiates an action for unlawful detainer in  
Magistrate Court or Circuit Court with a summons and complaint.  
Return must be within ninety days of the summons. The summons  
and complaint must be served on the tenant at least 10 days  
before the return day. The case must be heard by a jury. W.Va.  
Code 55-3-3.

D. Summary Eviction Proceeding for Wrongful Occupation of  
Residential Rental Property

A summary eviction proceeding is brought pursuant to the  
West Virginia Code Chapter 55, Article 3A. W.Va. Code  
55-3A-1(a) states that a "person desiring to remove a tenant  
from residential rental property may apply for such relief to the

magistrate or the circuit court of the county in which such  
property is located . . . ." 2

The landlord obtains from the court a time and place for a  
hearing, and serves on the tenant a verified petition which  
states the time of the hearing. The time of hearing must not be  
less than five nor more than ten judicial days following the  
landlord's request for a hearing date.

E. Applicable Rules

Actions in the Magistrate Court are governed by the rules of Civil Procedure for the Magistrate Courts of West Virginia (Magistrate Rules). Magistrate Rule 1.

Actions in the Circuit Court are governed by the West Virginia Rules of Civil Procedure for Trial Courts of Record (R.C.P.). R.C.P. 1, 81.

The West Virginia Rules of Evidence (R.E.) govern proceedings in the courts of the State. R.E. Rule 101.

F. West Virginia Constitution: Due Process Clause

The West Virginia Constitution guarantees due process. Article 3, 10 provides that "no person shall be deprived of life, liberty or property without due process of law and the judgment of his peers." Evictions in West Virginia are subject to the due process clause of the State Constitution.

2 W. Va. Code 50-4-8 provides a right to remove a case from the Magistrate Court to the Circuit Court if more than \$300.00 is "involved." In *State ex rel Strickland*, 318 S.E.2d 627, 632 (1984), the court held that "magistrate courts have initial jurisdiction over unlawful detainer cases regardless of the amount in controversy, but removal to circuit court is a matter of right if the case involves more than \$300." Magistrate Rule 12 provides that:

Unless good cause is shown as to why such requirements should be excused, the following motions and requests, if made, shall be made in writing and shall be filed with the court and served upon all parties not less than 7 days before the first date scheduled for trial:

- (1) Removal to Circuit Court . . . .

WEST VIRGINIA: DUE PROCESS DETERMINATION

Decisions of West Virginia courts indicate that the due process clause of the West Virginia Constitution gives identical if not more extensive rights than the Federal due process clause. *State v. Bonham*, 317 S.E.2d 501 (1973); *Harris v. Calendine*, 233 S.E.2d 318 (1977). Decisions of the Supreme Court of Appeals have held that due process includes the elements of notice (*Sisler v. Hawkins*, 217 S.E.2d 60 (1975)), a right to be heard (*Bowen v. Flowers*, 184 S.E.2d 611 (1971)), the opportunity to prepare an adequate defense (*Simpson v. Stanton*, 193 S.E. 64 (1937)), and the right to assert available defenses (*State v. Ruthbell Coal Co.*, 56 S.E.2d 549 (1949)).

IV. Analysis of West Virginia 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))

In both the Magistrate and Circuit Courts, a civil action is commenced by filing a complaint with the court. The complaint must contain a short and plain statement of the claim showing that the plaintiff is entitled to relief. Magistrate Rule 2; R.C.P. 3.

Under 55-3A-1, a summary eviction proceeding for wrongful occupation of residential property is initiated by filing a "petition" (which apparently constitutes the complaint in the special proceeding). The petition includes a short statement of the facts and the nature of the landlord's claim as well as an identification of the tenant and the property. At a minimum, W.Va. Code 55-3A-1(a)(3) requires a written allegation that:

the tenant is in arrears in the payment of rent, has breached a warranty or a leasehold covenant, or has deliberately or negligently damaged the property or knowingly permitted another person to do so . . . .

The summons and complaint must be served on the defendant. Magistrate Rule 3; R.C.P. Rule 4. Requirements for service of process are the same in the Magistrate and Circuit Courts. (Magistrate Rule 3 requires service of the summons and complaint upon the defendant in the same manner as provided by R.C.P. Rule 4.)

Rule 4 of the R.C.P. states that service of process shall be made upon a defendant by delivering a copy of the summons personally to the defendant; or by delivering a copy of the

WEST VIRGINIA: DUE PROCESS DETERMINATION

summons and complaint at the defendant's dwelling house or usual place of abode to a member of the defendant's family above the age of sixteen years and giving to such person information of the purpose of the summons and complaint. Substitute service may also be had by sending a copy of the complaint and summons by registered or certified mail, return receipt requested and delivery restricted to the addressee.

Adequate notice of the grounds for termination is required by the due process clause of the West Virginia Constitution. Article 3, 10. Due process requires notice as a prerequisite to action in a court. *Sisler v. Hawkins*, 217 S.E.2d 60 (1975). Notice need not be personal to meet the constitutional mandate, but it must be carried out by some method established by law. *Harloe v. Harloe*, 38 S.E.2d 362 (1946). Posting alone is insufficient notice in a landlord-tenant action brought in Magistrate Court. *State ex rel. Thomas v. Neal*, 299 S.E.2d 23, 25 (1982). While actual notice is not an absolute prerequisite to jurisdiction, the lack of it may justify setting aside a

summary judgment. Cordell v. Jarrett, 301 S.E.2d 227, 229 (1982).

Adequate notice is guaranteed to the tenant under West Virginia State law.

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

W.Va. Code 50-4-4 provides that any party to a civil action in Magistrate Court may appear and conduct the action by an attorney. This provision was not superseded by promulgation of the Magistrate Rules (1988). See Magistrate Rule 1. Various provisions of the Magistrate Rules refer to counsel, and imply that a litigant in Magistrate Court may elect to be represented by counsel. For example, Rule 8(b) refers to service "upon a party represented by an attorney of record." See also, Rule 9(b) (certificate of service "by the attorney"), Rule 14(c) (service of subpoena by an attorney), Rule 16(d) (parties not represented by counsel).

The Circuit Court is a record court in which parties are normally represented by counsel. R.C.P. Rule 5. See, Brewster v. Hines, 185 S.E.2d 513 (1971) (notice to an attorney for a party is effective as notice to the party). Many provisions of the R.C.P. refer to the role of counsel, and assume therefore that parties in Circuit Court have the right to be represented by counsel.

6

#### WEST VIRGINIA: DUE PROCESS DETERMINATION

The right to representation by counsel is guaranteed by the due process clause of the State Constitution. Article 3, 10.

- 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))

The West Virginia Rules of Evidence (W.V.R.E.) govern proceedings in the State courts. W.V.R.E. Rule 101. The W.V.R.E. are geared to promote the development of the law of evidence in order to attain the truth in a judicial proceeding. W.V.R.E. Rule 102.

The court must determine the qualifications of a person to be a witness and the admissibility of evidence based on the court's determination of relevance. W.V.R.E. Rule 104(a). A party may present relevant evidence before the jury. W.V.R.E. Rule 104(e). Generally, all relevant evidence is admissible unless limited by constitutional requirements, by statute or by court rules. W.V.R.E. Rule 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. W.V.R.E. Rule 403.

Generally, every person is deemed competent to be a witness unless specifically disqualified due to prescribed incapacities outlined in W.V.R.E. Rule 601(a), (b). Except for opinion testimony by expert witnesses, a witness must have personal knowledge of the matter. W.V.R.E. Rule 602. The West Virginia Rules of Civil Procedure (R.C.P.) provides that the testimony of witnesses must be taken orally in open court (unless otherwise provided by the R.C.P., the W.V.R.E., or other rules adopted by the Supreme Court of Appeals). R.C.P. Rule 43(a).

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. R.C.P. Rule 32(a). Any deposition may be used by a party to contradict or impeach the testimony of the deposed witness. R.C.P. Rule 32(a)(1). At the taking of a deposition, the witness may be cross-examined in the same manner as permitted at trial. R.C.P. Rule 30(c). A deposition may only be used at trial in specific and restrictive circumstances stated in the rules. R.C.P. Rule 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. R.C.P. Rule 32(a)(3).

7

#### WEST VIRGINIA: DUE PROCESS DETERMINATION

Under the West Virginia rules, a party has the opportunity to confront and cross-examine witnesses for the opposing party. The Magistrate Rules require that the trial must "be conducted by the examination and cross-examination of witnesses under oath or affirmation, and in accordance with the West Virginia Rules of Evidence." Magistrate Rule 16(a). A witness may be cross-examined on any matter relevant to issues in the case, including credibility. W.V.R.E. Rule 611(b). Ordinarily, leading questions are permitted on cross-examination of an adverse witness. W.V.R.E. Rule 611(c).

The defendant-tenant may seek to refute the credibility of the plaintiff's witness. The credibility of a witness may be impeached by any party. W.V.R.E. Rule 607. The credibility of a witness may be attacked by evidence of the witness' reputation for untruthfulness. W.V.R.E. Rule 608(a). Credibility of a witness may also be attacked by evidence of a prior conviction of a crime which involved dishonesty or was punishable by death or imprisonment in excess of one year. W.V.R.E. Rule 609. A witness may be examined concerning a prior statement. W.V.R.E. Rule 613.

A party has a right to inspect writings or recorded statements utilized in court by the adverse party. W.V.R.E. Rule 106. This allows the tenant-defendant the opportunity to refute such 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. W.V.R.E. Rule 611(a). The defendant may use a subpoena to command attendance of witnesses or production of documentary evidence. Magistrate Rule 14; R.C.P. Rule 45.

The West Virginia rules 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.

In addition, the due process clause of the West Virginia constitution grants a party the opportunity to refute evidence and to cross examine witnesses. West Virginia Constitution Art. 3, 10. The opportunity to be heard is an essential ingredient of the due process guaranteed by Article 3, 10 of the West Virginia Constitution. *Bowen v. Flowers*, 184 S.E.2d 611 (1971); *Staley v. Hereford*, 45 S.E.2d 738 (1947); accord, *Cordell v. Jarrett*, 301 S.E.2d 227, 230 (1982).

8

#### WEST VIRGINIA: DUE PROCESS DETERMINATION

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

For an eviction action in Magistrate Court, the Magistrate Rules provide that "the failure of the defendant to state a particular defense in an answer shall not prevent the defendant from raising such defense at trial." Magistrate Rule 4(d). The defendant may file supplemental pleadings "asserting claims or defenses which have arisen since the date of the pleading" on terms as may be just. Magistrate Rule 7.

The R.C.P. are applicable to an eviction action in Circuit Court. The R.C.P. provide for one form of action, known as a "civil action," and abolish procedural distinctions between actions at law or in equity. R.C.P. Rule 2. The R.C.P. provide that a party shall "state in short and plain terms his defenses to each claim asserted." R.C.P. Rule 8(b). In answering the complaint, the defendant must set forth affirmatively any matter "constituting an avoidance or affirmative defense." R.C.P. 8(c). If a responsive pleading is required, the defendant may assert "every defense, in law or fact" by pleading or by motion. R.C.P. Rule 12(b). No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. R.C.P. Rule 12(b). If a responsive pleading to a claim is not required, the defendant may assert at trial "any defense in law or in fact." R.C.P. Rule 12(b).

In an unlawful detainer or summary eviction action, in Magistrate Court or in Circuit Court, the applicable court rules give a tenant the opportunity to present any available affirmative legal or equitable defense which the tenant may have. Cf. *Warren v. Thompson*, 160 S.E. 297 (1930). The West Virginia Supreme Court of Appeals has been solicitous in preserving a tenant's rights to present meritorious defenses in an expedited

unlawful detainer action. *Cordell v. Jarrett*, 301 S.E.2d 227, 231 (1982). The summary eviction statute provides that a tenant "may assert any and all defenses which might be raised in an action for ejectment or an action for unlawful detainer." W.Va. Code 55-3A-2. Since the court rules allow all available defenses in an unlawful detainer action, tenant may also raise such defenses against an action for summary eviction.

Due process under the State Constitution includes the right to assert available defenses. Article 3, 10; *State v. Ruthbell Coal Co.*, 56 S.E.2d 549 (1949).

WEST VIRGINIA: DUE PROCESS DETERMINATION

The West Virginia Constitution, statutes and court rules permit a tenant to raise any available equitable or legal defense against the owner's action for eviction.

E. A decision on the merits ( 966.53(c)(5))

The incidents of the West Virginia rules of civil procedure and evidence are designed to lead to a decision on the merits -- a determination based on the law and the facts. The Rules of Evidence must be construed "to the end that the truth may be ascertained and proceedings justly determined." W.V.R.E. Rule 102. Similarly, the Civil Procedure Rules for an action in Circuit Court "shall be construed to secure the "just . . . determination of every action." R.C.P. Rule 1. The purpose of the Magistrate Rules is also to "help resolve cases in a just . . . manner." Magistrate Rule 1.

For an action in Magistrate Court or Circuit Court, issues of fact may be tried to the court or to a jury. Magistrate Rule 16; R.C.P. Rules 38 and 39. In a jury trial, issues of fact must be determined by the jury pursuant to instruction of law by the court. Magistrate Rule 16(c). Issues not demanded for trial by jury must be tried by the court. R.C.P. Rule 39(b). In actions tried upon the facts without a jury, the court must find the facts, state conclusions of law, and direct entry of the appropriate judgement. R.C.P. Rule 52. Whether the facts are determined by the court or by the jury, the decision must be based upon the law as applied to the facts determined from the evidence. At completion of the case, the court must "grant the relief to which the party in whose favor it is rendered is entitled." R.C.P. Rule 54(c). The court may set aside a judgment if the jury's verdict cannot be supported by the evidence, or there was a material mistake in application of the law. Magistrate Rule 17(d). The court may consider modifying or disturbing a judgment if refusal to take such action would be inconsistent with substantial justice. R.C.P. Rule 61. The foregoing provisions of the Magistrate and Circuit Court Rules indicate that the court must render a judgment upon the merit of the case -- based on the facts and the law.

A decision on the merits is also required by the due process

clause of the West Virginia State Constitution. Article 3, 10.

10

WEST VIRGINIA: DUE PROCESS DETERMINATION

V. Conclusion

West Virginia law governing an action in the Magistrate Court or Circuit Court for unlawful detainer (W.Va. Code, Chapt. 55, Article 3) or for wrongful occupation (W.Va. Code, Chapt. 55, Art. 3A-1) 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 under section 6(k) of the U.S. Housing Act of 1937, a PHA in West Virginia may evict a public tenant by judicial action for unlawful detainer or summary action for wrongful occupation 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.

11