

Legal Opinion: GCH-0015

Index: 2.245

Subject: PH Due Process Determination: Massachusetts

December 3, 1991

Honorable William F. Weld
Governor of Massachusetts
Boston, MA. 02133

Dear Governor Weld:

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

Under Federal law, if the Secretary of the Department of Housing and Urban Development (HUD) determines that law of the jurisdiction requires a pre-eviction court hearing with the basic "elements of due process" (42 U.S.C. 1437d (k), as amended in 1990), a public housing agency (PHA) is not required to provide an administrative grievance hearing before evicting a public housing tenant for:

1. Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the PHA; or
2. Any drug-related criminal activity on or near such premises.

In accordance with the law, HUD has recently issued a regulation which revises HUD's definition of due process elements at 24 CFR 966.53(c) (56 Federal Register 51560, October 11, 1991).

Pursuant to the revised regulation, HUD has determined that the State law governing an action for eviction in the Massachusetts Housing, District and Superior Courts under Chapter 239 of the Massachusetts General Laws requires that the tenant have the opportunity for a pre-eviction hearing in court containing the elements of due process as defined in 24 CFR 966.53(c) of the HUD regulations. The basis of this determination is explained in the legal analysis enclosed with this letter.

In accordance with HUD's determination, a PHA operating public housing in the State of Massachusetts may exclude from its administrative grievance procedure any grievance concerning an eviction or termination of tenancy which involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees

2

of the PHA, or any drug-related criminal activity on or near such premises.

When a PHA evicts a tenant pursuant to an action for eviction in the Massachusetts Housing, District and Superior Courts under Chapter 239 of the Massachusetts General Laws for the reasons set forth above, the PHA is not required to afford the tenant the opportunity for an administrative hearing on the eviction under 24 CFR Part 966, and may evict a public housing tenant pursuant to a decision in such judicial action.

Very sincerely yours,

Jack Kemp

Enclosure

DUE PROCESS DETERMINATION

for the

STATE OF MASSACHUSETTS

TABLE OF CONTENTS

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

ANALYSIS

I. Jurisdiction: Massachusetts.

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 PHA 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;
- (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 Massachusetts to determine if due process procedures under those laws require a hearing which comports with all of the regulatory "elements of due process" as defined in 966.53(c).

HUD finds that the requirements of Massachusetts law governing an action for eviction in the Housing, District, and Superior Courts under Chapter 239 of the Massachusetts General Laws 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 Massachusetts General Laws, case law and court rules.

Furthermore, HUD's analysis and conclusion accords with the view of the Federal District Court in *Skinner v. Boston Housing Authority* that "the minimal standards of due process found in 24 C.F.R. 966.53(c) are certainly present in Massachusetts, facts which can be readily confirmed by reference to the General Laws of Massachusetts and the rules of civil procedure applicable in its several courts." See, 690 F. Supp. 109, 113-114, n.7 (D. Mass. 1988). See also, *Spence v. Gormley*, 387 Mass. 258, 439 N.E.2d 741, 751 (1982), and *Kargman v. Dustin*, 5 Mass.App. 101, 359 N.E.2d 971, 974 (1977).

III. Overview of Massachusetts Eviction Procedures

A person entitled to possession of real property may bring a summary proceeding pursuant to Chapter 239 of the Massachusetts Code to recover possession of the property. Mass. Gen. Laws c. 239, 1; cf. also, c. 184, 18. All Massachusetts Trial Court departments (Housing, District, and Superior Courts) have jurisdiction to hear summary process actions under Chapter 239 for possession of housing. Mass. Gen. Laws c. 185C, 1, 3; c. 211B, 1; c. 212, 4; c. 218, 19; c. 239, 2; Uniform Summary Process Rules (U.S.P.R.) Rule 1.

The Massachusetts Code provides that a summary process action in any of these courts must be commenced and administered in accordance with rules promulgated with approval of the Supreme Judicial Court. Mass. Gen. Laws c. 185C, 19. Such rules are contained in the U.S.P.R. and the Massachusetts Rules of Civil Procedure (Mass.R.Civ.P.), The rules in the Mass.R.Civ.P. apply

2

unless they are inconsistent with the U.S.P.R., with applicable statutory law or the court's jurisdiction. U.S.P.R. Rule 1. The U.S.P.R. provides for some variation in the applicable rules depending on which Trial Court Department is used to prosecute the eviction action.

Massachusetts law requires a public housing authority (PHA) to grant the tenant an administrative hearing for termination of tenancy, except in the case of nonpayment of rent. Mass. Gen. Laws, c. 121B, 32. However, on the request of the PHA, the PHA's hearing panel may waive the State law grievance requirement for certain types of serious crimes. This HUD due process determination is not limited to evictions for which the hearing panel waives the State grievance requirement, but is also not intended to preempt a State law requirement for a grievance hearing.

IV. Analysis of Massachusetts 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))

A summary process action is commenced by filing a summons and complaint. U.S.P.R. Rule 2; Mass. Gen. Laws c. 185C, 19. The summons and complaint must state the reason for eviction:

in concise, untechnical form and with sufficient particularity and completeness to enable a defendant to understand the reasons for the requested eviction and the facts underlying those reasons.

U.S.P.R. Rule 2(d). See also Mass.R.Civ.P. Rule 8(a).

The summons and complaint must also specify the date of the hearing (see Commentary to U.S.P.R. Rule 2), and must be properly served on the defendant. U.S.P.R. Rule 2(b) and Mass.R.Civ.P. Rule 4(d).

The Massachusetts law and court rules require adequate notice to the tenant of the grounds for termination of tenancy and eviction.

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

The right of a litigant to be represented by counsel is

implied by various provisions of the court rules concerning the role of counsel. The Mass.R.Civ.P. regulate appearances by an attorney on behalf of a party. Rule 11; see also, references to a party's attorney in Rules 6 and 7(c) of the U.S.P.R.

3

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 Mass.R.Civ.P. provides that the testimony of witnesses must be taken orally in open court (unless otherwise provided by the Mass.R.Civ.P.). Mass.R.Civ.P. 43(a). Furthermore, all evidence must be admitted "which is admissible." Mass.R.Civ.P. 43(a).

The Mass.R.Civ.P. also provides the tenant-defendant the right to impeach or contradict the plaintiff's case through cross-examination. Mass.R.Civ.P. 43(b). A witness may be cross-examined "subject only to the trial judge's sound discretion." Rule 43(b), cf. Rule 43(g). A party may interrogate hostile or adverse party witnesses by leading questions and may contradict or impeach testimony of an adverse party witness. Rule 43(b).

The tenant may present evidence to refute the PHA's case. For this purpose the defendant may arrange issuance of subpoenas for production of witnesses or documentary evidence. Mass.R.Civ.P. 45.

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. Mass.R.Civ.P. 32(a). At the taking of a deposition, the witness may be cross-examined in the same manner as permitted at trial. Mass.R.Civ.P. 30(c). A deposition may only be used at trial in specific and restrictive circumstances stated in the rules. Mass.R.Civ.P. 32(a). Provisions which allow the use of a deposition at trial under "exceptional circumstances" note the "importance of presenting the testimony of witnesses orally in open court." Mass.R.Civ.P. 32(a)(3).

The Massachusetts rules of civil procedure give a defendant-tenant a full opportunity to defend against and refute the PHA's evidence, including the right to confront and cross-examine witnesses.

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

A defendant in a summary process action is entitled to answer the complaint. U.S.P.R. Rule 3. The answer may deny any statement which is in dispute and may state "any affirmative defense", without limitation. U.S.P.R. Rules 3 and 5; Mass.R.Civ.P. Rules 8(b) and (c), 13(a).

The answer may deny any statement which is in dispute, may state "any affirmative defense" without limitation, in accordance

4

with Mass. Gen. Laws ch. 239, 8A. U.S.P.R. Rules 3 and 5; Mass.R.Civ.P. Rules 8(b) and (c), 13(a). In the landlord's action to recover possession of the unit, a tenant is entitled to raise any defense based upon the landlord's breach of warranty, the rental agreement, or any law. Mass. Gen. Laws, ch. 239, 8A.

The Massachusetts Trial Courts have common law, statutory and equity jurisdiction over possessory actions. These Courts can consider any affirmative legal or equitable defense and grant any appropriate relief. Mass. Gen. Laws, c. 185C, 3. U.S.P.R. Rule 5 also grants power to issue equitable relief. The U.S.P.R. Commentary observes that "all courts have the authority to issue injunctive relief in appropriate cases." U.S.R.P. Rule 9, Commentary.

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

Under U.S.P.R. Rule 10, judgment is entered on the court's decision after hearing or trial. The structure of the trial and hearing requirements under the U.S.P.R and Mass.R.Civ.P. imply that the court decision is to be based on the evidence presented in the summary proceeding bearing on the legal and factual issues framed by the complaint and answer. See Mass.R.Civ.P. Rule 52(a), Rules 54-62.

The form of "Findings of Fact and Order for Judgment" used by judges in the Boston Housing Court, for example, provides for the specification of the facts found by the court after trial, "from the evidence" (emphasis supplied), and for grant of a judgment on the basis of the court findings. (Boston Housing Court, Summary Process Action Forms, Form 3, Massachusetts Rules of Court (1991), p. 326).

V. Nuisance Eviction Statute

Under Chapter 139, 19 of the Massachusetts laws, an owner may elect to "annul and make void" the lease of a tenant who uses the leased property for certain types of illegal activity, including "the illegal keeping, sale or manufacture of controlled substances." On voiding of the lease, the right of possession reverts and vests in the owner, who may:

. . . without process of law, make immediate entry upon the premises, or may avail himself of the remedy provided in chapter two hundred and thirty nine the summary process statute .

A landlord's use of the self-help repossession option provided by Chapter 139 would not provide a tenant with the opportunity for a pre-eviction due process hearing in court.

Consequently, a PHA landlord may not use this option to evict a public housing tenant without first providing the tenant with the opportunity for a hearing under the PHA grievance procedure.

The other avenue for an eviction under Chapter 139 is a summary process action under Chapter 239. For such an action, State law requires a hearing that meets the elements of due process in 966.53(c) (for the reasons discussed above, in the general analysis of a summary process action). A PHA may therefore exclude from its grievance process an eviction based on an annulment or voiding of the lease pursuant to Chapter 139 if it uses the summary process procedures of Chapter 239.

V. Conclusion.

Massachusetts law governing Chapter 29 summary eviction proceeding in Housing, District and Superior Courts (Massachusetts Trial Courts) requires that the tenant have the opportunity for a pre-eviction hearing in court which provides the basic elements of due process as defined in 24 CFR 966.53(c) of the HUD regulations.

By virtue of HUD's due process determination under section 6(k) of the U.S. Housing Act of 1937, a PHA in Massachusetts may evict a public housing tenant pursuant to a Trial Court decision in an eviction proceeding for any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the PHA or any drug related criminal activity on or near the premises, and is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.