

Legal Opinion: GCH-0018

Index: 2.245

Subject: PH Due Process Determination: Wyoming

December 3, 1991

Honorable Mike Sullivan
Governor of Wyoming
Cheyenne, Wyoming 82002-0010

Dear Governor Sullivan:

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

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 Wyoming law governing an action for ejection in the Wyoming district court under Wyo. Stat. 1-32-202 et seq. 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 HUD's determination is explained in the legal analysis enclosed with this letter.

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

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When a PHA evicts a tenant pursuant to a Wyoming district

court ejectment action 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

HUD DUE PROCESS DETERMINATION

for the

STATE OF WYOMING

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ANALYSIS

I. Jurisdiction: State of Wyoming

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

HUD finds that the requirements of Wyoming law governing an action for ejection in the District Court under Wyo. Stat.

1-32-202 et seq. (1988) 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 Wyoming statutes, case law and court rules. (See IV)

HUD has also examined the requirements applicable to an unlawful detainer action pursuant to Wyo. Stat. 1-21-1001 (1977) and to the self-help right of reentry provided by common law and has concluded that these procedures do not fulfill the required elements of due process. (See VI)

III. Overview of Wyoming Ejection Procedures

The procedures for ejection in Wyoming are stated in Wyo. Stat. 1-32-202 et seq. (1988). The District Courts have jurisdiction over cases of ejection. Wyo. Const. art. V, 10; *Allen v. Houn*, 30 Wyo. 186, 219 P. 573 (1923). Such cases are governed by the Wyoming Rules of Civil Procedure, W.R.C.P. 1.

Ejection is subject to the due process clause of the Wyoming Constitution, Wyo. Const. art. I, 6, which provides that "no person shall be deprived of life, liberty or property without due process of law."¹

¹ The Wyoming Constitution is of course the supreme law of the jurisdiction (subject to the United States Constitution and federal laws). In determining whether a jurisdiction requires "the basic elements of due process" for purposes of section 6(k), these elements may be found in State constitutional provisions, as well as in other valid sources of State law, such as State statute, regulation or common law.

Wyoming Due Process Determination

IV. Analysis of Wyoming Ejectment Procedures for Each of the Regulatory Due Process Elements

The following discussion will consider separately each element of the regulatory due process definition and demonstrate that each element is satisfied in the ejectment action under Wyoming law.

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

The landlord commences an ejectment action by filing a complaint with the court. W.R.C.P. 3(a). The complaint must contain a short and plain statement of the claim showing that the plaintiff is entitled to relief. W.R.C.P. 8. The plaintiff's complaint must state that the plaintiff has a legal estate in and is entitled to possession of the property and that the defendant unlawfully keeps the plaintiff out of possession. Wyo. Stat. 1-32-202 (1988).

The complaint must be served on the defendant. W.R.C.P. 4. The complaint must be served:

upon an individual other than an infant under 14 years of age or an incompetent person, by delivery of a copy of the summons and of the complaint to him personally, or by leaving copies thereof at his dwelling house or usual place of abode with some member of his family or person in his employ over the age of 14 years, or at the defendant's usual place of business with any employee then in charge of such place of business, or by delivery thereof to an agent authorized by appointment or by law to receive service of process W.R.C.P. 4(d)(1).

The due process clause of the Wyoming Constitution requires that a party to an action be given a reasonable opportunity to know the claims of the opposing party. State, Dept. of Revenue & Taxation v. Andrews, 671 P.2d 1239, 1248 (Wyo. 1983).

The Wyoming Constitution, statute and court rules require adequate notice to the tenant.

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

While the right to be represented by an attorney is nowhere stated explicitly, this right may be inferred from references

throughout the Wyoming Rules of Civil Procedure. For example, W.R.C.P. 5(b) requires that whenever service is made upon a party represented by counsel, the service must be made upon the attorney unless the court orders otherwise. The opportunity to be represented by counsel is also guaranteed by the due process clause of the Wyoming Constitution. *Lawrence-Allison & Assoc. West v. Archer*, 767 P.2d 989 (Wyo. 1989).

- 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 Wyoming Rules of Evidence, W.R.E. 1-1104, are applicable to ejectment actions in District Court, W.R.E. 101. The evidence rules provide the defendant the right to refute the plaintiff's evidence and cross-examine witnesses. W.R.E. 402 states that "all relevant evidence is admissible except as otherwise provided by statute, by the W.R.E., or by other rules prescribed by the Supreme Court." W.R.E. 611 provides for cross-examination of witnesses as well as leading questions when calling an adverse party. Furthermore, the court has held that one of the basic elements of the due process clause:

. . . is the right to be apprised of all the evidence upon which an issue is to be decided, with the right to examine, explain or rebut such evidence. And, the right to hear and confront all evidence upon which a factual adjudication is to be made includes the right to hear and cross-examine witnesses. *Holm v. State*, 404 P.2d 740, 744 (Wyo. 1965).

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

The Wyoming Rules of Civil Procedure provide for one form of action, to be known as a "civil action". W.R.C.P. 2. The Rules abolished the distinction between actions at law and suits at equity. *Thickman v. Schunk*, 391 P.2d 939 (Wyo. 1964). Rules 8(b) and (c) require the defendant to state his defenses to each claim asserted. Rule 8(b) states in part: "A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." Rule 8(c) states: "In pleading to preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." Rule 8(e) permits a party to state as many legal and equitable defenses as he has. Finally, the Wyoming Supreme Court has permitted equitable defenses to be raised in ejectment actions. *Allen v.*

Houn, 30 Wyo. 186, 219 P. 573 (Wyo. 1923).

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

W.R.C.P. 54(a) states that " a judgment is the final determination of the rights of the parties in action." The Wyoming Supreme Court has construed this to require the final judgment to grant all of the relief to which each party is entitled whether or not demanded in the pleadings. *Walton v. Atlantic Richfield Co.*, 501 P.2d 802 (Wyo. 1972). *Accord, Karn v. Hayes*, 530 P.2d 156 (Wyo. 1975) (the trial court has the jurisdiction to render a judgment which the pleadings and factual proof support even if the parties proceeded under a misapprehension as to the proper theory of law). Decision on the merits is also required by the due process clause of the Wyoming Constitution. Wyo. Const. art I, 6.

Hence, we conclude that the Wyoming Rules of Civil Procedure and the due process clause of the Wyoming Constitution require a decision on the merits.

V. Conclusion as to Ejectment Procedures

HUD has determined that Wyoming law governing the ejectment proceedings in the District Court 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 Wyoming may evict a public housing tenant pursuant to a District Court decision in an ejectment proceeding for any grievance involving any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any drug-related criminal activity on or near such premises, and is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.

VI. Other Eviction Procedures

A. Unlawful detainer

The procedures for bringing an unlawful detainer action in Wyoming are set forth in Wyo. Stat. 1-21-1001 to 1016 (1977). The unlawful detainer is a summary action for restitution in which equitable defenses are not permitted. *Knight v. Boner*, 459

P.2d 205 (Wyo. 1969). Under HUD's due process definition, the tenant must have an opportunity to present "any affirmative legal or equitable defenses" (966.53(c)(3)). Therefore, HUD has determined that the requirements for an unlawful detainer action do not include all of the elements of basic due process as defined in 24 CFR 966.53(c).

B. Self-help right of reentry

Wyoming law provides for no implied renewal of a lease upon the expiration of the term created by the lease. Any holding over by the tenant creates a tenancy by sufferance. Wyo. Stat. 34-2-128 (1990). The Wyoming Supreme Court has held that such tenancy by sufferance entitles the landlord to a right of peaceable reentry and repossession of the premises. *Welch v. Rice*, 61 Wyo. 511, 159 P.2d 502 (1945). Because this self-help right of reentry entails no judicial process whatsoever, it does not meet the HUD required elements of due process.