COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-10197

GALE COSTA,

Plaintiff-Appellee,

v.

FALL RIVER HOUSING AUTHORITY,

Defendant-Appellant,

and

ATTORNEY GENERAL MARTHA COAKLEY AND UNDERSECRETARY TINA BROOKS ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS, Intervenors-Appellants.

ON APPEAL FROM AND FURTHER APPELLATE REVIEW OF A JUDGMENT OF THE HOUSING COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES AS AMICUS CURIAE

The United States Department of Housing and Urban Development (HUD) implements the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437 et seq., which authorizes the Secretary of HUD to provide loans, grants and other funding to public housing authorities (PHAs) across the country so that those PHAs can either own and operate decent and safe public housing at low cost for eligible low-income families, or subsidize the rental of private housing by such families. The Fall River Housing Authority (FRHA) is one such PHA.

The primary interest of the United States in this litigation is to carry out Congress's intent, expressed in statute and implemented in HUD regulations, to make the housing subsidized by HUD safe and free of criminal activity. The United States obviously has a strong interest in the correct interpretation of HUD regulations. Similarly, the United States has an equally significant interest in ensuring that the procedures employed by PHAs in terminating federal housing subsidies comport with both the requirements of HUD regulations and the constitutional due process requirements.

Accordingly, in this amicus brief the United States will address the following two questions:

1. Whether the crime of prostitution falls within the term "other criminal activity" within the meaning of 24 C.F.R. § 982.551(l).

2. Whether the procedures employed by the FRHA in terminating Ms. Costa's housing subsidy satisfy HUD regulations and constitutional due process requirements.

ARGUMENT

THE FRHA'S TERMINATION OF MS. COSTA'S HOUSING SUBSIDY PASSES MUSTER UNDER HUD REGULATIONS AND THE CONSTITUTIONAL MANDATE OF DUE PROCESS.

A. Introduction.

At the outset, we stress that the United States is in general agreement with the arguments set forth in the briefs of the FRHA and the Commonwealth of Massachusetts, and therefore will endeavor not simply to repeat those arguments here. The instant brief is submitted to present HUD's unique perspective on the issues, given the centrality to this case of HUD's regulations, and HUD's role in administering the federally subsidized housing program at issue here.

It is well settled that an agency's interpretation of its own regulations is entitled to "substantial deference," and "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the

regulation.'" Thomas Jefferson Univ. Hosp. v. Shalala, 512 U.S. 504, 512 (1994) (citations omitted); accord, Federal Express Corp. v. Holowecki, 128 S. Ct. 1147, 1155 (2008); Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2349 (2007); Auer v. Robbins, 519 U.S. 452, 461-62 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) ("[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."); Udall v. Tallman, 380 U.S. 1, 16 (1965) (agency's interpretation of its own regulation is entitled to maximum deference).

B. The Crime Of Prostitution Constitutes "Other Criminal Activity" Within The Meaning Of 24 C.F.R. § 982.551(l).

With respect to the principal regulatory issue -- which concerns the meaning of the term "other criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises" in 24 C.F.R. § 982.551(l), a phrase that was added to the regulation in 2001 -- the analysis of the Appeals Court of Massachusetts, Bristol Division (the Appeals Court) is correct. The statutory construction principles that it invokes support its conclusion. Tellingly, as the

Appeals Court states, the contrary view of the housing court turns the regulatory language concerning "other criminal activity" into mere surplusage, in violation of fundamental canons of interpretation.

The regulation prohibits Section 8 household members from engaging in "drug-related criminal activity or violent criminal activity or other criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises (see § 982.553)." 24 C.F.R. § 982.551(l) (emphasis added). The history of the underscored regulatory language makes clear that the phrase "other criminal activity" was intended as a catch-all, to encompass criminal conduct that was neither violent nor drug-related.

This language plainly was added to the regulation in 2001 to increase the authority of housing authorities to remove problem tenants -- not to maintain the status quo. The alternative analysis favored by the housing court effectively nullifies the language added in 2001 and reads it out of the regulation.

On May 24, 2001, HUD published a final rule amending the regulations for the Section 8 Certificate

Program to "give Public Housing Agencies . . . the tools for adopting and implementing fair, effective, and comprehensive policies for screening out program applicants who engage in illegal drug use or other criminal activity and for evicting or terminating assistance persons who engage in such activity." 66 Fed. Reg. 28776 (May 24, 2001). HUD determined that crime "prevention and enforcement will be advanced by the authority to evict and terminate assistance for persons who participate in criminal activity." Id. The amended regulations derived from several significant legislative amendments to the United States Housing Act of 1937 designed to provide safety and security in public and assisted housing.[1]

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[1] See, e.g., Section 9 of the Housing Opportunity Program Extension Act, Pub. L. No. 104-120, 110 Stat. 834-46 (1996); Sections 428, 506, 545 and 575-79 of the HUD Appropriations Act for FY 1999, Pub. L. No. 105-276 (1998); amended Sections 3, 6, 8 and 16 of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437 et seq., and other statutory authority concerning crime prevention and security provisions in most federally assisted housing (set forth at 42 U.S.C. §§ 13661-13664); and Title V of the HUD Appropriations Act for FY 1999, Pub. L. No. 105-276, (1998), which was designated the Quality Housing and Work Responsibility Act of 1998. See also 66 Fed. Reg. 28776 (May 24, 2001), for a comprehensive list of the statutory authorities that furnish the basis for the amended regulations at issue in the instant case.

One such amendment allows a PHA to terminate the Section 8 assistance of any participant who violates the "family obligation" not to engage in criminal activity that threatens the health, safety or peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises. See 24 C.F.R. § 982.552(c)(1)(i) and 24 C.F.R. § 982.551(l).

The Appeals Court correctly interpreted the scope and meaning of three HUD regulations which, when read together, provide the authority for a public housing authority to terminate the Section 8 assistance of any participant or family member who engages in criminal activity that interferes with the health, safety or peaceful enjoyment of others. The first provision addresses the obligations of a participant family to refrain from engaging "in drug-related criminal activity or violent criminal activity or other criminal activity that threatens the health, safety or peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises (see § 982.553)." 24 C.F.R. § 982.551(l). The second provision provides that a PHA may terminate assistance if "the family violates any family obligations under the program (see § 982.551). See § 982.553 concerning

denial or termination of assistance for crime by family members." 24 C.F.R. § 982.552(c)(1)(i). And the third regulatory provision addresses the termination of assistance for criminals and alcohol abusers. 24 C.F.R. § 982.553.

The Appeals Court rejected the Housing Court's decision that the parenthetical references to § 982.553 in the family obligations regulation and the grounds for termination regulation acted as a limitation on the types of criminal activity that may serve as a basis for terminating assistance. The Housing Court had concluded that the regulations do not provide authority to terminate assistance for other than criminal activity of a drug-related or violent character.

Using traditional canons of statutory construction, the Appeals Court correctly viewed HUD's regulatory scheme as a whole in order to interpret these overlapping provisions "harmoniously so as to preserve some useful effect for each one," and to "avoid literal interpretations contradictory of the visible purpose of a provision." Costa v. Fall River Hous. Auth., 71 Mass. App. Ct. 269, 277 (2008) (citations omitted).

The Appeals Court also looked at HUD's rulemaking history to support its analysis:

> The 1995 and 2001 versions of § 982.551(l) are identical, including the parenthetical cross-reference to § 982.553, with one notable exception: an amendment in 2001 introduced the new family obligation to refrain from "other criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents" and neighbors. See 66 Fed. Reg. 22,805 (2001). We infer that the retained parenthetical cross-reference to § 982.553 relates only to the preexistent categories of violent and drug-related criminal activities.

Costa, 71 Mass. App. Ct. at 278.

The Appeals Court reached the correct conclusion that HUD regulations provide authority for a PHA to terminate the Section 8 assistance of a participant if a family member engages in criminal activity that threatens the health, safety or peaceful enjoyment of others.[2]

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[2] PHAs have discretion under HUD rules to determine which criminal activities constitute cause for termination of assistance. Ms. Costa can make no serious argument that a Section 8 tenant who runs a house of ill-fame out of her subsidized unit is immune from having her subsidy terminated simply because of the nature of the crime. Prostitution occurring in a unit subsidized with federal funds is covered by the criminal activities prohibited under HUD's family obligations regulations. It cannot be reasonably

(continued...)

HUD regulations allow termination of assistance for violation of any family obligation under 24 C.F.R. § 982.551, such as failing to provide required information, failing to allow the PHA to inspect the unit, having undeclared persons residing in the unit, or using alcohol in a way that threatens the health, safety or right to peaceful enjoyment of other residents and neighbors. See 24 C.F.R. § 982.552(c)(1)(i). Given the breadth of authority granted to PHAs to terminate assistance, it would be an absurd result indeed to limit the applicable regulations to not allow termination of assistance for prostitution in the federally assisted unit.

The Housing Court's ruling cannot be reconciled with other provisions in HUD's Section 8 regulations. The PHA must terminate assistance for a family evicted from a Section 8 unit for a serious violation of the

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[2](...continued)
argued that such criminal activities do not interfere with the health, safety and peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises. As the Appeals Court noted, the crime of prostitution is "visibly asocial" criminal conduct and "[i]t is important that a public housing authority be able to deal with such activity decisively and swiftly to avoid the spread of physical or social decay." Costa, 71 Mass. App. Ct. at 278 n.8 (quoting Boston Hous. Auth. v. Bryant, 44 Mass. App. Ct. 776, 779 (1998)).

lease. 24 C.F.R. § 982.552(b)(2). One such serious violation is engaging in criminal activity that interferes with the health, safety or peaceful enjoyment of other residents or neighbors. 24 C.F.R. § 982.310(c)(2)(i)(A) (mandating a lease provision that allows eviction for such offenses). If Ms. Costa's landlord had evicted her because she engaged in prostitution in her unit, the FRHA would have been required to terminate her assistance for having committed a serious lease violation, i.e., prostitution in her assisted unit. The Housing Court's interpretation that a PHA lacks authority to terminate for non-drug related or non-violent criminal acts simply cannot be squared with the HUD regulations that require the PHA to terminate assistance if the landlord evicts for non-drug related or non-violent criminal acts.

Ms. Costa and her amici Boston Tenants Coalition et al. argue that under the HUD regulations, eviction and termination are wholly separate and analytically distinct matters, and that the onus is on the landlord to evict the tenant before a PHA may terminate a Section 8 subsidy for "other criminal activity." They thus put the responsibility on the landlord to act in the first instance, and essentially strip the PHA of

its authority and leave it at the mercy of the landlord (who might prefer to look the other way). They appear to argue further that their interpretation of the regulations is compelled by the relevant statutes.

The short answer to these contentions is that HUD does not interpret either the regulations or the applicable statutes in such a patently illogical, implausible and impractical fashion, and it is HUD's interpretation -- not that of Ms. Costa and her amici -- that is entitled to deference. See, e.g., Udall v. Tallman, 380 U.S. at 316 (agency's interpretation of its own regulations is entitled to maximum deference); see also, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 464 U.S. 837, 842-45 (1984) (agency's interpretation of statutes it administers is entitled to deference, and must be upheld unless either inconsistent with unambiguous congressional intent or unreasonable). Nor can it be said by any stretch of the imagination that their interpretation is mandated by the plain language of either the regulations or the underlying statutes.

Thus, the alternative construction proposed by Ms. Costa and her amici, which goes beyond even the mistaken rationale of the Housing Court that was

soundly rejected by the Appeals Court, is an utterly baseless exercise in sophistry. Under HUD's regulations, a PHA need not stand idly by while a Section 8 tenant turns a federally subsidized residence into a house of prostitution.

C. The Procedures Employed By The FRHA In Terminating Ms. Costa's Housing Subsidy Satisfy HUD Regulations And Constitutional Due Process Requirements.

The holding of the Appeals Court with respect to the procedural issues, however, is erroneous. Neither HUD's regulations nor constitutional due process principles call into question the procedures employed by the FRHA in this case.

1. The Purported Regulatory And Constitutional Flaws Identified By The Appeals Court Do Not Exist.

The Appeals Court held that the FRHA proceedings were deficient under HUD regulations and due process strictures in several respects. In particular, it found fault with the FRHA's reliance upon the police report and the newspaper article; with hearing officer Quental's role in the appeal process; and with the terseness of the FRHA's final decision. The Appeals Court ruled that the FRHA's procedures violated HUD's regulations guaranteeing Ms. Costa's right to "question any witness," 24 C.F.R. § 982.555(e)(5); her right to a

termination hearing conducted by "any person or persons designated by the [public housing authority], other than a person who made or approved the decision under review or a subordinate of this person," id. at § 982.555(e)(4)(i); and her right to a written decision setting out factual findings and reasoning, id. at § 982.555(e)(6). The Appeals Court also found corresponding due process rights in Goldberg v. Kelly, 397 U.S. 254, 269-71 (1970).

All of these rulings are erroneous. The Appeals Court's ruling not only conflates the requirements of the regulations and the requirements of due process, but errs with respect to both the regulatory and constitutional dictates.

Regarding the former, the Appeals Court cites no authority construing HUD's regulations in the manner it has adopted, and we are aware of no such authority. Crucially, HUD, which promulgated and administers the regulations in question, does not interpret them in this fashion, and HUD's interpretation of the regulations is entitled to maximum deference under the many Supreme Court decisions cited at p. 3, supra.

With respect to the due process analysis, the Appeals Court merely cites Goldberg and does not even

mention, let alone apply, Matthews v. Eldridge, 424 U.S. 319 (1976), although the latter case establishes the operative general framework for evaluating procedural due process claims. Goldberg itself simply held that an informal, in-person pre-termination hearing was required before need-based welfare benefits could be terminated, and established general parameters for the conduct of such hearings. See 397 U.S. at 264, 269-71. In Eldridge, however, the Supreme Court ruled that a court must consider "three distinct factors" in determining the constitutional adequacy of administrative procedures:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. Here, a balancing of the Eldridge factors leads to the conclusion that the procedures employed by the FRHA in terminating Ms. Costa's Section 8 housing subsidy are consistent with both HUD regulations and due process requirements.

Although Ms. Costa obviously has a significant interest in continued Section 8 subsidies, the risk of an erroneous deprivation from the challenged FRHA procedures deemed constitutionally infirm by the Appeals Court -- i.e., reliance upon a police report and a newspaper article, use of the same hearing officer both on preliminary review of the administrative decision and as a member of a five-member panel conducting the ultimate plenary review, and a decision that tersely explains the basis for the adverse decision -- does not appear substantial, and the probable value of additional safeguards seems slight; in contrast, the government has a very strong interest (consistent with both the public interest and its statutory mandate to protect public health and safety and to provide safe and decent public housing) in swiftly terminating the housing subsidies of individuals who commit crimes in Section 8 housing, and the burden of turning the pre-termination hearing into a full-fledged trial, as the appellate court suggests, would obviously be considerable, in terms of both time and expense. See Goldberg, 397 U.S. at 266 ("[T]he pre-termination hearing need not take the form of a judicial or quasi-judicial trial."); id. at 269

("Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence.").

Furthermore, as we demonstrate at greater length at pp. 27-33, infra, ample authority establishes that hearsay evidence is admissible in administrative proceedings. See, e.g., Richardson v. Perales, 402 U.S. 389, 406-08 (1971); Commonwealth v. Durling, 407 Mass. 108, 117 (1990); Beauchamp v. De Abadia, 779 F.2d 773, 775-76 (1st Cir. 1985); Sears v. Dep't of the Navy, 680 F.2d 863, 866 (1st Cir. 1982); Gammons v. Massachusetts Dep't Of Housing & Comm. Dev., 502 F. Supp.2d 161, 165-66 (D. Mass. 2007) (Section 8 termination case); Clark v. Alexander, 894 F. Supp. 261, 264-65 (E.D. Va. 1995), aff'd, 85 F.3d 146 (4th Cir. 1996). At the very least, the use of a police report under these circumstances, where the officer was directly reporting his own observations and experiences, is not problematic. Compare, e.g., Basco v. Machin, 514 F.3d 1177, 1182-83 (11th Cir. 2008) (rejecting reliance upon police reports to establish that Section 8 rule against presence of "unauthorized resident" had been violated, where police reports only cited assertions of other individuals), with Durling,

407 Mass. at 120 (upholding reliance upon detailed police reports in probation revocation hearing), and Williams v. Housing Auth. of City of Raleigh, 2008 WL 2355850, *4-5 (E.D.N.C. June 9, 2008) (distinguishing Basco and upholding use of hearsay statements of former landlord in Section 8 termination proceeding).

Moreover, the fact that hearing officer Quental both conducted the "preliminary appeal hearing" and sat as a member of the five-member grievance panel that upheld the termination of Ms. Costa's subsidy does not run afoul of HUD regulations or due process requirements. Ms. Quental was not the original agency decisionmaker, and the "preliminary appeal hearing" was essentially an informal alternative dispute resolution-type component of the administrative appeal process; thus, although she preliminarily approved the termination, and allowed the process to go forward, she cannot reasonably be said to have been reviewing her own decision -- any more than a trial judge who finds probable cause to allow a case to proceed to trial and thereafter hears the case on the merits, or an appellate judge who denies a motion for summary reversal and then sits on the panel that decides the merits of the appeal, can be said to be reviewing their

earlier rulings. Rather, Ms. Quental was simply one member of the five-member panel that decided Ms. Costa's appeal. See Goldberg, 397 U.S. at 271 (although "an impartial decision maker is essential" (citations omitted), "prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review").

The Appeals Court provided no due process analysis on this point and, if it were correct, appellate judges who hear a case on appeal presumably would be constitutionally barred from participating in further review en banc. That is plainly not the law.

In the alternative, due process does not require two levels of appellate review, so any problem with having the hearing officer sit on the grievance panel is harmless. Clearly, even if it can be said that there were two appellate adjudications involving Ms. Quental, the Constitution did not require the initial, informal dispute resolution and preliminary hearing process, so the fact that the same hearing officer who presided there also sat on the grievance adjudication

panel does not render the ultimate adjudication constitutionally suspect.

Finally, the decision of the FRHA grievance panel, although brief, plainly was adequate for both regulatory and due process purposes. It fully informed Ms. Costa of the reason for the termination of her subsidy, and also provided a sufficient basis for the judicial review that Ms. Costa ultimately chose to seek. Neither HUD regulations nor Goldberg v. Kelly, supra, and its progeny require a more elaborate recitation of the grounds underlying the administrative decision, and the Appeals Court's ruling to the contrary is mistaken. See Goldberg, 397 U.S. at 271 ("Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.") (citations omitted).

The grievance panel's decision, though short, explained that it found that Ms. Costa had engaged in

criminal activity was based on the preponderance of the evidence, specifically identifying the police report and newspaper article. That should more than suffice for due process purposes. It also fully comports with HUD's regulations. See 24 C.F.R. § 982.555(e)(6) (decision must be based upon a "preponderance of the evidence presented at the hearing" and must be in writing, "stating briefly the reasons for the decision").

2. HUD's Flexible Hearing Rules Implement Minimum Due Process Requirements And Make Clear That The Formal Rules Of Evidence, Including Hearsay Prohibitions, Do Not Apply.

On March 29, 1984, HUD published a final rule amending the Section 8 Certificate program (formerly known as the Section 8 Existing program) regulations concerning, among other things, the termination of assistance. That rule prescribed the minimum hearing procedures that PHAs must follow when terminating a participant's Section 8 assistance. The promulgation of the rule followed a careful balancing by HUD of the interests of the participant, the PHA and the program. 49 Fed. Reg. 12215, 12229 (March 29, 1984).

According to the preamble, HUD designed the rules to give the participant the opportunity for a hearing to test whether the PHA decision is in compliance with

applicable laws or rules, as well as the opportunity to present evidence bearing on the decision. At the same time, HUD recognized the need to design procedures to "avoid burdening the PHA with elaborate and inflexible requirements that may be more appropriate to judicial or other formal hearing process." Id.

The final rule requires that PHA hearing procedures provide the following minimum elements:

- the hearing may be conducted by any person or persons designated by the PHA, other than the person who made the decision under review or a subordinate of such person;
- the hearing official may regulate the conduct of the hearing;
- the participant may be represented by an attorney or another, at the participant's expense;
- the participant and the PHA may be given the opportunity to present evidence and question any witnesses, and evidence may be considered without regard to the rules of evidence;
- the hearing official must issue a written decision, stating briefly the reasons for the decision.

Id. (internal citations omitted). These elements, now codified at 24 C.F.R. § 982.555, meet the minimum procedural due process requirements for a hearing on a PHA decision that affects a participant. 49 Fed. Reg. at 12228; see also 55 Fed. Reg. 28538, 28541 (July 11, 1990) (PHAs must adopt written informal hearing procedures consistent with HUD rules, which provide the minimum due process requirements under Goldberg v. Kelly).

In 1990, HUD revised the hearing procedures to state that the standard of proof for testing the PHA's decision is a preponderance of evidence. 55 Fed. Reg. at 28542. The hearing procedures were again revised in 1995, to permit participants to examine PHA documents prior to the hearing. The provision is designed to help the participant prepare for the hearing and supports the basic purpose of the hearing -- to produce an accurate determination of the points at issue. 60 Fed. Reg. 34660, 34691 (July 3, 1995).

These informal hearing procedures "strike an appropriate balance between the participant's interest in avoiding erroneous terminations and the PHA's need to have practical and expeditious procedures for determining the facts concerning a proposed

termination." 55 Fed. Reg. at 28541. Indeed, the Supreme Court in Goldberg v. Kelly, supra, recognized the "importance of not imposing upon the States or the Federal Government . . . any procedural requirements beyond those demanded by rudimentary due process." 397 U.S. at 267.

In keeping with an informal and flexible approach to hearings, HUD rejected the use of the formal rules of evidence applicable in a judicial proceeding. See 24 C.F.R. § 982.555(e)(5) ("Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings."). Formal rules governing the admissibility of evidence are not suitable for the informal hearings required under the regulations. 49 Fed. Reg. at 12230.[3] The obvious purpose of not burdening a PHA with adherence to the rules of evidence, as is the case with other administrative boards, "is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed

[3] HUD's rule is consistent with the general rule that administrative tribunals are not bound by the strict or technical rules of evidence governing court proceedings. See Hearsay Evidence in Proceedings Before Federal Administrative Agencies, 6 A.L.R. Fed. 76, § 2(a)(2008), and cases cited therein.

incompetent in judicial proceedings would not invalidate the administrative order." Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229-30 (1938) (citations omitted).

The Housing Court and Appeals Court decisions on hearsay would significantly interfere with the informal and practical approach HUD envisioned for termination hearings, and would instead lead to formal legalistic proceedings. Recognizing that most hearing officers are not trained in the law, HUD rejected a suggestion that the hearing officer's decision should state the "legal and evidentiary grounds for the decision." Rather, HUD requires a "written decision, stating briefly the reasons for the decision." 49 Fed. Reg. 12215, 12229, 12230; accord, 24 C.F.R. § 982.555(e)(6). Hearing officers are not required to make determinations about the admissibility of evidence based on formal rules; rather, they may use a "common-sense" judgment about the evidence in their decision. Yet the Housing Court and Appeals Court decisions rejecting hearsay evidence no matter how reliable that evidence is would require a more formal and technical approach to hearing decisions.

Furthermore, HUD's decision to reject the use of formal rules of evidence is entirely consistent with the ruling in Goldberg that pre-termination hearings "need not take the form of a judicial or quasi-judicial trial." Goldberg, 397 U.S. at 266. In contrast, however, the Appeals Court ruled that the FRHA's use of hearsay evidence in a police report and newspaper article denied Ms. Costa her right under HUD regulations to "question any witness." Costa, 71 Mass. App. Ct. at 281 (quoting 24 C.F.R. § 982.555(e)(5)). The Appeals Court reasoned that in the absence of a right to subpoena witnesses, the right to "question any witness" becomes meaningless against hearsay information. Id. The Appeals Court then found that the newspaper article in question was blatantly untrustworthy by reason of its slanted headline, yet the Court was silent about the reliability of the information contained in the police report. Id.

But the Appeals Court misconstrued the meaning of HUD's regulations. The regulations provide that the PHA and the participant must be given the opportunity to present evidence, and may question any witnesses. 24 C.F.R. § 982.555(e)(5). That rule manifestly establishes a right to question any witness called to

testify at the hearing -- but the regulation does not require production of witnesses to establish the basis for a termination. By its plain language, the regulation simply means that if a witness is produced, the participant or the PHA may question that witness.

Moreover, HUD regulations expressly contemplate that a PHA may use documents as a basis for a termination decision. 24 C.F.R. § 982.555(e)(2) provides that the participant must be given the opportunity to examine and copy before the hearing any documents that are directly relevant to the hearing. And the regulation provides that if the PHA fails to make the document available for inspection, "it may not rely on the document at the hearing." This advance disclosure rule is designed to assist the participant to prepare for hearing. 60 Fed. Reg. at 34692; see also 24 C.F.R. § 982.553(d)(2) (contemplating that an authority may terminate assistance solely on the basis of criminal activity reflected in a "criminal record" and, in such cases, a copy of that record must be provided to the participant).

Taken as a whole, the regulations are designed to provide the participant with a meaningful opportunity to challenge the information on which the PHA is

relying to terminate assistance, whether it is testimonial evidence or documentary evidence or both. Under HUD's regulatory scheme, the hearing officer is not being asked to adjudicate guilt, but rather whether, under a standard of preponderance of the evidence, a family member engaged or is engaging in certain activities. In making the preponderance of evidence determination, the hearing officer may consider hearsay evidence, such as a police report or other documentary evidence. Under HUD rules, the participant has a right to challenge the reliability of hearsay evidence, but if the hearing officer finds that the preponderance of reliable evidence indicates that a family member has engaged in criminal conduct that threatens the health, safety or peaceful enjoyment of other residents or neighbors, the PHA may terminate assistance, even though the evidence might be considered inadmissible hearsay in a court of law.

3. Case Law Establishes That Hearsay Evidence Is Admissible In Administrative Proceedings.

It is well established that hearsay evidence is admissible in administrative proceedings, where relevant. See, e.g., Richardson v. Perales, 402 U.S. at 407-08; Commonwealth v. Durling, 407 Mass. at 117. In Perales -- a case decided after Goldberg v. Kelly --

the Supreme Court held that the use of written reports alone may constitute sufficient evidence to deny disability benefits, rejecting the argument that the use of the reports violated the claimant's right of cross-examination under the Due Process Clause.

The Supreme Court thus squarely rejected in Perales the approach suggested by the Appeals Court -- a per se rule that hearsay evidence denies the right to cross-examine witnesses. Instead, the Court recognized that prohibiting agency reliance on documentary hearsay evidence can place a great burden on the agency, for live testimony may be available only at inordinate costs, or may not be available at all. Perales, 402 U.S. at 406. The Court adopted a common-sense approach to the use of hearsay -- a test that looks at the need for and the reliability of the hearsay evidence in administrative proceedings, rather than the application of strict evidentiary rules. Id.; see also Use of Hearsay in Administrative Proceedings, 85 Harv. L. Rev. 326, 328 (1971).

This Court has adopted a similar approach to the use of hearsay in probation revocation hearings. In Commonwealth v. Durling, supra, the Court held that the use of hearsay evidence at probation revocation

hearings is not per se prohibited by federal or state due process guarantees. The Court acknowledged that the requirements of the Due Process Clause serve "the goal of providing an accurate determination whether [the decision] is proper." 407 Mass. at 116. Thus, "[t]he proper focus of inquiry . . . is the reliability of the evidence presented. . . . When hearsay evidence is reliable . . . then it can be the basis of a revocation. In our view, a showing that the proffered evidence bears substantial indicia of reliability and is substantially trustworthy is a showing of good cause obviating the need for confrontation." Id. at 117-18.

The use of hearsay evidence in a Section 8 termination hearing was recently analyzed by a federal district court in Massachusetts. Citing Perales, the court in Gammons v. Massachusetts Department of Housing and Community Development, 502 F. Supp.2d 161 (D. Mass. 2007), found that the use of hearsay statements at the Section 8 hearing "was permissible and did not violate the due process clause." Id. at 166. The court observed that "'[t]he principle that hearsay evidence is admissible in administrative proceedings would be vitiated if a party could object to its admission on

the ground that he was denied his right to cross examin[e]' every person questioned by the government." Id. at 165, quoting Beauchamp v. De Abadia, 779 F.2d 773, 775-76 (1st Cir. 1985).

The Section 8 termination case relied on by the Appeals Court in holding that the use of hearsay alone violates the participant's right to question any witness, Edgecomb v. Housing Authority of Vernon, 824 F. Supp. 312 (D. Conn. 1993), is readily distinguishable from the instant case. In Edgecomb, as here, the hearing officer relied on information contained in a police report -- but the nature of the information contained in the report was very different than that contained in the police report in the case at bar. According to the Edgecomb court, "[t]he police report was based on discussions the affiant had overheard monitoring a wireless transmitter and provided no information based on his first-hand observations. The report contained quotations from a confidential informant . . ." Id. at 315. In the face of such unreliable evidence, the district court held that the right to confront and cross-examine witnesses is essential when the information supplied is relied on to terminate assistance.

Unlike the report in Edgecomb, the police report in this case was very reliable because it was based on firsthand observations by the officer. Accordingly, Ms. Costa's due process right to confront witnesses was not violated.

This Court's Durling decision is also particularly relevant on this score, because it involved the reliability of police reports as evidence that a probationer had committed further crimes in violation of the conditions of his probation. The Court found that the "proffered evidence was imbued with sufficient indicia of reliability to warrant a denial of the defendant's limited right to cross-examine." Durling, 407 Mass. at 120.

In analyzing the information contained in the police reports in question, the Court found that the reports contained factual details rather than general statements or conclusions, and related facts actually observed by the officers personally. The Court observed that factual detail is indicative of reliability. Id. at 121. Equally important, the Court pointed out that it is a crime for a police officer to file a false report, which "significantly bolsters the

reliability of the reports." Id., citing Mass. Gen. Laws Ann. ch. 268 § 6A (1990).

Inasmuch as probation revocation results in a deprivation of liberty, whereas termination of Section 8 assistance merely results in a deprivation of rental assistance, the hearsay reliability test set forth for a probation revocation hearing in Durling should apply a fortiori in Section 8 termination hearings. And the police report read into the record by the FRHA at Ms. Costa's hearing contains the same indicia of reliability as the reports in Durling.

Detective Huard's report, submitted under penalty of perjury, relates his first-hand encounter with Ms. Costa on the night of June 24, 2004. It does not contain general statements or conclusions, nor is it based on information provided by confidential informants. On the contrary, the report recounts in graphic detail Ms. Costa's offer of sex for money. It also contains an account of Ms. Costa's statement to her friend, who was also arrested, that they should not have gotten into the "sex thing" because "charging money for sex is what got us in trouble." Detective Huard's report thus meets the reliability test set

forth in Durling, and accordingly Ms. Costa's procedural due process rights were not infringed.

Finally, the fact that Ms. Costa ultimately pled guilty to the criminal charges against her, while perhaps technically not dispositive, certainly is further indication of the police report's reliability. See Costa, 71 Mass. App. Ct. at 283, 284. The guilty plea, which was not in the record at the time of the grievance hearing, should be virtually conclusive if the Court remands this case for any further proceedings -- a course that should not be necessary, however, because the reliable police report standing by itself should suffice to uphold the Section 8 subsidy termination here.

In short, under HUD's informal hearing requirements, participants have a right to cross-examine any witness who testifies at the informal hearing, but the regulations do not compel a PHA to produce witnesses to prove that a participant has engaged in criminal conduct. Participants have a right to raise issues and challenge the probative value of any evidence offered by the PHA, but the formal rules of evidence do not apply.

4. The Additional Hearing Requirements Suggested By The Appeals Court Opinion Are Unworkable.

The Appeals Court decision suggests that a PHA must produce live witnesses in the informal hearing process to prove that a participant has engaged or is engaging in criminal conduct. Not only is this notion contrary to the informal and flexible approach to informal hearings envisioned by HUD under its regulatory scheme, but such a requirement is impractical and unnecessarily burdensome to a PHA's administrative proceedings. PHAs have no power to subpoena witnesses and are very often unable to persuade police officers to testify at informal hearings, particularly prior to the resolution of any criminal proceedings involving the participant or family member.[4] In such cases, where the PHA cannot produce a witness, the PHA will be without the ability to promptly terminate a participant engaging in criminal conduct.

Moreover, a requirement to produce live witness testimony is inconsistent with the congressional mandate to provide safety and security in assisted

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[4] "[O]wners are generally not prepared to provide their own witnesses to prove such [a criminal] offense." 66 Fed. Reg. at 28785 (comments to the final rule).

housing by eliminating criminal activity. If a PHA is unable to persuade a police officer to testify at the informal hearing about the contents of his report, the participant will continue to receive rental assistance, at least until the conclusion of the criminal proceeding, no matter how egregious his or her conduct. To be sure, the PHA can terminate assistance based upon a conviction without having to produce a police officer, but HUD regulations specifically state that a criminal conviction is not required to terminate Section 8 assistance for criminal activity. 24 C.F.R. § 982.553(c). Requiring a PHA to delay its termination proceedings when the police officer is unavailable runs counter to the intent of § 982.553(c).

CONCLUSION

For the foregoing reasons, the decision of the Appeals Court, Bristol Division, should be affirmed with respect to that Court's interpretation of the regulatory term "other criminal activity," and reversed with respect to that Court's holding concerning the procedural requirements of HUD's regulations and the Due Process Clause.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k), Mass. R. A. P., I hereby certify that the foregoing brief complies with the rules of Court that pertain to the filing of briefs.

_____

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CERTIFICATE OF SERVICE

I hereby certify, on penalty of perjury, that on September 22, 2008, I caused two copies of the foregoing Brief Of The United States As Amicus Curiae to be served by first-class mail on each of the following counsel:

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ADDENDUM

Legal Addendum.

United States Constitution, Amend. Art. XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

24 C.F.R. § 982.551. Obligations of participant.

(a) Purpose. This section states the obligations of a participant family under the program.

(b) Supplying required information--

(1) The family must supply any information that the PHA or HUD determines is necessary in the administration of the program, including submission of required evidence of citizenship or eligible immigration status (as provided by 24 CFR part 5). "Information" includes any requested certification, release or other documentation.

(2) The family must supply any information requested by the PHA or HUD for use in a regularly scheduled reexamination or interim reexamination of family income and composition in accordance with HUD requirements.

(3) The family must disclose and verify social security numbers (as provided by part 5, subpart B, of this title) and must sign and submit consent forms for obtaining information in accordance with part 5, subpart B, of this title.

(4) Any information supplied by the family must be true and complete.

(c) HQS breach caused by family. The family is responsible for an HQS breach caused by the family as described in § 982.404(b).

(d) Allowing PHA inspection. The family must allow the PHA to inspect the unit at reasonable times and after reasonable notice.

(e) Violation of lease. The family may not commit any serious or repeated violation of the lease.

(f) Family notice of move or lease termination. The family must notify the PHA and the owner before the family moves out of the unit, or terminates the lease on notice to the owner. See § 982.314(d).

(g) Owner eviction notice. The family must promptly give the PHA a copy of any owner eviction notice.

(h) Use and occupancy of unit.--

(1) The family must use the assisted unit for residence by the family. The unit must be the family's only residence.

(2) The composition of the assisted family residing in the unit must be approved by the PHA. The family must promptly inform the PHA of the birth, adoption or court-awarded custody of a child. The family must request PHA approval to add any other family member as an occupant of the unit. No other person [i.e., nobody but members of the assisted family] may reside in the unit (except for a foster child or live-in aide as provided in paragraph (h)(4) of this section).

(3) The family must promptly notify the PHA if any family member no longer resides in the unit.

(4) If the PHA has given approval, a foster child or a live-in-aide may reside in the unit. The PHA has the discretion to adopt reasonable policies concerning residence by a foster child or a live-in-aide, and defining when PHA consent may be given or denied.

(5) Members of the household may engage in legal profitmaking activities in the unit, but only if such activities are incidental to primary use of the unit for residence by members of the family.

(6) The family must not sublease or let the unit.

(7) The family must not assign the lease or transfer the unit.

(i) Absence from unit. The family must supply any information or certification requested by the PHA to verify that the family is living in the unit, or relating to family absence from the unit, including any PHA-requested information or certification on the purposes of family absences. The family must cooperate with the PHA for this purpose. The family must promptly notify the PHA of absence from the unit.

(j) Interest in unit. The family must not own or have any interest in the unit.

(k) Fraud and other program violation. The members of the family must not commit fraud, bribery or any other corrupt or criminal act in connection with the programs.

(l) Crime by household members. The members of the household may not engage in drug-related criminal activity or violent criminal activity or other criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises (see § 982.553).

(m) Alcohol abuse by household members. The members of the household must not abuse alcohol in a way that threatens the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises.

(n) Other housing assistance. An assisted family, or members of the family, may not receive Section 8 tenant-based assistance while receiving another housing subsidy, for the same unit or for a different unit, under any duplicative (as determined by HUD or in accordance with HUD requirements) federal, State or local housing assistance program.

24 C.F.R. § 982.552. PHA denial or termination of assistance for family.

(a) Action or inaction by family--

(1) a PHA may deny assistance for an applicant or terminate assistance for a participant under the programs because of the family's action or failure to act as described in this section or § 982.553. The provisions of this section do not affect denial or termination of assistance for grounds other than action or failure to act by the family.

(2) Denial of assistance for an applicant may include any or all of the following: denying listing on the PHA waiting list, denying or withdrawing a voucher, refusing to enter into a HAP contract or approve a lease, and refusing to process or provide assistance under portability procedures.

(3) Termination of assistance for a participant may include any or all of the following: refusing to enter into a HAP contract or approve a lease, terminating housing assistance payments under an outstanding HAP contract, and refusing to process or provide assistance under portability procedures.

(4) This section does not limit or affect exercise of the PHA rights and remedies against the owner under the HAP contract, including termination, suspension or reduction of housing assistance payments, or termination of the HAP contract.

(b) Requirement to deny admission or terminate assistance.

(1) For provisions on denial of admission and termination of assistance for illegal drug use, other criminal activity, and alcohol abuse that would threaten other residents, see § 982.553.

(2) The PHA must terminate program assistance for a family evicted from housing assisted under the program for serious violation of the lease.

(3) The PHA must deny admission to the program for an applicant, or terminate program assistance

for a participant, if any member of the family fails to sign and submit consent forms for obtaining information in accordance with part 5, subparts B and F of this title.

(4) The family must submit required evidence of citizenship or eligible immigration status. See part 5 of this title for a statement of circumstances in which the PHA must deny admission or terminate program assistance because a family member does not establish citizenship or eligible immigration status, and the applicable informal hearing procedures.

(5) The PHA must deny or terminate assistance if any family member fails to meet the eligibility requirements concerning individuals enrolled at an institution of higher education as specified in 24 CFR 5.612.

(c) Authority to deny admission or terminate assistance.

(1) Grounds for denial or termination of assistance. The PHA may at any time deny program assistance for an applicant, or terminate program assistance for a participant, for any of the following grounds:

(i) If the family violates any family obligations under the program (see § 982.551). See § 982.553 concerning denial or termination of assistance for crime by family members.

(ii) If any member of the family has been evicted from federally assisted housing in the last five years;

(iii) If a PHA has ever terminated assistance under the program for any member of the family.

(iv) If any member of the family has committed fraud, bribery, or any other corrupt or criminal act in connection with any Federal housing program (see also § 982.553(a)(1));

(v) If the family currently owes rent or other amounts to the PHA or to another PHA in connection with Section 8 or public housing assistance under the 1937 Act.

(vi) If the family has not reimbursed any PHA for amounts paid to an owner under a HAP contract for rent, damages to the unit, or other amounts owed by the family under the lease.

(vii) If the family breaches an agreement with the PHA to pay amounts owed to a PHA, or amounts paid to an owner by a PHA. (The PHA, at its discretion, may offer a family the opportunity to enter an agreement to pay amounts owed to a PHA or amounts paid to an owner by a PHA. The PHA may prescribe the terms of the agreement.)

(viii) If a family participating in the FSS program fails to comply, without good cause, with the family's FSS contract of participation.

(ix) If the family has engaged in or threatened abusive or violent behavior toward PHA personnel.

(x) If a welfare-to-work (WTW) family fails, willfully and persistently, to fulfill its obligations under the welfare-to-work voucher program.

(xi) If the family has been engaged in criminal activity or alcohol abuse as described in § 982.553.

(2) Consideration of circumstances. In determining whether to deny or terminate assistance because of action or failure to act by members of the family:

(i) The PHA may consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members,

mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure.

(ii) The PHA may impose, as a condition of continued assistance for other family members, a requirement that other family members who participated in or were culpable for the action or failure will not reside in the unit. The PHA may permit the other members of a participant family to continue receiving assistance.

(iii) In determining whether to deny admission or terminate assistance for illegal use of drugs or alcohol abuse by a household member who is no longer engaged in such behavior, the PHA consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated successfully (42 U.S.C. 13661). For this purpose, the PHA may require the applicant or tenant to submit evidence of the household member's current participation in, or successful completion of, a supervised drug or alcohol rehabilitation program or evidence of otherwise having been rehabilitated successfully.

(iv) If the family includes a person with disabilities, the PHA decision concerning such action is subject to consideration of reasonable accommodation in accordance with part 8 of this title.

(v) Nondiscrimination limitation. The PHA's admission and eviction actions must be consistent with fair housing and equal opportunity provisions of § 5.105 of this title.

(d) Information for family. The PHA must give the family a written description of:

(1) Family obligations under the program.

(2) The grounds on which the PHA may deny or terminate assistance because of family action or failure to act.

(3) The PHA informal hearing procedures.

(e) Applicant screening. The PHA may at any time deny program assistance for an applicant in accordance with the PHA policy, as stated in the PHA administrative plan, on screening of applicants for family behavior or suitability for tenancy.

24 C.F.R. § 982.553. Denial of admission and termination of assistance for criminals and alcohol abusers.

(a) Denial of admission.

(1) Prohibiting admission of drug criminals.

(i) The PHA must prohibit admission to the program of an applicant for three years from the date of eviction if a household member has been evicted from federally assisted housing for drug-related criminal activity. However, the PHA may admit the household if the PHA determines:

(A) That the evicted household member who engaged in drug-related criminal activity has successfully completed a supervised drug rehabilitation program approved by the PHA; or

(B) That the circumstances leading to eviction no longer exist (for example, the criminal household member has died or is imprisoned).

(ii) The PHA must establish standards that prohibit admission if:

(A) The PHA determines that any household member is currently engaging in illegal use of a drug;

(B) The PHA determines that it has reasonable cause to believe that a household member's illegal drug use or a pattern of illegal drug use may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents; or

(C) Any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(2) Prohibiting admission of other criminals--

(i) Mandatory prohibition. The PHA must establish standards that prohibit admission to the program if any member of the household is subject to a lifetime registration requirement under a State sex offender registration program. In this screening of applicants, the PHA must perform criminal history background checks necessary to determine whether any household member is subject to a lifetime sex offender registration requirement in the State where the housing is located and in other States where the household members are known to have resided.

(ii) Permissive prohibitions.

(A) The PHA may prohibit admission of a household to the program if the PHA determines that any household member is currently engaged in, or has engaged in during a reasonable time before the admission:

(1) Drug-related criminal activity;

(2) Violent criminal activity;

(3) Other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity; or

(4) Other criminal activity which may threaten the health or safety of the owner, property management staff, or persons performing a contract administration function or responsibility on behalf of the PHA (including a PHA employee or a PHA contractor, subcontractor or agent).

(B) The PHA may establish a period before the admission decision during which an applicant must not to have engaged in the activities specified in paragraph (a)(2)(i) of this section ("reasonable time").

(C) If the PHA previously denied admission to an applicant because a member of the household engaged in criminal activity, the PHA may reconsider the applicant if the PHA has sufficient evidence that the members of the household are not currently engaged in, and have not engaged in, such criminal activity during a reasonable period, as determined by the PHA, before the admission decision.

(1) The PHA would have "sufficient evidence" if the household member submitted a certification that she or he is not currently engaged in and has not engaged in such criminal activity during the specified period and provided supporting information from such sources as a probation officer, a landlord, neighbors, social service agency workers and criminal records, which the PHA verified.

(2) For purposes of this section, a household member is "currently engaged in" criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current.

(3) Prohibiting admission of alcohol abusers. The PHA must establish standards that prohibit admission to

the program if the PHA determines that it has reasonable cause to believe that a household member's abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

(b) Terminating assistance--

(1) Terminating assistance for drug criminals.

(i) The PHA must establish standards that allow the PHA to terminate assistance for a family under the program if the PHA determines that:

(A) Any household member is currently engaged in any illegal use of a drug; or

(B) A pattern of illegal use of a drug by any household member interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(ii) The PHA must immediately terminate assistance for a family under the program if the PHA determines that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(iii) The PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that any family member has violated the family's obligation under § 982.551 not to engage in any drug-related criminal activity.

(2) Terminating assistance for other criminals. The PHA must establish standards that allow the PHA to terminate assistance under the program for a family if the PHA determines that any household member has violated the family's obligation under § 982.551 not to engage in violent criminal activity.

(3) Terminating assistance for alcohol abusers. The PHA must establish standards that allow termination of assistance for a family if the PHA determines that a household member's abuse or pattern of abuse of alcohol may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

(c) Evidence of criminal activity. The PHA may terminate assistance for criminal activity by a household member as authorized in this section if the PHA determines, based on a preponderance of the evidence, that the household member has engaged in the activity, regardless of whether the household member has been arrested or convicted for such activity.

(d) Use of criminal record.--

(1) Denial. If a PHA proposes to deny admission for criminal activity as shown by a criminal record, the PHA must provide the subject of the record and the applicant with a copy of the criminal record. The PHA must give the family an opportunity to dispute the accuracy and relevance of that record, in the informal review process in accordance with § 982.554. (See part 5, subpart J for provision concerning access to criminal records.)

(2) Termination of assistance. If a PHA proposes to terminate assistance for criminal activity as shown by a criminal record, the PHA must notify the household of the proposed action to be based on the information and must provide the subject of the record and the tenant with a copy of the criminal record. The PHA must give the family an opportunity to dispute the accuracy and relevance of that record in accordance with § 982.555.

(3) Cost of obtaining criminal record. The PHA may not pass along to the tenant the costs of a criminal records check.

24 C.F.R. § 982.554 Informal review for applicant.

(a) Notice to applicant. The PHA must give an applicant for participation prompt notice of a

decision denying assistance to the applicant. The notice must contain a brief statement of the reasons for the PHA decision. The notice must also state that the applicant may request an informal review of the decision and must describe how to obtain the informal review.

(b) Informal review process. The PHA must give an applicant an opportunity for an informal review of the PHA decision denying assistance to the applicant. The administrative plan must state the PHA procedures for conducting an informal review. The PHA review procedures must comply with the following:

(1) The review may be conducted by any person or persons designated by the PHA, other than a person who made or approved the decision under review or a subordinate of this person.

(2) The applicant must be given an opportunity to present written or oral objections to the PHA decision.

(3) The PHA must notify the applicant of the PHA final decision after the informal review, including a brief statement of the reasons for the final decision.

(c) When informal review is not required. The PHA is not required to provide the applicant an opportunity for an informal review for any of the following:

(1) Discretionary administrative determinations by the PHA.

(2) General policy issues or class grievances.

(3) A determination of the family unit size under the PHA subsidy standards.

(4) An PHA determination not to approve an extension or suspension of a voucher term.

(5) A PHA determination not to grant approval of the tenancy.

(6) A PHA determination that a unit selected by the applicant is not in compliance with HQS.

(7) A PHA determination that the unit is not in accordance with HQS because of the family size or composition.

(d) Restrictions on assistance for noncitizens. The informal hearing provisions for the denial of assistance on the basis of ineligible immigration status are contained in 24 CFR part 5.

24 C.F.R. § 982.555 Informal hearing for participant.

(a) When hearing is required.--

(1) A PHA must give a participant family an opportunity for an informal hearing to consider whether the following PHA decisions relating to the individual circumstances of a participant family are in accordance with the law, HUD regulations and PHA policies:

(i) A determination of the family's annual or adjusted income, and the use of such income to compute the housing assistance payment.

(ii) A determination of the appropriate utility allowance (if any) for tenant-paid utilities from the PHA utility allowance schedule.

(iii) A determination of the family unit size under the PHA subsidy standards.

(iv) A determination that a certificate program family is residing in a unit with a larger number of bedrooms than appropriate for the family unit size under the PHA subsidy standards, or the PHA determination to deny the family's request for an exception from the standards.

(v) A determination to terminate assistance for a participant family because of the family's action or failure to act (see § 982.552).

(vi) A determination to terminate assistance because the participant family has been absent from the assisted unit for longer than the

maximum period permitted under PHA policy and HUD rules.

(2) In the cases described in paragraphs (a)(1)(iv), (v) and (vi) of this section, the PHA must give the opportunity for an informal hearing before the PHA terminates housing assistance payments for the family under an outstanding HAP contract.

(b) When hearing is not required. The PHA is not required to provide a participant family an opportunity for an informal hearing for any of the following:

(1) Discretionary administrative determinations by the PHA.

(2) General policy issues or class grievances.

(3) Establishment of the PHA schedule of utility allowances for families in the program.

(4) A PHA determination not to approve an extension or suspension of a voucher term.

(5) A PHA determination not to approve a unit or tenancy.

(6) A PHA determination that an assisted unit is not in compliance with HQS. (However, the PHA must provide the opportunity for an informal hearing for a decision to terminate assistance for a breach of the HQS caused by the family as described in § 982.551(c).)

(7) A PHA determination that the unit is not in accordance with HQS because of the family size.

(8) A determination by the PHA to exercise or not to exercise any right or remedy against the owner under a HAP contract.

(c) Notice to family.

(1) In the cases described in paragraphs (a)(1)(i), (ii) and (iii) of this section, the PHA must notify the family that the family may

ask for an explanation of the basis of the PHA determination, and that if the family does not agree with the determination, the family may request an informal hearing on the decision.

(2) In the cases described in paragraphs (a)(1)(iv), (v) and (vi) of this section, the PHA must give the family prompt written notice that the family may request a hearing. The notice must:

(i) Contain a brief statement of reasons for the decision,

(ii) State that if the family does not agree with the decision, the family may request an informal hearing on the decision, and

(iii) State the deadline for the family to request an informal hearing.

(d) Expeditious hearing process. Where a hearing for a participant family is required under this section, the PHA must proceed with the hearing in a reasonably expeditious manner upon the request of the family.

(e) Hearing procedures--

(1) Administrative plan. The administrative plan must state the PHA procedures for conducting informal hearings for participants.

(2) Discovery--

(i) By family. The family must be given the opportunity to examine before the PHA hearing any PHA documents that are directly relevant to the hearing. The family must be allowed to copy any such document at the family's expense. If the PHA does not make the document available for examination on request of the family, the PHA may not rely on the document at the hearing.

(ii) By PHA. The PHA hearing procedures may provide that the PHA must be given the opportunity to examine at PHA offices before the PHA hearing any family documents that are directly relevant to the hearing. The PHA must be

allowed to copy any such document at the PHA's expense. If the family does not make the document available for examination on request of the PHA, the family may not rely on the document at the hearing.

(iii) Documents. The term "documents" includes records and regulations.

(3) Representation of family. At its own expense, the family may be represented by a lawyer or other representative.

(4) Hearing officer: Appointment and authority.

(i) The hearing may be conducted by any person or persons designated by the PHA, other than a person who made or approved the decision under review or a subordinate of this person.

(ii) The person who conducts the hearing may regulate the conduct of the hearing in accordance with the PHA hearing procedures.

(5) Evidence. The PHA and the family must be given the opportunity to present evidence, and may question any witnesses. Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings.

(6) Issuance of decision. The person who conducts the hearing must issue a written decision, stating briefly the reasons for the decision. Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing. A copy of the hearing decision shall be furnished promptly to the family.

(f) Effect of decision. The PHA is not bound by a hearing decision:

(1) Concerning a matter for which the PHA is not required to provide an opportunity for an informal hearing under this section, or that otherwise exceeds the authority of the person

conducting the hearing under the PHA hearing procedures.

(2) Contrary to HUD regulations or requirements, or otherwise contrary to federal, State, or local law.

(3) If the PHA determines that it is not bound by a hearing decision, the PHA must promptly notify the family of the determination, and of the reasons for the determination.

(g) Restrictions on assistance to noncitizens. The informal hearing provisions for the denial of assistance on the basis of ineligible immigration status are contained in 24 CFR part 5.