

No. 47696-7-II

COURT OF APPEALS – DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY CONSOLIDATED HOUSING AUTHORITY d/b/a
HOUSING KITSAP,

Respondent,
v.

KIMBRA HENRY-LEVINGSTON,

Appellant.

STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

BRIEF OF RESPONDENT

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I. INTRODUCTION

Housing Kitsap complied with both federal and state law to evict Kimbra Henry-Levingston.¹ Kimbra's public housing lease was for a twelve-month fixed term expiring on December 31, 2014. Under 42 USC 1437d(l) a public housing lease must provide for automatic renewal. Kimbra's lease had such a provision. But § 1437d(l) also allows a public housing authority to terminate a lease for cause.

Housing Kitsap learned that Kimbra violated her lease in several substantial ways. It sought to terminate the lease. Housing Kitsap followed federal law, providing Kimbra a hearing regarding the termination. A neutral factfinder upheld the termination. And the trial court's uncontested findings demonstrate the violations were proven. It is uncontested the violations were substantial and material. Kimbra's lease was terminated under federal law, so it could not renew, and it expired on December 31, 2014. Housing Kitsap then properly commenced an unlawful detainer action under RCW 59.12.030 (1). No error occurred. This court should affirm.

¹ Housing Kitsap follows Ms. Henry-Levingston's convention of referring to herself as "Kimbra." No disrespect is intended.

II. RESTATEMENT OF THE ISSUES

- A. Federal law allows a public housing authority to terminate a lease for cause without giving an opportunity to cure by using a grievance procedure. Did Housing Kitsap comply with federal law?
- B. Can a terminated lease automatically renew under federal law?
- C. Kimbra's lease did not renew. Its term expired. Did Housing Kitsap comply with state law in bringing this unlawful detainer action under RCW 59.12.030(1)?

III. RESTATEMENT OF THE CASE

Kimbra does not challenge the trial court's factual findings,² so they are verities on appeal.³ This restatement presents those findings, the evidence supporting those findings, and all reasonable inferences from the evidence, in a light most favorable to Housing Kitsap.

² Kimbra challenges the trial court's adoption of the findings of Housing Kitsap's administrative hearing officer (*See* Finding of Fact No. 5; CP 278). But the Court independently made the same findings. The trial court's independent findings (Findings of Fact Nos. 1-4; 6-10; CP 277-79) are unchallenged.

³ *In re Estate of Lint*, 135 Wn.2d. 518, 533, 957 P.2d 755 (1998).

1. The lease expired on December 31, 2014.

Housing Kitsap rented an apartment to Kimbra under a written lease.⁴ As required by federal law, the lease term was twelve months.⁵

The initial term of the Lease shall be 12 months. The first month of the lease shall be the calendar month during which initial tenancy commences. Where tenancy commences after the first day of the month, the first month rent shall be pro-rated accordingly.

Unless otherwise modified or terminated in accordance with Section VII, or unless not renewed for noncompliance with community service requirement, this Lease shall automatically be renewed for successive terms of 12 months.⁶

2. Mr. Levingston occupied the property, violating the lease.

Kimbra's future husband, Mr. Levingston, came with her to the lease signing. He was not screened for occupancy because he would not be part of the household.⁷ Mr. Levingston is a sex offender.⁸ Kimbra knew that having Mr. Levingston live at the property would violate the lease.⁹

⁴ FF 1-2; CP 277; 324-353.

⁵ 42 U.S.C. § 1437d(l)(1).

⁶ CP 324.

⁷ VRP 34.

⁸ CP 430-442.

⁹ VRP 149.

Housing Kitsap’s Admission and Continued Occupancy Policy (“ACOP”) denies any sex offenders admission. This policy is stricter than federal law requires.¹⁰

On January 14, 2014 Mr. Levingston reported Kimbra’s unit as his address to the Kitsap County sheriff.¹¹ In May, 2014 Kimbra married Mr. Levingston.¹² Kimbra disputes whether Mr. Levingston’s conviction¹³ would disqualify him from subsidized housing. But his criminal history, or ability to qualify for housing, is not relevant to the issue in this appeal. The trial court found his criminal history relevant only to the extent it created a paper trail showing he resided in Kimbra’s unit – a substantial violation of the lease.¹⁴

Despite the hearing officer’s and trial court’s findings to the contrary, Kimbra testified throughout that Mr. Levingston did not live in the

¹⁰ VRP 126.

¹¹ CP 430-442.

¹² CP 362-363; 443-444; Exhibits 1; 8.

¹³ There is no evidence to support Kimbra’s factual recitation of Mr. Levingston’s criminal history. Footnote 3 on page 6 of her brief cites to two places in the record – Kimbra’s testimony and her trial brief. But her trial brief is not evidence. And Kimbra did not testify as to the details of his conviction that are contained in the brief.

¹⁴ VRP 188.

unit.¹⁵ And on appeal she makes this same factual argument even though she does not assign error to the Court's explicit findings to the contrary.¹⁶

3. Kimbra violated the lease by failing to pay for utilities.

Kimbra received a utility reimbursement for Puget Sound Energy from Housing Kitsap.¹⁷ At one point she was over eight hundred dollars behind on her utility payment.¹⁸ To prevent the electricity from being shut off, the utility service was put in Kimbra and Mr. Levingston's name.¹⁹

4. Housing Kitsap terminated the lease under 42 USC 1437d(1)(5).

On November 24, 2014 Housing Kitsap gave Kimbra notice that it was terminating her lease for serious or repeated violations of material terms of the lease.²⁰ Housing Kitsap alleged three violations: (1) that an unauthorized person (Mr. Levingston) resided on the property continuously; (2) that she was delinquent in her payment of utilities; and (3) that a third-party used the property address to apply for benefits.²¹

¹⁵ CP 41; VRP 150; VRP 188; CP 316-318.

¹⁶ BA 12; CP 278-279.

¹⁷ VRP 97.

¹⁸ VRP 150.

¹⁹ VRP 120; 143.

²⁰ FF 4; CP 278; CP 319-322.

²¹ CP 319-322.

5. Housing Kitsap followed federal law and afforded Kimbra formal and informal grievance hearings.

Kimbra requested an informal and formal hearing under federal law and Housing Kitsap's policies.²² At the formal hearing a neutral factfinder upheld the termination.²³ Because the termination was upheld the lease did not renew.²⁴ Because it did not renew, under its express terms the lease expired on December 31, 2014.²⁵

6. The trial court upheld the violations and termination under federal law: the lease expired and the court had jurisdiction under RCW 59.12.030(1).

Kimbra's motions to dismiss were denied and the matter was tried. After reviewing the evidence and hearing from witnesses, the trial court found two violations. First, the trial court found that Mr. Levingston was living on the property. He was seen on the property regularly, for a long period, at all times of the day.²⁶ Mr. Levingston also used the property as his address on several forms – a marriage license application²⁷ and Sex Offender Registration.²⁸ His marriage application was signed under penalty

²² CP 129-130; 138-140.

²³ FF 5; CP 278; CP 316-318.

²⁴ FF 10; CP 279.

²⁵ FF 10, CP 279.

²⁶ FF 7; CP 278.

²⁷ FF 7; CP 278; CP 443-444; Ex. 8.

²⁸ FF 7; CP 278; CP 430-442; Ex. 6

of perjury.²⁹ If the sex offender registration was falsified it could lead to felony charges.³⁰ This led the trial court to conclude that Mr. Levingston had substantial motivation to accurately complete the forms and that Mr. Levingston was at the unit for over fourteen days.³¹ Mr. Levingston did not testify to rebut the statements in the written evidence.

It was undisputed that Kimbra failed to promptly pay her utility bill to PSE. This was true even though Housing Kitsap gave her a stipend for utility payments.³² Kimbra presented no argument or evidence that the violations were immaterial or insubstantial.³³ The Court found a substantial and material violation of the lease.³⁴

The trial court reviewed the hearing officer's decision and found it was based on substantial evidence and not an abuse of discretion. The trial court made the same the finding except it did not find that allowing a third party to use the property address for applying for benefits was proven as a substantial and material violation.³⁵

²⁹ FF 7; CP 279; CP 443-444; Ex. 8.

³⁰ FF 7; CP 279.

³¹ FF 7; CP 279.

³² FF 8, CP 279.

³³ FF 7; CP 279.

³⁴ FF 8; CP 279.

³⁵ FF 5; CP 278.

IV. ARGUMENT

A. STANDARD OF REVIEW

Kimbra did not assign error to any finding of fact.³⁶ The trial court's findings are verities on appeal.³⁷ This Court must also take all the reasonable inferences from the evidence in a light most favorable to Housing Kitsap.³⁸

The central issue is not factual, however. The trial court found that Mr. Levingston was living in Kimbra's apartment. As stated in the trial court's findings, there was no argument or evidence that the violation was not substantial or material.

Despite Kimbra's brief and its recitation of facts more favorable to her, there is no issue whether Mr. Levingston was present at the unit frequently; no issue whether she knew him living there was a violation; no issue she

³⁶ Kimbra does assign error to the trial court's "adoption" of the hearing officer's decision. As will be discussed below, the trial court did not adopt the hearing officer's decision. It found the decision to be based on substantial evidence and not an abuse of discretion. The trial court also independently weighed the evidence and came to the same conclusion.

³⁷ *In re Estate of Lint*, 135 Wn.2d 518, 533, 957 P.2d 755 (1998).

³⁸ *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn.App. 335, 341, 307 P.3d 791 (2013), *rev. denied* 179 Wn.2d 1011 (2014).

failed to pay utilities as required; and no issue whether the violations were substantial or material. In short, there are no fact issues.

The only issue is whether Housing Kitsap properly commenced the unlawful detainer proceeding under RCW 59.12.030 (1). This is a question of law the Court reviews *de novo*.³⁹

B. HOUSING KITSAP COMPLIED WITH BOTH FEDERAL AND STATE LAW.

To terminate a federally subsidized tenancy and evict a tenant, a housing authority must comply with both federal and state law.⁴⁰ In *Housing Authority of Everett v. Terry*⁴¹ the Housing Authority did not comply with RCW 59.12.030(4) because it gave a ten-day notice but no opportunity to cure. Kimbra conflates the *requirement* under RCW 59.12.030(4) that to terminate a tenancy for a lease violation a landlord must give an opportunity to cure,⁴² on the one hand, with the *right* of a public housing authority to terminate a lease for serious or repeated lease violations under 42 USC §14378d(1)(5), on the other hand.

³⁹ *Carlstrom v. Hanline*, 98 Wn. App. 780, 784, 990 P.2d 986, 988 (2000).

⁴⁰ *Hous. Auth. of Everett v. Terry*, 114 Wn.2d 558, 789 P.2d 489 (1990).
See also CP 48 Defendant's Answer, Affirmative Defenses and Motion to Dismiss.

⁴¹ 114 Wn.2d 558, 789 P.2d 489 (1990).

⁴² RCW 59.12.030(4).

In *Terry* the housing authority argued that federal law preempts Washington's unlawful detainer statute by removing the requirement for an opportunity to cure. Housing Kitsap never made that argument. Housing Kitsap does not assert that the notice to Kimbra terminated the tenancy under any provision of RCW 59.12.030.

The federal statute allows lease termination for a substantial violation. Termination under 42 USC §1437(d)(1)(5) does not terminate the tenancy under RCW 59.12.030(4).⁴³ Because the lease here was terminated under federal law it did not renew. It expired on December 31, 2014. Housing Kitsap properly used RCW 59.12.030 (1).

1. Federal law

- a. Federal law allows a public housing authority to terminate a lease for serious lease violations.

Kimbra admitted in the trial court that the lease could be terminated for serious violations of the material terms of the lease.⁴⁴ And 42 USC §1437d(1)(5) specifically allows termination for “serious or repeated violation of the terms or conditions of the lease....”⁴⁵ Federal law does not

⁴³ *See Terry*.

⁴⁴ January 30, 2015 VRP 4:1-4.

⁴⁵ 42 USC 1437d(1)(5).

require a landlord to provide an opportunity to cure prior to terminating a public housing lease, in contrast to RCW 59.12.030(4).

But federal law provides a grievance procedure to protect the tenant.⁴⁶ Housing Kitsap complied with the grievance procedure. Kimbra does not allege that it was flawed or that her due process rights were violated. The facts supporting the termination – that Mr. Levingston resided in the apartment and that utilities were not paid – are verities.

Because the lease terminated under federal law on December 31, 2014, it could not automatically renew on January 1, 2015.

- b. Federal law does not prohibit the automatic renewal language in Kimbra’s lease.

42 USC 1437d sets out terms required and prohibited in public housing leases. There must be a 12-month term. Here, there is. The lease must automatically renew. Here it does. The lease provides:

Unless otherwise modified or terminated in accordance with Section VII, or unless not renewed for noncompliance with community service requirement, this Lease shall automatically be renewed for successive terms of 12 months.⁴⁷

Kimbra claims that the first clause is prohibited by 42 USC 1437d(1)’s requirement that leases be automatically renewed “for all

⁴⁶ 42 USC 1437d(1)(7); 24 CFR §966.

⁴⁷ CP 324. (Emphasis added).

purposes.” But this claim ignores the termination provisions of that same section. 42 USC §1437d(l)(6) -(9) outline the ways a federal housing lease can be terminated for cause. A terminated lease cannot renew.

Kimbra’s analysis of 42 USC 1437d(l) fails to account for this reality. She states that “Federal law requires public housing leases that automatically renew....”⁴⁸ She is correct. But she goes too far in claiming that federal law requires public housing leases that “do not expire.”⁴⁹ She cites no authority for this claim.

That a lease must automatically renew does not mean it never expires. If it did, the “twelve-month term” language in 42 USC § 1437d(l)(1) would be superfluous. “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous....”⁵⁰ Federal law does not create a perpetual lease. Instead, 42 USC 1437d(l) sets out several ways that the lease can terminate.

Here, Kimbra admits that Housing Kitsap can terminate her lease for cause under federal law.⁵¹ The trial court’s uncontested factual findings support the termination. A terminated lease cannot automatically renew.

⁴⁸ BA 23.

⁴⁹ Id at 18, 23.

⁵⁰ *Whatcom Cty. v. City of Bellingham*, 128 Wn. 2d 537, 546, 909 P.2d 1303, 1308 (1996).

⁵¹ BA at 38.

Kimbra's argument about the provision in Housing Kitsap's lease that states it does not automatically renew if terminated leads to absurd results. Under Kimbra's analysis, if a public housing agency terminates a lease under federal law November 27 (which she admits it can do) the lease will automatically renew on January 1. The termination allowed by federal law would be a nullity.

The language in Kimbra's lease states that if there is a termination it will not renew. There is nothing in 42 USC 1437d that prohibits this language.

c. Even if federal law prohibited the non-automatic renewal language in Kimbra's lease, the result would not change.

Even if the first clause above is invalid under federal law, the result here would not change. The lease has a severability clause.⁵² And the lease provides detailed procedures for termination in conformance with federal law.⁵³ There is no allegation these procedures were not followed. Either way, the lease terminated and did not renew.

d. State law cannot preempt federal law.

Kimbra claims that to terminate her lease she must be given an opportunity to cure any violation.⁵⁴ But state law cannot pre-empt federal

⁵² CP 342.

⁵³ CP 336-340.

⁵⁴ BA 33.

law.⁵⁵ This is a different question than whether Housing Kitsap can terminate the lease under 42 USC §1437d(l) and commence an unlawful detainer action during the term of a lease. Under *Terry*, it cannot.⁵⁶

But under Kimbra's argument, state law would preempt federal law because she posits that under state law her lease could not be terminated. This would invalidate 42 USC §1437d(l)'s termination provisions. She is incorrect. Her lease terminated under federal law.

2. State Law.

a. The lease expired so it could not renew.

To use the unlawful detainer statute a landlord must rely on one of the seven subsections of RCW 59.12. Kimbra's recitation of the unique nature of unlawful detainer actions is correct. But her analysis under RCW 59.12.030(1) is flawed. A tenant of real property for a term less than life is guilty of unlawful detainer:

(1) When he or she holds over or continues in possession, in person or by subtenant, of the property or any part thereof ***after the expiration of the term for which it is let to him or her***. When real property is leased for a specified term or period by express or implied contract, whether written or oral, the tenancy shall be terminated without notice at

⁵⁵ U.S. Const., Art. VI, cl. 2.

⁵⁶ *Terry*.

the expiration of the specified term or period....⁵⁷

Kimbra's lease was for twelve calendar months.⁵⁸ As discussed above, the twelve months expired. Kimbra maintained possession. The court's inquiry should end there.

Kimbra confuses the issue by arguing that the lease automatically renewed, and by raising *Terry* as a defense. But the lease did not renew because it terminated under federal law. And *Terry* does not analyze RCW 59.12.030(1) or the right of a public housing agency to terminate a lease under federal law.

The lease was not terminated under RCW 59.12.030(4). But because it terminated under federal law it did not renew. It then expired on December 31, 2014. Kimbra is guilty of unlawful detainer because "she [held] over or continue[d] in possession, in person...of the property... after the expiration of the term for which it is let to ...her."⁵⁹ *Terry* is inapplicable.

⁵⁷ RCW 59.12.030 (1). (Emphasis added).

⁵⁸ Kimbra claims for the first time on appeal that the lease did not expire until January 10, 2015. But as will be discussed *infra*, this argument has no merit and is contradicted by admissions in her Answer (CP 44).

⁵⁹ RCW 59.12.030(1).

Also, "...the tenancy shall be *terminated* without notice at the expiration of the specified term or period."⁶⁰ Here, the federal termination and state law terminations occurred simultaneously. Under 42 USC 1437(l)(5) the lease terminated under the federal notice and hearing process. As a result, it did not renew. Its fixed term then expired.

b. *Terry* is not applicable because 1) Housing Kitsap does not argue preemption, and 2) housing Kitsap did not commence the unlawful detainer under RCW 59.12.030(4).

A careful reading of *Terry* shows it is not applicable. The main issue in *Terry* was whether federal housing law preempts state law. The Everett Housing Authority tried to evict with a ten-day notice but gave no opportunity to cure. *Terry* stands for the principle that a public housing landlord in Washington must comply with both state and federal law to bring an unlawful detainer. Here, Housing Kitsap complied with both.

Indeed, Kimbra concedes that under *Terry* Housing Kitsap could lawfully bring an ejectment action.⁶¹ *Terry* states that ejectment would have been a proper remedy.⁶² But for ejectment to be proper *here*, Kimbra must also concede that her lease terminated under federal law. And if it terminated it could not renew.

⁶⁰ RCW 59.12.030(4). Emphasis added.

⁶¹ BA 38.

⁶² *Id.*

Terry contains *dicta* that Washington’s Legislature enacted the ten-day requirement to mesh with federal law’s thirty-day notice requirement in 42 USC §1437d(l):

On one level, then, the state 10-day requirement may be regarded as the Legislature’s expression of what it considers “reasonable” under the federal statute.⁶³

This cannot be true because the federal statute was enacted *after* Washington’s unlawful detainer statute.⁶⁴ The Washington Legislature could not consider federal housing law when enacting the “comply or vacate” subsection, where federal housing law did not yet exist.

Kimbra may argue that *FPA Crescent Associates, LLC v. Jamie's, LLC*⁶⁵ is analogous. There, the landlord also sought to evict its tenant based RCW 59.12.030(1) even though the lease did not expire until 2021. The lease could be terminated for the non-payment of rent, so the landlord gave a notice of termination for non-payment of rent. It then commenced an unlawful detainer. It argued that because the lease allowed for termination

⁶³ *Terry* at 749.

⁶⁴ The federal statute was passed in 1939 as part of the “New Deal.” The unlawful detainer statute was enacted in 1890. The 10-day requirement was in the statute as early as 1923 See *Lee v. Weerda*, 124 Wn. 168 (1923).

⁶⁵ 190 Wn. App. 666, 360 P.3d 934 (2015).

for nonpayment of rent, and because FPA enforced that provision of the lease, the term of the lease had “expired.”⁶⁶ The Court held:

Because *Terry* requires us to construe ambiguities in the unlawful detainer statute strictly in favor of tenants, we distinguish “expiration of the term for which it is let” from a unilateral termination, such as what occurred here. We thus hold that a landlord must comply with RCW 59.12.030(3)'s notice and opportunity to cure procedures prior to bringing an unlawful detainer action against a tenant whose lease it unilaterally terminated for nonpayment of rent.⁶⁷

This holding illustrates why Kimbra’s argument fails. First, Kimbra’s termination was not unilateral. It was subject to a due-process hearing under federal statute and regulation. Second, because the lease in *FPA* did not expire until 2021, it had to argue that the words “termination” and “expiration” were the same. But Housing Kitsap does not argue that the federal termination is the “expiration of the term for which it is let.” Instead Housing Kitsap relies on the lease term expressly expiring on December 31, 2014.

⁶⁶ *Id.* at 676.

⁶⁷ *Id.*

Terry and its progeny do not command reversal. Instead, they show that the trial court did not err in its decision that RCW 59.12.030(1) applied to this situation

C. KIMBRA’S LEASE EXPIRED ON 12/31/2104.

Kimbra argues for the first time on appeal that her lease ended on January 10, 2015, not December 31, 2014. This argument has no merit for three reasons. First, issues not raised in the trial court will generally not be considered for the first time on appeal.⁶⁸

Second, she contradicts her admission in her answer: “the lease between the parties was for an initial term of twelve months from January 10, 2014 to *December 31* that renewed automatically for another twelve-month period from January 1, 2015 to *December 31, 2015*....”⁶⁹

Finally, her argument is contrary to the plain text of the lease:

The initial term of the Lease shall be 12 months. The first month of the lease shall be the **calendar month** during which initial tenancy commences. Where tenancy commences after the first day of the month, the first month rent shall be pro-rated accordingly.⁷⁰

⁶⁸ *Ruddach v. Don Johnston Ford, Inc.*, 97 Wn. 2d 277, 281, 644 P.2d 671, 673 (1982); *Fuqua v. Fuqua*, 88 Wn. 2d 100, 105, 558 P.2d 801, 804 (1977).

⁶⁹ CP 44. (Emphasis added).

⁷⁰ CP 324.

This lease, like most leases, started and ended at the beginning and end of the month for administrative convenience. The tenant may move in after the lease starts (and rent is pro-rated accordingly) but the move-in date does not change the term.

D. BRINGING AN UNLAWFUL DETAINER LAWSUIT DOES NOT VIOLATE FEDERAL LAW.

Kimbra argues this unlawful detainer action violates federal law because federal law prohibits a housing authority from having a lease that allows the initiation of suit without notice – “thus preventing the tenant from defending against the lawsuit.”⁷¹ This issue was not raised in the trial court. It should not be considered here. But even if the Court considered it, her claim has no merit.

Housing Kitsap’s lease with Kimbra has no such provision. And Kimbra *was* given notice of the termination.⁷² That notice indicated she had a right to defend the action in a court; that she could make a reply to the landlord; that she could request a grievance hearing; that she could examine documents; and that if she did not comply, an unlawful detainer action

⁷¹ CP 7-28.

⁷² CP 319-322.

would be commenced.⁷³ This is all that is required under 42 USC 1437(l) and 24 CFR 966.

Kimbra was given proper notice under federal law.

E. JUDGE HULL'S REASONING WAS SOUND.

Kimbra challenges Judge Hull's reasoning in denying her motion to dismiss.⁷⁴ Because this Court's review is *de novo*, Judge Hull's rationale is not dispositive. But his analysis is correct.

Judge Hull correctly noted that Housing Kitsap chose not to issue a ten-day notice to comply or vacate under state law.⁷⁵ Instead, it issued a termination notice under federal law.⁷⁶ Under state law this notice did not make Kimbra guilty of unlawful detainer. But it prevented automatic renewal of the lease.

Kimbra's focus on Judge Hull's reasoning exposes the flaw in hers. She claims that "the only permissible exception to automatic renewal is noncompliance with community service requirements."⁷⁷ But this cannot be true because 42 USC §1437(l) allows for lease termination for various reasons, including serious or repeated lease violations. The obvious

⁷³ CP 34.

⁷⁴ BA 29-33.

⁷⁵ RCW 59.12.030(4)

⁷⁶ 42 USC §1437d; 24 CFR 966.

⁷⁷ BA 31.

implication from the federal statute is that a terminated lease will not automatically renew.

Kimbra claims that “Judge Forbes compounded Judge Hull’s error by refusing to consider jurisdictional arguments on the mistaken assumption that she lacked the power or authority to reconsider an interlocutory decision by another Superior Court judge.”⁷⁸ But Judge Forbes did not do so. While she was reluctant to reconsider another judge’s decision, she reviewed the arguments and came to the same conclusion as Judge Hull: because the lease terminated, it could not automatically renew.⁷⁹

F. HOUSING KITSAP’S ADMINISTRATIVE GRIEVANCE PROCEDURE WAS NOT SUBSTITUTED FOR STATE COURT PROCESS.

Kimbra cites to a Missouri Court of Appeals case for the proposition that the decision of a hearing officer has no precedential effect.⁸⁰ Housing Kitsap does not dispute the principal in *Housing Authority of St. Louis County v. Lovejoy*⁸¹ that a housing grievance hearing has no collateral estoppel effect on a court in an eviction proceeding. But Housing Kitsap

⁷⁸ BA 31.

⁷⁹ VRP April 8, 2015 at 5-6.

⁸⁰ BA 40.

⁸¹ 762 S.W.2d 843 (988).

made no such claim, the trial court did not base its decision on the hearing officer's decision, and it did not find a preclusive effect.

Federal regulations govern the effect of the hearing officer's decision.⁸² Had the hearing officer decided against Housing Kitsap, it would have been bound by that decision.⁸³ But Kimbra had a right to, and was allowed, judicial review of the hearing officer's decision under 944 CFR §966.57 (c):

A decision by the hearing officer, hearing panel, or Board of Commissioners in favor of the PHA or which denies the relief requested by the complainant in whole or in part shall not constitute a waiver of, nor affect in any manner whatever, any rights the complainant may have to a trial de novo or judicial review in any judicial proceedings, which may thereafter be brought in the matter.

Courts generally do not interpret this provision to grant a substantive right to trial de novo or judicial review, but interpret it to mean that if a tenant has a right to judicial review or a trial de novo, the hearing officer decision does not affect those rights.⁸⁴ Here, in an abundance of caution, the trial court reviewed the hearing officer's decision, found it was well-

⁸² 24 CFR 966.57.

⁸³ 24 CFR 966.57(b).

⁸⁴ See *Sinisgallo v. Town of Islip Hous. Auth.*, 865 F. Supp. 2d 307, 325 (E.D.N.Y. 2012) for a discussion of the rights involved. In short, some states allow a trial de novo; others, like New York, only provide for limited judicial review of the hearing officer's decision.

grounded in fact, and additionally made a *de novo* factual determination that supported the termination.⁸⁵

Housing Kitsap did not claim the findings in the administrative hearing were binding on the trial court. But the trial court found that the findings by the hearing officer were supported by substantial evidence, and made the same findings independently. Kimbra received ample due process.

G. THE PROCEDURES USED TO EVICT KIMBRA WERE
FAIR AND RATIONAL

Kimbra complains that Housing Kitsap did not abide by “elementary standards of fairness.”⁸⁶ Not so. Federal law allows Housing Kitsap to evict for serious lease violations. It is undisputed that Mr. Levingston living in the unit was a serious lease violation. Kimbra received an informal settlement of grievance hearing. At that conference she denied Mr. Levingston was living there. It was not true. This is uncontested on appeal.

Kimbra was then afforded notice, and an opportunity for a hearing before a neutral decision maker. Again she denied he was living with her. The hearing officer found to the contrary.⁸⁷

⁸⁵ CP 278.

⁸⁶ BA 44.

⁸⁷ CP 316-318.

Kimbra was afforded a full trial in Superior Court. She again denied he was living there.⁸⁸ The trial court found he was living there. At this point, under the unchallenged findings, it is beyond dispute that Kimbra violated her lease and lied about it.

Kimbra claims that “the trial court erred in adopting findings of Housing Kitsap’s internal administrative public housing grievance hearing.”⁸⁹ But she fails to address how this was error, or to cite any facts found by the trial court that contradict the hearing officer’s decision. She cited no facts that rebut the trial court’s findings that the neutral factfinder considered the evidence and that the decision was based substantial evidence, and not an abuse of discretion. And the trial court made the same findings *de novo*. Kimbra is simply wrong.

H. ATTORNEY’S FEES.

A prevailing party is entitled to fees on appeal if permitted by contract or statute.⁹⁰ Here, Housing Kitsap is entitled to its fees on both

⁸⁸ CP 41; VRP 150.

⁸⁹ BA 2.

⁹⁰ RAP 18.1; *Bayo v Davis*, 127 Wn. 2d 256, 264, 897 P.2d 1239 (1995); RCW 4.84.330, *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn.App. 73, 96 P.3d 454 (2004).

theories. Both RCW 59.18.290(2) and the lease⁹¹ provide for prevailing party fees.

If Housing Kitsap prevails, the Court should award it fees and costs on appeal.⁹²

V. CONCLUSION

Housing Kitsap's lease with Kimbra terminated under federal law. It could not renew. Its term then expired. Housing Kitsap then properly commenced this action. This Court should affirm and award Housing Kitsap its fees and costs on appeal.

Respectfully submitted this 24th day of March, 2016.

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⁹¹ CP 25.

⁹² RAP 18.1.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

KITSAP COUNTY CONSOLIDATED
HOUSING AUTHORITY d/b/a HOUSING
KITSAP,

Plaintiff,

vs.

KIMBRA HENRY-LEVINGSTON

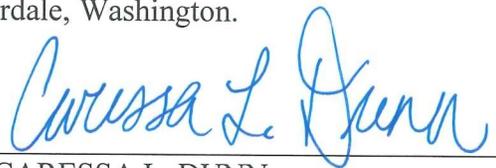
Court of Appeals No. 47696-7-II

DECLARATION OF OVERNIGHT
MAILING

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 24th day of March, 2016, via overnight mailing I caused delivery of copies of the following documents: BRIEF OF RESPONDENT

To: Attorney for Appellant
Stephen J. Parsons
Northwest Justice Project
715 Tacoma Avenue S.
Tacoma, WA 98402

Dated this 21st day of March, 2016 at Silverdale, Washington.



CARESSA L. DUNN