

No. 47696-7-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

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

Respondent

vs.

KIMBRA HENRY-LEVINGSTON

Appellant

BRIEF OF APPELLANT

NORTHWEST JUSTICE PROJECT
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January 25, 2016

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TABLE OF CONTENTS

TABLE OF AUTHORITIESiv-vii

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR2

 A. Assignments of Error2

 B. Issues Pertaining to Assignments of Error2

III. STATEMENT OF THE CASE4

IV. ARGUMENT.....18

 A. The Trial Court Should Have Dismissed This Unlawful Detainer
 Action.....18

 1. Unlawful Detainer Actions Must Be Predicated on One of the
 Subsections of RCW 59.12.030.....19

 2. Unlawful Detainer Jurisdiction is Limited, and Landlords
 Must Strictly Comply with the Statutory Requirements...19

 3. Kimbra’s Lease Did Not Expire at the End of a Specified
 Term within the Meaning of RCW 59.12.030(1).....22

 4. Federal Law Requires Public Housing Leases That
 Automatically Renew and do not Expire.....23

 a. The Only Lawful Exception to Automatic Renewal
 Does Not Apply and Was Not Alleged or Proved.24

 b. Housing Kitsap’s Attempted Inclusion of a Second
 Exception to Automatic Renewal of the Lease Is
 Contrary to Federal Law24

TABLE OF CONTENTS

5. Proceeding in a Lawsuit to Evict Kimbra Without an Unlawful Detainer Notice Violates Federal Law.....26

6. Kimbra’s Lease Did Not Expire on 12/31/14 Because She Was Not Provided a 12-Month Term.....27

7. Housing Kitsap Cannot Maintain This Action Under Any Subsection of RCW 59.12.030.....28

B. The Trial Court Decision to Allow This Action to Proceed Under RCW 59.12.030(1) Was Clearly Erroneous.....29

1. The Requirement That Housing Authorities Comply With Federal Law When Terminating a Public Housing Tenancy Does Not Preempt State Law Notice Requirements.....31

2. Without Having Provided Any Notice with an Opportunity to Cure, Housing Kitsap Cannot Maintain This Action....33

3. Housing Kitsap Must Comply with Both State Law and Federal Law in Terminating Kimbra’s Public Housing Tenancy.....36

4. Housing Kitsap Could Have Commenced This Action in Ejection Rather Than Unlawful Detainer.....38

5. Public Housing Administrative Grievance Hearings Cannot Substitute for State Court Eviction Procedures.....40

6. This Action Cannot Be Distinguished from Terry Based On Whether a Public Housing Grievance Hearing was Provided.....41

C. The Procedure Used by Housing Kitsap To Evict Kimbra Was Neither Fair Nor Rational.....43

D. Attorney’s Fees.....45

E. Conclusion.....46

TABLE OF AUTHORITIES

Washington Cases

Angelo Property Co., LP v. Hafiz,
167 Wn. App. 789, 274 P.3d 1075 (2012)..... 19, 21, 35

Christensen v. Ellsworth,
162 Wash.2d 365, 372, 173 P.3d 228 (2007).....20, 21

Community Investments v. Safeway,
36 Wn.App. 34, 671 P.2d 289 (1983).....27

Council House v. Hawk,
136 Wn. App. 153, 147 P.3d 1305 (2006).....46

Geters v. Baytown Housing Authority,
430 S.W.3d 578 (2014).....23

Goldberg v. Kelly,
397 U.S. 254, 90 S.Ct. 1011 (1970).....42

Hall v. Feigenbaum,
178 Wn.App. 811, 827, 319 P.3d 61 (2014).....46

Housing Authority of Everett v. Terry,
114 Wn.2d 558, 789 P.2d 489 (1990).....1, 10, 20-21, 28-33, 34-38, 40-44

Housing Authority of King Co. v. Saylor,
19 Wn. App. 871, 578 P. 2d 76 (1978)..... 44

Housing Authority v. Silva,
94 Wn.App. 731, 972 P.2d 952 (1999).....35-38

Housing Authority of Seattle v. Bin,
163 Wn.App. 367, 260 P.3d 900 (2011).....21, 46

IBF, LLC. v. Heuft,
141 Wn.App. 624, 174 P.3d 95 (2007).....28

In re Estate of Jones,
170 Wn.App. 594, 287 P.3d 610 (2012).....31

TABLE OF AUTHORITIES

Kelly v. Schorzman,
3 Wn.App. 908, 912-13, 478 P.2d 769 (1970).....36

McCrae v. Way,
64 Wn.2d 544, 392 P.2d 827 (1964).....21

Munden v. Hazelrigg,
105 Wn.2d 39, 711 P.2d 295 (1985).....22

Petch v. Willman,
29 Wn.2d 136, 185 P.2d 992 (1947).....39

Smith v. Seattle Camp 69, Woodmen of the World,
57 Wash. 556, 107 P. 372 (1910).27, 28

Soper v. Clibborn,
31 Wn. App. 767, 644 P.2d 738 (1982).....46

Sowers v. Lewis,
49 Wn.2d 891, 307 P.2d 1064 (1957).....21,34, 36

Sullivan v. Purvis,
90 Wn. App. 456, 966 P.2d 912 (1998)35-36

Turner v. White,
20 Wn. App. 290, 579 P.2d 410 (1978).....19

Tuschoff v. Westover,
65 Wn.2d 69, 395 P.2d 630 (1964).....22

Wilson v. Daniels,
31 Wn.2d 633, 198 P.2d 496 (1948)20, 34

Woodward v. Blanchett,
36 Wn.2d 27, 216 P.2d 228 (1950)34

Young v. Riley,
59 Wn.2d 50, 365 P.2d 769 (1961).....21

Other Jurisdictions

TABLE OF AUTHORITIES

Housing Authority of St. Louis County v. Lovejoy,
762 S.W.2d 843 (Mo.Ct.App.1988)..... 40-41

Kennedy v. Andover Place Apartments,
203 S.W.3d 495 (2006).....23, 24

McQueen v. Druker,
317 F.Supp. 1122 (D. Mass. 1970).....43

Rudder v. United States,
226 F.2d 51, 53 (1955).....44

Saxton v. Housing Authority of City of Tacoma,
1 F.3d 881 (9th Cir. 1993).....44

Thorpe v. Housing Authority of Durham,
386 U.S. 670, 678, (1967).....44

U.S. v. Smith,
389 F.3d 944, 949 (9th Cir.2004).....32

Yesler Terrace Community Council et al. v. Cisneros,
37 F.3d 442 (9th. Cir. 1994) (“Yesler Terrace I”).....42

Yesler Terrace Community Council et al. v. Cisneros,
No. C96-1629C (“Yesler Terrace II”).....42

Constitutional Provisions

U.S. Const. Amend. XIV § 1 and Wash. Const. Art. 1, § 12..... 44

Statutes

RCW 35.825

RCW 59.12.030.....1-2, 4, 10, 18-21, 28, 33, 36, 40-41

RCW 59.12.030(1).....1-4, 10, 18, 22-24, 26, 28-30, 43, 45

TABLE OF AUTHORITIES

RCW 59.12.030(3).....	35
RCW 59.12.030(4).....	2, 7, 22, 28, 33-34, 36-38, 43
RCW 59.18.290(2).....	45-46
RCW 59.18.400.....	44
RCW 7.28.....	38, 39
RCW 7.28.010.....	39
42 U.S.C. § 1437d(l)(1).....	3, 18-19, 23-25
42 U.S.C. § 1437d(k).....	42

Regulations

24 C.F.R. § 966.....	5
24 C.F.R. § 966.4(a)(2)(i).....	3, 18, 23, 25, 27
24 C.F.R. Part 5.....	5

Periodicals, Treatises, and Other Authorities

1C <i>Wash.Prac.</i> 88.43.....	46
1C Kunsch, <i>Wash. Prac.</i> § 89 (4 th Ed. 1977).....	39
1C Kunsch, <i>Wash. Prac.</i> § 89.2, at 266 (4 th Ed. 1977).....	40
RAP 12.8.....	46

I. INTRODUCTION

Kitsap County Consolidated Housing Authority, d/b/a Housing Kitsap (“Housing Kitsap”) evicted Kimbra Henry-Levingston (“Kimbra”¹) and her three young children from public housing without providing any opportunity to cure an alleged lease violation and without issuing a notice complying with Washington’s Unlawful Detainer Act, RCW 59.12.030. Housing Kitsap argued, and the trial court agreed, that no unlawful detainer notice was required under RCW 59.12.030(1) because Housing Kitsap had “elected” not to renew Kimbra’s 12-month lease. However, the lease and federal law governing public housing tenancies require that Kimbra’s lease shall automatically renew for successive terms of twelve months and has no expiration date. Because Kimbra’s lease automatically renewed, the trial court should have ruled that Kimbra’s tenancy did not terminate without notice at the end of a specified lease term within the meaning of RCW 59.12.030(1). The trial court also erred by allowing Housing Kitsap to substitute a federal public housing notice for a state law notice in an unlawful detainer action in violation of State law, contrary to Washington Supreme Court precedent. *Housing Authority of Everett v.*

¹ The Appellant is referred to throughout as “Kimbra” rather than “Ms. Henry-Levingston” for ease of use and because her name changed from Kimbra Henry to Kimbra Henry-Levingston during her tenancy.

Terry, 114 Wn. 2d 558, 789 P.2d 745 (1990). The trial court further erred in not dismissing this action due to failure to provide a notice that complies with RCW 59.12.030, which is required for the court to exercise its jurisdiction in this special unlawful detainer proceeding.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred in entering judgment and ordering the issuance of a writ of restitution against the Appellant on April 8, 2015.

2. The trial court erred in concluding that the public housing lease expired by its terms, that it did not automatically renew, and that the tenancy terminated without notice at the end of a specified lease term within the meaning of RCW 59.12.030(1).

3. The trial court erred in not dismissing this action due to Respondent's failure to provide an unlawful detainer notice as required under RCW 59.12.030.

4. The trial court erred in not dismissing this action due to Respondent's failure to provide an opportunity to cure the alleged violation of a lease covenant as required under RCW 59.12.030(4).

5. The trial court erred in adopting findings of Housing Kitsap's internal administrative public housing grievance hearing.

B. Issues Pertaining to Assignment of Error

1. Whether Housing Kitsap's inclusion in its public housing lease of a second exception to automatic renewal of the lease violates 42 U.S.C. § 1437d(l)(1) and 24 C.F.R. § 966.4(a)(2)(i). (Yes)

2. Whether Housing Kitsap's inclusion in its public housing lease of an unauthorized exception to automatic renewal of the lease in violation of Federal law is an unreasonable term under 42 U.S.C. § 1437d(l)(2). (Yes)

3. Whether the unauthorized exception to automatic renewal of the lease Housing Kitsap inserted in its public housing lease in violation of Federal law is enforceable. (No)

4. Whether Kimbra's lease did failed to automatically renew due to noncompliance with community service requirements. (No)

5. Whether the lease automatically renewed for an additional twelve months under Part I, Section II(a) of the lease. (Yes)

6. Whether the lease automatically renewed for an additional twelve months under 42 U.S.C. 1437d(l)(1) and 24 C.F.R. § 966.4(a)(2)(i). (Yes)

7. Whether the lease expired at the end of a specific term within the meaning of RCW 59.12.030(1). (No)

8. Whether the court erred in concluding that Kimbra's lease expired by its terms on December 31, 2014, within the meaning of RCW 59.12.030(1). (Yes)

9. Whether the trial court had subject matter jurisdiction to proceed with this unlawful detainer action under any provision of RCW 59.12.030. (No)

10. Whether Housing Kitsap's failure to provide a notice under RCW 59.12.030 prevents the trial court from having subject matter jurisdiction to proceed with this unlawful detainer action. (Yes)

11. Whether Housing Kitsap was required to provide at least one notice with an opportunity to cure alleged lease breaches before it could terminate Kimbra's lease and tenancy for noncompliance under State law. (Yes)

12. Whether a federal termination of tenancy notice and a federally-mandated internal Housing Authority grievance procedure can be a substitute for compliance with unlawful detainer procedures and proper notice under RCW 59.12.030 in an unlawful detainer action. (No)

III. STATEMENT OF THE CASE

Housing Kitsap² is a public housing authority that owns and

² Housing Kitsap is public corporation, established pursuant to the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974, 42

manages low income housing, including public housing, in Kitsap County. Housing Kitsap owns and manages the Nollwood Apartments, a public housing apartment complex with 48 apartments. RP 04/06/15, Vol. I, 73. Like every other public housing authority that owns and manages public housing, Housing Kitsap must operate its public housing units pursuant to an annual contributions contract with the Department of Housing and Urban Development (“HUD”), and in compliance with 42 U.S.C. §§ 1437 and HUD regulations including 24 C.F.R. § 960, 24 C.F.R. § 966 and 24 C.F.R. Part 5.

Kimbra and her three young sons became tenants at the Nollwood Apartments in January 2014 after six years on Housing Kitsap’s public housing waitlist. Ex. 5, CP 326-47; RP 04/06/15, Vol. II, 138; RP 04/06/15, Vol. I, 31. Kimbra executed her lease with Housing Kitsap on January 10, 2014. Ex. 5, CP 326-47. The lease has an initial twelve-month term that renews automatically for successive twelve month terms. Ex. 5, CP 326-47. The lease provides that the amount of Kimbra’s monthly rent was \$26 per month and (as with all public housing tenants) was based on her income. Ex. 5, CP 345.

Notice to Terminate Tenancy

U.S.C. §§1437 et seq. and regulations promulgated thereunder, and pursuant to the Housing Authorities Law, Chapter 35.82 RCW.

On November 26, 2014, Housing Kitsap issued Kimbra a 30-Day Notice to Terminate Tenancy (Notice of Adverse Action). Ex. 4, CP 320-25. Stating that Kimbra's tenancy would terminate effective December 31, 2014, the notice cited as grounds for termination three alleged breaches of the lease that constitute "serious or repeated violations of the material terms of the lease." Ex. 4, CP 320-325. First, the notice alleged: that Kimbra had permitted Gregory Levingston to reside in the apartment since January 2014; that Kimbra married Mr. Levingston in May 2014 without notifying Housing Kitsap of the marriage; that Kimbra and Mr. Levingston used Kimbra's address on their marriage license; that Mr. Levingston is a level 1 sex offender³ and that he used Kimbra's address as his registered address with the Department of Corrections. Ex. 4, CP 320-325.

Second, the notice alleged that Kimbra's utility account with Puget Sound Energy ("PSE") was closed and sent to collections in June 2014, that the account for Kimbra's address was in the name of Gregory

³ As a juvenile, Gregory Levingston was adjudicated guilty in 1992 of rape in the third degree, which under Washington law is a Class C Felony (RCW 9A.44.060) and a "non-violent offense" (RCW 9.94A.030(33) and (54)). RP 04/06/15, Vol. I, 139, CP 238-43. For persons convicted of Class C Felonies, the requirement to register can be removed by meeting the requirement of spending 10 consecutive years in the community without being convicted of a "disqualifying offence" and making application to the court. RCW 9A.44.140(3)) Federal law prohibits *admission* into public housing of any household that includes any individual who is subject to a *lifetime* registration requirement under a State sex offender registration program. 42 USC § 13663; 24 CFR § 960.204(4).

Levingston and that the utility allowance payment Housing Kitsap paid to PSE had been applied to Mr. Levingston's account. Third, the notice alleged that Kimbra's sister Ryen and Ryen's boyfriend had moved into Kimbra's apartment over the past weekend and had received mail at Kimbra's address.

The notice demanded that Kimbra surrender the premises by December 31, 2014, or a suit for unlawful detainer would be commenced. Ex. 4, CP 324. The notice provided no opportunity to cure the alleged lease violations. Ex. 4, CP 320-325. The notice did not state (in the language of RCW 59.12.030(4)) that in the alternative to surrendering possession, Kimbra may perform the condition or covenant and thereby save the lease from forfeiture. Ex. 4, CP 320-325. Prior to the November 26, 2014 notice, Housing Kitsap did not provide written or verbal notice that Kimbra may be in violation of any lease term and never provided Kimbra an opportunity to cure any alleged lease violation. RP 04/06/15, Vol. I, 45-46.

After stating that "each of the above actions are serious and/or repeated violations of a material term of your lease agreement and is grounds for termination of your tenancy," the notice recited several lease provisions that are allegedly "applicable to violations above." Ex. 4, CP 323. Following this recitation, the notice advised of rights required by

Federal law to be provided to public housing tenants including the right to request an informal settlement of grievance in accordance with the housing authority's grievance policy. Ex. 4, CP 325. The notice did not state that Kimbra had the right to be represented by an attorney or other person during the grievance process. Ex. 4, CP 320-325. The notice stated that a request for an informal conference must be received no later than December 12, 2014. The notice did not allege that Kimbra violated any community service requirements. Ex. 4, CP 320-325.

Public Housing Grievance Proceedings

Kimbra asked to grieve the termination and participated pro se in an informal conference on December 5, 2014. Ex. 7, CP 358-59. Following the informal conference, Housing Kitsap prepared a written Informal Settlement Decision dated December 5, 2014, which upheld the termination decision effective December 31, 2014, and advised Kimbra of her right to request a formal hearing. Ex. 7, CP 358-59.

Kimbra submitted a written request for a formal grievance hearing and represented herself pro se at a hearing on December 16, 2014. Ex. 3, CP 316-319. The hearing officer, an employee of the Bremerton Housing Authority, prepared a written hearing decision dated December 21, 2014, upholding the termination and stating that Housing Kitsap "may proceed with the termination of tenancy adhering to landlord/tenant law." Ex. 3,

CP 316-319.

Unlawful Detainer Action: Commencement; Show Cause Hearing and Motions to Dismiss

Housing Kitsap filed this unlawful detainer action on January 9, 2015, and a show cause hearing was scheduled for January 23, 2015. CP 1-34; CP 38-39. After Kimbra obtained counsel and filed an Answer, Affirmative Defenses and Motion to Dismiss, the hearing was continued to January 30, 2015. CP 54-55; CP 43-52. During the show cause hearing, Housing Kitsap abandoned its request for a pretrial writ of restitution and agreed that the matter should be dismissed or set for trial. RP 1/30/15, 3. Judge Kevin Hull declined to dismiss the action and told the parties to set the matter for trial. RP 1/30/15, 3.

The trial was scheduled for February 23, 2015. CP 114. Both parties submitted their trial briefs on Friday February 20, 2015. CP 115; CP 186. When the case was called for trial on the morning of February 23, 2015, Kimbra's attorney asked as a preliminary matter that the court hear argument under CR 12(h)(3) on whether the court had subject matter jurisdiction to proceed in this unlawful detainer action or should dismiss the action. RP 02/23/2015, 3. After hearing oral argument from both parties, Judge Hull acceded to Housing Kitsap's request to reserve ruling and allow additional briefing. RP 28, 02/23/2015; CP 211-17; CP 218-26.

Judge Hull denied the motion to dismiss on March 16, 2015 on the ground that Housing Kitsap had a right, under the lease, to terminate the lease and tenancy for noncompliance without providing any opportunity to cure or notice under RCW 59.12.030. RP 03/16/15, 1-11. Citing *Housing Authority of Everett v. Terry* as authority, Judge Hull ruled that Housing Kitsap had three options in terminating Kimbra's public housing lease and tenancy: unlawful detainer; ejectment or administrative public housing grievance procedure. RP 03/16/15, 7-8 He ruled that, having elected to provide the grievance procedure, Housing Kitsap "can escape the intended policy of the state legislature to provide the opportunity to cure." RP 03/16/15, 9. He ruled that Housing Kitsap could proceed under RCW 59.12.030(1). RP 03/16/15, 5; CP 236-37.

Trial was rescheduled for April 6, 2015. CP 228. Judge Hull did not sign an order denying the motion to dismiss until after trial had begun on April 6, 2015. RP 04/06/15, Vol. I & II; CP 236-37.

The trial resumed on April 6, 2015, with Judge Jennifer Forbes presiding. RP 04/06/15, Vol. I & II. Kimbra's attorney again attempted to argue that the Court lacked jurisdiction to proceed in this unlawful detainer action, because the lease renewed automatically and did not expire by its terms, and because Housing Kitsap did not serve any unlawful detainer notice under RCW 59.12.030. RP 04/06/15, Vol. I, 6-8.

Judge Forbes, however, refused to hear this argument believing she did not have the authority to “overrule” Judge Hull. RP 04/06/15, Vol. I, 9.

Unlawful Detainer Action – Trial Testimony

During the trial, the Court heard testimony from three of Housing Kitsap’s employees, Megan Hastings, Holly Hawes, and Bernard Goldbeck, and from Kimbra and her mother Kim Michelotti. Housing Kitsap’s Public Housing Specialist Megan Hastings testified that her responsibilities include wait list maintenance, screening for admission, leasing up an applicant to a tenant status, and processing re-certifications and interim changes of circumstances. RP 04/06/15, Vol. I, 31. When she met with Kimbra to go over the lease, Mr. Levingston was present and was introduced as the father of Kimbra’s three children. RP 04/06/15, Vol. I, 34-35. Ms. Hastings explained that Mr. Levingston was not screened because Kimbra denied that he was going to be part of the household or added to the lease. RP 04/06/15, Vol. I, 34. During this meeting, Kimbra was in a wheelchair. RP 04/06/15, Vol. I, 34.

Kimbra testified that during and after the time she moved into her apartment, she needed assistance with activities of daily living and taking care of her children because she was in a wheelchair. RP 04/06/15, Vol. II, 141. At the time, she was recovering from a broken leg and ankle. RP 04/06/15, Vol. II, 141. She also testified that she had been diagnosed with

fibromyalgia, and her symptoms included fatigue, pain when touched, confusion and forgetfulness. RP 04/06/15, Vol. II, 141. The leg didn't heal properly, and she had an operation in July of 2014 which made it difficult for her to care for her children, to clean and to drive. RP 04/06/15, Vol. II, 141. Kimbra testified that because of her health problems, it was necessary for her to rely on help from others, including her parents, her sister Ryen, some friends and from Mr. Levingston. RP 04/06/15, Vol. II, 141. She testified that she had applied for disability benefits and was awaiting a decision. RP 04/06/15, Vol. II, 142.

On May 15, 2014, Kimbra Henry married the father of her three children, Gregory Levingston. RP 04/06/15, Vol. I, 39, Vol. II, 139. Although Kimbra did not report the marriage to Housing Kitsap, Ms. Hastings heard about it, obtained a copy of the marriage certificate, and learned that it listed Kimbra's address as the address for both Kimbra and Gregory. RP 04/06/15, Vol. I, 37-39. She contacted Kimbra and asked her to bring Mr. Levingston with her to the recertification appointment. RP 04/06/15, Vol. I, 39. When Ms. Hastings confronted Kimbra about her getting married but not listing Gregory's name on her recertification papers, Kimbra explained that that she believed there was no change of household composition or income to report because Mr. Levingston did not move in with her and the children and because he had no income. RP

04/06/15, Vol. I, 40. Ms. Hastings testified that it was at the time of the recertification appointment that she learned that Mr. Levingston was required to register as a Level 1 sex offender, and that he had used Kimbra's address at the Nollwood Apartments as his own address when registering with the Department of Corrections. RP 04/06/15, Vol. I, 39.

Throughout the trial, and the earlier grievance process, Kimbra maintained that Mr. Levingston never resided with her in the apartment or kept his personal possessions on the premises. 04/06/15, Vol. II 153; Ex 3, CP 317; Ex 7, CP 359. Her mother, Kim Michelotti, testified that she visited often but did not see Mr. Levingston or his belongings in the apartment. 04/06/15, Vol. II 155-56. Bernard Goldbeck, the Nollwood Apartments maintenance man who resides on site, testified that he saw Mr. Levingston around the apartment complex four to five days a week, at various times of day or night, including on the basketball court and coming out of Kimbra's apartment. RP 04/06/15, Vol. I, 70. Mr. Goldbeck also testified that Mr. Levingston came to his apartment two times to request repairs and that he answered the door at Kimbra's apartment on several occasions when Mr. Goldbeck went to perform a work order. RP 04/06/15, Vol. I, 70. Holly Hawes, Housing Kitsap's Housing Manager for Federal Programs, testified that as of August 18, 2014, Mr. Levingston was no longer registered to Kimbra's address. RP 4/6/15, Vol. II 115.

Kimbra testified that she did not give permission for Mr. Levingston to use her address to register with the Department of Corrections and did not learn that he had done so until she received the November 26, 2014 notice.

Although her rent was deeply subsidized under the public housing program, Kimbra experienced serious financial difficulties when her income was reduced to zero a few months after she moved in. RP 04/06/15, Vol. II, 142. She had been receiving financial assistance under the Temporary Assistance for Needy Families (“TANF”) Program. RP 04/06/15, Vol. II, 142. However, TANF assistance is time-limited, and Kimbra stopped receiving this assistance effective April 1, 2014. RP 04/06/15, Vol. I, 51, Vol. II, 142. She informed Housing Kitsap of this change in financial circumstances, and consequently her rental obligation was reduced from \$26 to \$0 effective May 1, 2014. RP 04/06/15, Vol. I, 51. Another consequence of her reduced income was that Housing Kitsap began paying \$82.00 per month to PSE towards Kimbra’s utility bill under public housing utility allowance rules. RP 04/06/15, Vol. I, 51, Vol. I, 97.

Kimbra testified that she fell behind on her utility bill and received a shut off notice from PSE. RP 04/06/15, Vol. II, 143. The \$100 she received in emergency assistance from a charitable organization was insufficient to prevent the threatened shut off. RP 04/06/15, Vol. II, 142. In order to protect her children from being without utilities, she closed her

account with PSE in the name of Kimbra Henry in June 2014, and opened a new PSE account under the name of Gregory Levingston and Kimbra Levingston. RP 04/06/15, Vol. II, 142. Kimbra testified that once she was notified by the November 26, 2014 notice that what she did regarding the utility account was a possible lease violation, she changed the utility account to being solely in her name by the end of December 2014.

In November 2014, Kimbra allowed her younger sister, Ryen Michelotti, to use her mailing address to receive important mail from the Social Security Administration and DSHS because Ryen had no secure mailbox. RP 4/6/15 Vol. II, 153. Ms. Hastings testified that when Kimbra asked to add Ryen and Ryen's boyfriend to the lease in November 2014, she told Kimbra that they must first come into the office, fill out an application and pass screening. 04/06/15, Vol. I, 40, 62. On November 17, 2014, Ryen submitted two letters dated November 14, 2014 and addressed to Ryen at Kimbra's address, one stating that she would receive a Social Security card within two weeks and the other a DSHS award letter. RP 04/06/15, Vol. I, 65-66. Kimbra testified that Ryen and her boyfriend stayed with her from approximately the 18th or 19th through the 30th of November 2014. RP 4/6/15 Vol. II, 153. Ms. Hastings testified that Housing Kitsap gave no consideration to this request because by then they had learned of Kimbra's marriage. 04/06/15, Vol. I, 66. Instead, an

allegation that Ryen was an unauthorized occupant was added to the grounds for termination in the notice to terminate that was already being prepared. RP 04/06/15, Vol. I, 66. Kimbra denied that Ryen and her boyfriend stayed at her apartment for more than the 14-days allowed by the lease for guests. 04/06/15, Vol. II 153.

After Housing Kitsap presented its evidence and rested its case, Kimbra's attorney again moved for dismissal under CR 41(b)(3), CR 12(h)(3), CR 12(b)(1) and CR 12(b)(6) on the ground that Housing Kitsap had not shown the right to relief, because it cannot avail itself of the Court's unlawful detainer subject matter jurisdiction. RP 04/06/15, Vol. II, 135-36. Judge Forbes did not allow the argument and ruled against dismissal again citing her lack of authority to "overrule" Judge Hull. RP 04/06/15, Vol. II, 136. Testimony was concluded by the end of the day on April 6, 2015, and Judge Forbes announced her factual findings orally. RP 04/06/15, Vol. II, 186-89.

Judge Forbes announced her conclusions of law Wednesday April 8, 2015. CP 235; RP 04/08/15, 1-16. Judge Forbes ruled that because Housing Kitsap "had opted to pursue, essentially, a federal process which allowed for this informal and formal administrative review . . . there was no cure opportunity, which is available under state law." She further concluded that because Judge Hull had determined that "the administrative

hearing and the decision of the administrative hearing officer, finding that there was a material violation of the lease, constituted, essentially, a termination of the lease such that . . .it did not automatically renew.”
RP 04/08/15, 5.

Judge Forbes entered Findings, Conclusions, Judgment and Order Granting Writ of Restitution on April 8, 2015. CP 276-280. Judge Forbes, adopted the findings of the Housing Kitsap’s public housing grievance hearing officer with the exception that she found that Housing Kitsap did not prove that Kimbra allowed a third party (her sister) to use her address for the purpose of applying for federal benefits. CP 278. Judge Forbes also found that Kimbra had committed serious material breaches of her lease. CP 278. Judge Forbes found that Mr. Levingston had resided at the premises for more than fourteen days and that Kimbra had failed to pay her utility bill for electricity supplied by PSE and that these were both serious and material violations of her lease. CP 279. Judge Forbes did not find that utilities were shut off to the unit. RP 04/08/15, 7-8. Judge Forbes found (concluded) that Housing Kitsap terminated Kimbra’s lease under federal law by giving notice and providing a grievance hearing. CP 279. She further found that the decision of the hearing officer was supported by substantial evidence, and was not arbitrary and capricious. CP 279. She thus ruled that the lease did not renew and the lease and tenancy expired

on December 31, 2014. CP 279. Judge Forbes refused to stay the writ or set a bond amount, and Kimbra vacated the premises in compliance with the court's order. A judgment for attorney's fees was entered in favor of Housing Kitsap on April 24, 2015. CP 308-09.

Kimbra's attorneys filed a timely motion for reconsideration under CR 59(a)(1), (7), (8) and (9), seeking to vacate the judgment, quash the writ, restore Kimbra to possession and enter judgment of dismissal in her favor. CP 285-307. Judge Forbes entered an order on May 5, 2015, denying the motion without a hearing. CP 312.

IV. ARGUMENT

A. The Trial Court Should Have Dismissed This Unlawful Detainer Action.

The trial court should have dismissed this case because subject matter jurisdiction in unlawful detainer actions must be predicated upon one of the subsections of RCW 59.12.030. Housing Kitsap contended, and the trial court agreed, that RCW 59.12.030(1) applies. But RCW 59.12.030(1) cannot apply because public housing leases do not expire by their terms. Instead, the term of the lease is endless, renewing automatically every twelve months. 42 U.S.C. § 1437d(l)(1); 24 C.F.R. § 966.4(a)(2)(i). The only lawful exception to automatic renewal, noncompliance with community service requirements, did not apply and

was not alleged or proved. 42 U.S.C. § 1437d(1)(1); 24 C.F.R. § 966.4(a)(2)(ii). None of the other subsections of RCW 59.12.030 apply to the facts of this case. It is undisputed that no unlawful detainer notice under RCW 59.12.030 was ever served on Kimbra. It is undisputed that Kimbra was never provided an opportunity to cure any of the alleged lease violations.

1. Unlawful Detainer Actions Must Be Predicated on One of the Subsections of RCW 59.12.030

Subject matter jurisdiction in an unlawful detainer action is only possible if one of the seven jurisdictional prerequisites set forth in RCW 59.12.030 is present. *Turner v. White*, 20 Wn.App. 290, 579 P.2d 410 (1978); *Angelo Property Co., LP v. Hafiz*, 167 Wn.App. 789 (2012).⁴ Because none of the subsections of RCW 59.12.030 apply to the facts of this case and an unlawful detainer action must be predicated upon one of the subsections of RCW 59.12.030, the trial court erred in not dismissing this action.

2. Unlawful Detainer Jurisdiction is Limited, and

⁴ RCW 59.12.030 provides for five types of unlawful detainer notices and sets forth the seven ways that a tenant can enter into the status of unlawful detainer: (1) holding over after the expiration of a lease for a specified term; (2) failing to vacate after a twenty day notice to terminate a month to month tenancy; (3) failing to pay rent or vacate after a three day notice; (4) failing to cure a lease violation or vacate after a ten day notice; (5) failing to vacate after a three-day notice for waste, nuisance or unlawful business activities; (6) by entering as a trespasser and failing to vacate after a three day notice; (7) by committing or permitting gang-related activity at the premises.

**Landlords Must Strictly Comply with the
Statutory Requirements.**

Unlawful detainer actions are special expedited statutory proceedings to determine the right of possession of real property between a landlord and a tenant. *Christensen v. Ellsworth*, 162 Wash.2d 365, 372, 173 P.3d 228 (2007). They are summary in nature, in derogation of the common law, and must be strictly construed in favor of the tenant. *Housing Authority v. Terry*, 114 Wn.2d 558, 789 P.2d 489 (1990); *Wilson v. Daniels*, 31 Wn.2d 633, 198 P.2d 496 (1948). If the landlord elects to take advantage of the favorable expedited provisions of the unlawful detainer act, rather than use an action in ejectment, the landlord must strictly comply with its requirements. *Terry*, at 563-64. As expressed by a long line of Supreme Court cases, “[a]ny noncompliance with the statutory method of process precludes the superior court from exercising subject matter jurisdiction over the unlawful detainer proceeding.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007).

Service of a proper unlawful detainer notice under RCW 59.12.030, when required, is a “jurisdictional condition precedent” to commencing an

unlawful detainer action. *Christensen*, at 372, citing *Terry*, at 564–65, quoting, *Sowers v. Lewis*, 49 Wn.2d 891, 307 P.2d 1064 (1957).⁵

In an unlawful detainer action, the superior court sits as a special statutory tribunal, limited to deciding the primary issue of right to possession together with the statutorily designated incidents thereto, i.e., restitution and rent or damages. *McCrae v. Way*, 64 Wn.2d 544, 392 P.2d 827 (1964). It does not sit as a court of general civil jurisdiction with the power to hear and determine other issues. *Young v. Riley*, 59 Wn.2d 50, 365 P.2d 769 (1961). If the right to possession of real property is not at issue, or ceases to be at issue, there is no unlawful detainer jurisdiction.

⁵ Recent appellate decisions from Divisions I and II disagree with earlier Supreme Court language regarding the lack of unlawful detainer jurisdiction when there is a procedural defect such as insufficient notice or an improper summons. In these recent cases the appellate courts prefer to say that the superior court has jurisdiction to determine whether an unlawful detainer action may go forward but if a landlord does not follow the statutory unlawful detainer procedure, he cannot maintain an unlawful detainer action or avail himself of the superior court's jurisdiction. *MHM & F, LLC v. Pryor*, 168 Wn. App. 451, 461, 277 P.3d 62 (2012); *Housing Authority of Seattle v. Bin*, 163 Wash.App. 367, 376, 260 P.3d 900 (2011); *Tacoma Rescue Mission v. Stewart*, 155 Wn.App. 250, 254 n. 9, 228 P.3d 1289 (2010). A major concern of these courts appears to be the perceived unfairness of a litigant raising the lack of subject matter jurisdiction for the first time on appeal. See e.g., *Pryor* at 461. (A party “may not assert lack of subject matter jurisdiction as an excuse for avoiding his responsibility to preserve error.”) *Id.* at 461. Despite this evolving terminology, a court's obligation to dismiss an unlawful detainer action remains unaffected when a notice under RCW 59.12.030 is required and no such notice has been provided. Moreover, in *Angelo Property Co., LP v. Hafiz*, 167 Wn.App. 789 (2012), Division II of the court of appeals appears to have reverted to more traditional language regarding subject matter jurisdiction in unlawful detainer actions. In *Hafiz*, the trial court exceeded its unlawful detainer jurisdiction when it considered a constructive eviction counterclaim without first converting the unlawful detainer action into an ordinary civil action for damages. *Id.*

Tuschoff v. Westover, 65 Wn.2d 69, 395 P.2d 630 (1964). An unlawful detainer action may be converted into an ordinary civil action for damages, but only after possession ceases to be an issue. *Munden v. Hazelrigg*, 105 Wn.2d 39, 711 P.2d 295 (1985).

3. **Kimbra's Lease Did Not Expire at the End of a Specified Term within the Meaning of RCW 59.12.030(1).**

By bringing this unlawful detainer action under RCW 59.12.030(1), Housing Kitsap contends that the term of Kimbra's lease expired, and no unlawful detainer notice was required. The only reason for attempting to bring this unlawful detainer action under RCW 59.12.030(1), rather than RCW 59.12.030(4), was to prevent Kimbra from having any opportunity to cure the alleged lease violations described in the November 26, 2014 termination notice. RCW 59.12.030(1) provides that:

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 . . . *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 the expiration of the specified term or period*; (Emphasis added.)

Kimbra's public housing lease renews automatically and has no specific expiration date. Because Kimbra's lease automatically renewed

for successive twelve-month terms, the term for which the property was let did not expire at the end of a specified term within the meaning of RCW 59.12.030(1).

4. **Federal Law Requires Public Housing Leases That Automatically Renew and do not Expire.**

Public housing tenancies do not expire by their terms. Under federal law, public housing leases are initially for a twelve month term that renews automatically. Automatic renewal is mandatory. 42 U.S.C. § 1437d(1)(1) (“Each public housing agency *shall* utilize leases which— (1) have a term of 12 months and **shall be automatically renewed for all purposes . . .**”)(Emphasis added.); 24 C.F.R. § 966.4(a)(2)(i) (“The lease shall have a twelve month term. . . . [and] the *lease term must be automatically renewed* for the same period.”)(Emphasis added.)

If a housing authority uses a lease that does not expressly state that it automatically renews as required by Federal law, courts will apply the missing term and hold that the public housing lease automatically renewed by operation of federal law. See e.g. *Getters v. Baytown Housing Authority*, 430 S.W.3d 578 (2014); *Kennedy v. Andover Place Apartments*, 203 S.W.3d 495 (2006). The mere expiration of a lease term does not provide good cause for failure to renew a lease. *Getters*, at 583. Federally-subsidized landlords may not terminate or refuse to renew federally-

subsidized housing solely because the term of the lease has expired. *Kennedy*, at 497. RCW 59.12.030(1) cannot apply to the facts of this case because public housing leases automatically renew. It cannot provide the basis for Housing Kitsap to avail itself of the court's jurisdiction in an unlawful detainer action.

a. **The Only Lawful Exception to Automatic Renewal Does Not Apply and Was Not Alleged or Proved.**

The term of a public housing lease must automatically renew for *all* purposes except non-compliance with community service requirements. 42 U.S.C. § 1437d(l)(1); 24 C.F.R. § 966.4(a)(2). Public housing authorities must not renew a public housing lease if the tenant is in noncompliance with the community service requirements. 24 C.F.R. § 966.4(a)(2)(ii). For all other purposes, however, a public housing lease term renews automatically and does not expire by its terms. 42 U.S.C. § 1437d(l)(1); 24 C.F.R. § 966.4(a)(2).

The trial court made no finding, and Housing Kitsap made no allegation and presented no evidence, that Kimbra had failed to comply with any community service requirements.

b. **Housing Kitsap's Attempted Inclusion of an Unauthorized Exception to Automatic Renewal of the Lease Is Contrary to Federal Law.**

Housing Kitsap's attempted inclusion of an unauthorized exception to automatic renewal of the lease term for an additional twelve months is contrary to Federal law. 42 U.S.C. § 1437d(l)(1); 24 C.F.R. § 966.4(a)(2)(i). Housing Kitsap inserted an unauthorized exception in Part I, Section II(a) of the lease:

The initial term of the Lease shall be 12 months. . . . 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. Ex 5, CP 326.

Noncompliance with community service requirements is the only exception to automatic renewal of the lease authorized by Federal law, and Housing Kitsap cannot lawfully add other exceptions to automatic renewal not recognized by Federal law.

HUD regulations distinguish between the obligation of public housing authorities to use leases with a twelve-month lease term that automatically renews (24 C.F.R. 966.4(a)(2)(i)) and the ability of the housing authority to terminate the tenancy (24 C.F.R. 966.4(a)(2)(iii)) in accordance with 24 C.F.R. 966.4(l) for serious or repeated violations of the material terms of the lease.⁶ A lease term that conflicts with a Federal

⁶ 24 C.F.R. § 966.4(a)(2) Lease term and renewal.

(i) The lease shall have a twelve month term. Except as provided in paragraph (a)(2)(ii) of this section, the lease term must be automatically renewed for the same period.

statute and a mandatory HUD regulation is per se an unreasonable term or condition of the lease in violation of 42 U.S.C. 1437d(1)(2).⁷

5. Proceeding in a Lawsuit to Evict Kimbra Without an Unlawful Detainer Notice Violates Federal Law.

In addition to violating the requirement that public housing leases automatically renew except for noncompliance with community service requirements, a lease provision allowing a housing authority to proceed in an eviction lawsuit against a public housing tenant without notice, as permitted under RCW 59.12.030(1), violates 24 C.F.R § 966. Under 24 C.F.R § 966.6(d), housing authorities are prohibited from including in their leases any provision allowing that the housing authority “may institute suit without any notice . . . thus preventing the tenant from defending against the lawsuit.” Under 24 C.F.R § 966.6(e), housing authorities are prohibited from including in their leases any provision allowing them “to evict the tenant . . . whenever the landlord determines

(ii) The PHA may not renew the lease if the family has violated the requirement for resident performance of community service or participation in an economic self-sufficiency program in accordance with part 960, subpart F of this chapter.

(iii) At any time, the PHA may terminate the tenancy in accordance with § 966.4(1).

⁷ Under 42 U.S.C. § 1437d(1)(2) “[e]ach public housing agency shall utilize leases which—(2) do not contain unreasonable terms and conditions.”

that a breach or default has occurred without notice to the tenant or any determination by a court of the rights and liabilities of the parties.”

6. Kimbra’s Lease Did Not Expire on 12/31/14 Because She Was Not Provided a 12-Month Term.

As discussed above, Federal law requires that public housing authorities “shall utilize leases which – (1) have a term of 12 months.” 42 U.S.C. § 1437d(l); 24 C.F.R. § 966.4(a)(2)(i). Kimbra’s lease states that “initial term of the Lease shall be 12 months.” CP 326. Part II, ¶ 3 of the lease provides that “the term of this lease shall be twelve calendar months, renewed as stipulated in Part I of the lease.” CP 345. The initial term of Kimbra’s lease was for a term less than twelve calendar months, from January 10, 2014 until December 31, 2014. (CP 345) If the initial term is construed to run for full twelve calendar months, then it would extend from January 10, 2014 to January 10, 2015, the lease could not expire on December 31, 2014, and the unlawful detainer action was commenced prematurely by filing the Summons and Complaint on January 9, 2014. Strict compliance with the provisions governing the time and manner of bringing an unlawful detainer action is required. *Community Investments v. Safeway*, 36 Wn.App. 34, 671 P.2d 289 (1983); *Smith v. Seattle Camp 69, Woodmen of the World*, 57 Wash. 556, 107 P. 372 (1910). If the action is commenced even one day prematurely, the court lacks jurisdiction and

the action must be dismissed. *Id.*; *IBF, LLC. v. Heuft*, 141 Wn.App. 624, 174 P.3d 95 (2007).

7. **Housing Kitsap Cannot Maintain This Action Under Any Subsection of RCW 59.12.030**

For the reasons described above, Housing Kitsap cannot maintain this action under RCW 59.12.030(1) or under any other subsection of RCW 59.12.030. No unlawful detainer notice was served on Kimbra that could serve as the jurisdictional prerequisite for an unlawful detainer action.

Because the grounds for terminating Kimbra's tenancy were alleged lease violations, RCW 59.12.030(4) could have provided the jurisdictional foundation for maintaining an unlawful detainer action against Kimbra. However, the November 26, 2014 notice alleges that Kimbra failed to keep or perform certain conditions or covenants of the lease, but failed to provide a 10-day opportunity to cure as required to maintain an unlawful detainer action under RCW 59.12.030(4). *Housing Authority of Everett v. Terry*, 114 Wn.2d 558, 789 P.2d 489 (1990). It is undisputed that no opportunity to cure any alleged breach of the lease was ever provided.

Housing Kitsap cannot lawfully maintain this action under any of the subsections of RCW 59.12.030. Therefore, the trial court erred when it denied Kimbra's multiple requests for dismissal.

B. The Trial Court Decision to Allow This Action to Proceed Under RCW 59.12.030(1) Was Clearly Erroneous.

In March 16, 2015, Judge Hull denied Kimbra’s motion to dismiss and explained that in his view, under *Housing Authority of Everett v Terry*, Housing Kitsap had three options: (1) take advantage of the expedited unlawful detainer proceeding and provide an opportunity to cure; (2) proceed with an action in ejectment; or (3) proceed with the federal public housing grievance hearing. In Judge Hull’s reading of *Terry*, if a public housing authority provides an administrative public housing grievance hearing (as required by Federal law) to a tenant it seeks to evict, State law procedural requirements for unlawful detainer need not be followed. RP 03/16/15, 8. According to Judge Hull, Housing Kitsap, having provided Kimbra with a federal notice and the grievance process, “can escape the intended policy of the state legislature to provide the opportunity to cure” because “the law and the lease provide for such an election.” RP 03/16/15, 9. “Because the parties opted for the federal hearing, the opportunity to cure was not necessary.” RP 03/16/15, 9. Judge Hull stated that

Housing Kitsap argues that the lease was terminated as of December 31st, 2014, meaning it did not automatically renew under its terms. The lease provides that it may be terminated for material and repeated breaches of the lease terms. That is what happened here. The Housing Kitsap gave her the termination notice and proceeded to a federal grievance hearing. The Bremerton Housing Authority upheld the termination at the hearing. By upholding the

termination, the lease ended on December 31st, 2014, and therefore the Housing Kitsap proceeded to state action under RCW 59.12.030(1), which requires no notice because she was holding over after the termination and expiration of the lease. By the terms of her lease and under federal law, her lease was for an initial term of twelve months. That term automatically renews unless she does not comply with the community service requirements or the lease is otherwise terminated in accordance with the terms of the lease. Grounds for terminating the lease include repeated and material breaches of the lease. RP 03/16/15, 4-5.

Judge Hull erred in concluding that *Terry* could be distinguished because the parties went through an internal public housing grievance hearing prior to bringing the unlawful detainer action. He said:

[W]hile *Terry* is certainly similar, there is one key difference. Here the parties went through a federal grievance hearing prior to bringing the unlawful detainer. In *Terry*, the housing authority proceeded straight to an unlawful detainer. The issue, as I see it, is whether the outcome at the federal grievance hearing changes the procedure for Housing Kitsap once the grievance hearing upheld the termination. . . . The Housing Authority may either proceed to a state unlawful detainer action or to an administrative hearing, if one is permitted. RP 03/16/15, 6.

However, Judge Hull misinterpreted holding in *Terry*. He further misapprehended the federally-mandated public housing grievance process and its relationship with State law unlawful detainer process. He also erred by conflating any lease termination for “serious or repeated violations of the material terms of the lease” with a permitted exception to the automatic renewal of the term of the lease. As explained above, the only

permissible exception to automatic renewal is noncompliance with community service requirements. But even if Housing Kitsap's attempted inclusion of a second exception to automatic renewal were lawful and enforceable, it does not purport to permit non-renewal for any serious or repeated violation of the lease.

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. All rulings of a trial court, including those made by another judge, are subject to revision at any time before the entry of judgment. *In re Estate of Jones*, 170 Wn.App. 594, 287 P.3d 610 (2012); *U.S. v. Smith*, 389 F.3d 944, 949 (9th Cir.2004). "Were it otherwise, a trial judge would have no authority to reconsider a prior ruling or correct a prior mistake, but would have to memorialize the original ruling in a judgment in order for an appellate court to correct the problem." *In re Estate of Jones*, at 606.

1. **The Requirement That Housing Authorities Comply With Federal Law When Terminating a Public Housing Tenancy Does Not Preempt State Law Notice Requirements.**

In *Housing Authority of Everett v. Terry*, 114 Wn. 2d 558, 789 P.2d 745 (1990), the unanimous Washington Supreme Court held that the

requirement for federally-subsidized public housing authority to comply with federal law in terminating tenancies does *not* preempt the state law requirement to provide notice with an opportunity to cure an alleged violation of a lease covenant when a housing authority alleges a lease violation. “Congress may have intended to create its own notice provisions for termination of leases, but, in leaving eviction proceedings to the states for enforcement, Congress necessarily relied upon existing state substantive law.” at 566. Substituting a federal notice for a state law notice in direct violation of Supreme Court precedent is precisely what the trial court allowed Housing Kitsap to do in this unlawful detainer action.

In *Terry*, the Housing Authority of Everett brought an unlawful detainer action against Mr. Terry for “creating a threat to the health and safety of other residents.” *Id.* at 560. The Housing Authority had received twelve written complaints against Mr. Terry from other tenants. As a result of a mental disability, Mr. Terry’s behavior was “often disagreeable and his conduct has been, from time to time, unpleasant and intimidating.” The worst of his “unpleasant and intimidating” behavior was directed at his neighbor and included “verbal threats, physical intimidation and destruction of property.” *Id.* at 560-61. On at least one occasion, Mr. Terry tried to run down this neighbor with his car. *Id.* Although the neighbor obtained a series of civil protection orders against Mr. Terry, he repeatedly violated them. *Id.*

The notice issued by the Housing Authority of Everett did not comply with RCW 59.12.030(4) which requires a 10-day opportunity to comply with a breached covenant in a lease. The trial court held that federal law preempts state law notice requirements, and a notice without an opportunity to cure was sufficient. Overruling the decision of the trial court, the Supreme Court held that there is no federal preemption of Washington statutory unlawful detainer notice requirements and that the failure to provide a notice with an opportunity to cure deprived the trial court of unlawful detainer subject matter jurisdiction because the jurisdictional condition precedent of proper notice was not met. *Id.* at 564-65.

2. **Without Having Provided Any Notice with an Opportunity to Cure, Housing Kitsap Cannot Maintain This Action.**

Because Kimbra’s lease and tenancy can only be terminated for “serious or repeated violations of the material terms of the lease,” Housing Kitsap must provide Kimbra with a 10-day notice to comply or vacate under RCW 59.12.030(4) in order to avail itself of the court’s unlawful detainer jurisdiction. Because none of the other subsections of RCW 59.12.030 apply, and because a breach of a lease covenant is alleged, Housing Kitsap’s only available option to avail itself of the court’s jurisdiction in an unlawful detainer action is RCW 59.12.030(4). Because it failed to provide any notice with an opportunity to cure, Housing Kitsap

cannot maintain this unlawful detainer action.

RCW 59.12.030(4) provides that

A tenant . . . is guilty of unlawful detainer . . . When he or she continues in possession . . . after a neglect or failure to keep or perform any other condition or covenant of the lease or agreement under which the property is held . . . and ***after notice in writing requiring in the alternative the performance of such condition or covenant*** or the surrender of the property . . . shall remain uncomplied with for ten days after service thereof. ***Within ten days after the service of such notice the tenant . . . may perform such condition or covenant and thereby save the lease from such forfeiture;*** (Emphasis added)

The jurisdictional condition precedent to the maintenance of an unlawful detainer action for breach of a lease covenant is a ten-day written notice requiring in the alternative the performance of the covenant or surrender of the premises. *Sowers v. Lewis*, 49 Wn.2d 891, 895, 307 P.2d 1064 (1957); *Woodward v. Blanchett*, 36 Wn.2d 27, 216 P.2d 228 (1950). When a landlord alleges a breach of a lease covenant, the proper unlawful detainer notice is a ten-day notice to comply or vacate pursuant to RCW 59.12.030(4). *Housing Authority of Everett v. Terry*, 114 Wn.2d 558, 789 P.2d 489 (1990). In order to obtain relief in an unlawful detainer action: “There must exist a breach or breaches of the covenants of the lease; the landlord must notify the tenant of the existence of such breach or breaches, and give him ten days to correct them; the tenant must fail or neglect to correct such breach or breaches.” *Wilson v. Daniels*, 31 Wn.2d

633, 198 P.2d 496 (1948); *See also Angelo Property Co., LP v. Hafiz*, 167 Wn.App. 789 (2012).

Under Washington law, a tenant must be given at least one opportunity to correct a breach of the lease before a landlord may resort to forfeiture of the lease under the accelerated provisions of RCW 59.12. *Terry*, at 568-69; *Silva*, at 734-35; *Sullivan v. Purvis*, 90 Wn. App. 456, 460, 966 P.2d 912 (1998). “The Legislature has provided for a tenant to have **at least** one opportunity to correct a breach before forfeiture of the lease under the accelerated restitution provisions of RCW. 59.12.” *Terry*, 114 Wn.2d at 568-69 (emphasis in original). “Prior to the commencement of any action based upon the tenant's breach of a lease covenant, the tenant must be given notice of an opportunity to perform the covenant and avoid eviction.” *Housing Authority v. Silva*, 94 Wn. App. 731, 972 P.2d 952 (1999), citing RCW 59.12.030(3), RCW 59.12.030(4) and *Terry*.

A 30-day notice to vacate alleging repeated lease violations even when preceded by numerous informal demands to comply with the lease is insufficient to confer unlawful detainer jurisdiction where there has been no written notice under R.C.W. 59.12.030(4) providing the tenant with the alternative of performing the covenant or surrendering the premises. *Sullivan v. Purvis*, 90 Wn. App. 456, 460, 966 P.2d 912 (1998). As stated by the Court in *Sullivan*:

The law on this issue is well settled. Jurisdiction is statutory. A 10-day alternative to cure lease violations is a jurisdictional condition precedent to an unlawful detainer action for breach. *Sowers v. Lewis*, 49 Wn.2d 891, 895, 307 P.2d 1064 (1957). . . . In an action for unlawful detainer based on a covenant breach, a notice that does not give the tenant the alternative of performing the covenant or surrendering the premises does not comply with the provisions of the statute. And the court has no authority to adjudicate the controversy. *Sowers*, 49 Wn.2d at 894, 307 P.2d 1064; *Kelly v. Schorzman*, 3 Wn.App. 908, 912-13, 478 P.2d 769 (1970).

Id. at 459. However, a 30-day notice to vacate alleging repeated lease violations, multiple opportunities to cure the alleged lease violations and avoid eviction, service of a number of 10-day comply or vacate notices under RCW 59.12.030(4), and a failure to cure the lease violations after notice may be sufficient. *Housing Authority v. Silva*, 94 Wn. App. 731, 972 P.2d 952 (1999).

It is undisputed that Kimbra was given no opportunity to cure and no notice complying with any subsection of RCW 59.12.030.

3. **Housing Kitsap Must Comply with Both State Law and Federal Law in Terminating Kimbra's Public Housing Tenancy.**

In order to terminate the tenancy of a conventional public housing tenant, a housing authority must fully comply with the requirements of both state and federal law. *Terry*, at 568-69. It is possible to satisfy the requirements of RCW 59.12.030 and federal law notice requirements by

drafting a termination notice that complies with both. *Id.* The Supreme Court said there is no reason why a housing authority cannot prepare a notice that complies with both the Federal and State law requirements, for example, “simply by including within the federal notice the 10-day opportunity to correct required by RCW 59.12.030(4).” *Id.* at 568. But public housing authorities cannot substitute a federal notice for a state law unlawful detainer notice. *Id.* at 563.

If a housing authority chooses not to combine the federal notice with a state law notice, as suggested by the Supreme Court in *Terry*, it apparently can issue separate state law and federal law notices so long as the notices fully satisfies the requirements of both State and Federal law as was done in *Silva. Silva*, at 734-35. Where applicable, landlords must also comply with the requirements of local law before evicting a tenant. In *Silva*, the Court of Appeals reversed the decision of the trial court on grounds that Housing Authority had failed to comply with the Seattle Just Cause ordinance requiring three or more ten-day notices to comply or vacate within a twelve month period before commencing an unlawful detainer action. *Id.* at 735-36.

Even if Housing Kitsap fully complied with the requirements of Federal law by issuing an adequate Federal notice and providing a public housing grievance hearing, it did not comply with the State law

requirement of providing notice of and at least one opportunity to correct an alleged breach of a lease covenant. Housing Kitsap failed to provide the jurisdictional condition precedent of proper notice necessary to maintain this unlawful detainer action. Like the Housing Authority of Everett in *Terry*, Housing Kitsap failed to provide any notice with an opportunity to cure the alleged breach of a lease covenant. Unlike the Housing Authority of Seattle in *Silva*, Housing Kitsap did not provide several RCW 59.12.030(4) notices informing the tenant of alleged lease violations and providing multiple opportunities to cure, before proceeding with a 30-day notice.

4. **Housing Kitsap Could Have Commenced This Action in Ejectment Rather Than Unlawful Detainer.**

If Housing Kitsap did not wish to provide an opportunity to cure under RCW 59.12.030(4) when it decided to terminate Kimbra's tenancy for alleged lease violations, it could have issued a federal notice to terminate (as it did) and then commence an action in ejectment under RCW 7.28. In *Terry*, the Supreme Court stated that the Housing Authority of Everett could have brought its case against Mr. Terry as an action in ejectment rather than claiming Federal preemption of RCW 59.12.030(4). *Terry*, at 567. The Supreme Court extensively discussed this option of using ejectment instead of unlawful detainer. *Terry*, at 566-67.

“Compliance with the federal notice requirements of 42 U.S.C. § 1437d(l)(3)(A) would permit a landlord to utilize the Washington cause of action in ejectment under RCW 7.28, which does not have a 10-day opportunity-to-correct requirement.”)

Washington law provides two alternative methods for landlords to recover possession of real property from a tenant or other person occupying the premises: a regular civil action in ejectment under RCW 7.28 or a special statutory unlawful detainer action under RCW 59.12. Unlike unlawful detainer actions, actions in ejectment under RCW 7.28.010 *et seq.* are ordinary civil actions in which: (1) counterclaims can be litigated; (2) there is sufficient time to conduct full discovery before the court decides the right to possession; (3) a 20-day civil summons must be used; (4) there is no statutory show cause procedure; (5) there is no right to a trial within 30 days and no statutory right to precedence over other civil actions on the court’s docket. 1C Kunsch, *Wash. Prac.* § 89 (4th Ed. 1977).

A plaintiff seeking to recover possession of real property must elect whether to proceed by unlawful detainer or ejectment. *Petch v. Willman*, 29 Wn.2d 136 (1947). The two forms of action are mutually exclusive, and the plaintiff cannot, in the same action, proceed on both

theories, but must choose between the two. 1C Kunsch, *Wash. Prac.* § 89.2, at 266 (4th Ed. 1977).

Having elected to use the unlawful detainer form of action, Housing Kitsap must strictly comply with its requirements. *See Terry*. It failed to strictly comply by failing to issue any unlawful detainer notice under RCW 59.12.030 and by failing to provide any opportunity to cure the alleged lease violations.

5. Public Housing Administrative Grievance Hearings Cannot Substitute for State Court Eviction Procedures.

Public housing grievance hearings are a condition precedent to the commencement of a State court eviction proceeding. They are not intended to supersede or substitute for the eviction procedures of state law. *Cf. Housing Authority of St. Louis County v. Lovejoy*, 762 S.W.2d 843 (Mo.Ct.App.1988). The decision of the hearing officer has no precedential effect. When a public housing tenant requests a grievance hearing, the tenancy does not terminate until the hearing process has been completed. 24 CFR § 966.4(1)(3)(iv). If a public housing grievance hearing decision is adverse to the tenant, it is not a final decision because the tenant has the right to a “trial de novo or judicial review in any judicial proceedings, which may thereafter be brought in the matter.” 24 CFR § 966.57(c). In *Lovejoy*, the court compared the hearing decision in a public housing

grievance hearing to a landlord's decision not to renew the lease and held that the tenant's rights were unaffected by the findings in the hearing decision. "The Housing Authority's decision is simply a landlord's decision not to renew the lease. The legal rights of the parties remain unadjudicated." *Id.* at 846.

The trial court's conclusion that Federally-mandated administrative grievance hearings are a substitute for compliance with the jurisdictional prerequisite of a proper notice under RCW 59.12.030 is erroneous. There is no legal authority for the mistaken notion that that so long as a housing authority complies with federal notice and grievance hearing requirements, it does not have to comply with State law notice requirements if it brings an unlawful detainer action. There is no credible interpretation of the Supreme Court's decision in *Terry* that would authorize the use of a housing authority's internal administrative public housing grievance hearing as either a separate third eviction option (along with unlawful detainer and ejectment) or as substitute for compliance with the jurisdictional condition precedent of a proper notice under RCW 59.12.030 if an unlawful detainer action is elected.

6. **This Action Cannot Be Distinguished from *Terry* Based On Whether a Public Housing Grievance Hearing was Provided.**

The trial court erred when it distinguished this case from *Terry* on

the basis that Kimbra was provided a public housing grievance whereas Mr. Terry was not. Ordinarily, public housing tenants may be evicted in a State court eviction proceeding only after a pre-eviction administrative grievance hearing before a hearing officer or panel appointed by the PHA. 42 U.S.C. § 1437d(k); 24 CFR § 966. However, PHAs may bypass the otherwise mandatory administrative grievance procedures and proceed directly to the State court eviction procedure in certain types of eviction cases involving “any activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees” or “any violent or drug-related criminal activity on or off such premises,” or “any activity resulting in a felony conviction.” 42 U.S.C. § 1437d(k).⁸

Unlike the allegations against Kimbra, the allegations against Mr. Terry were grave enough to fit within the limited category of cases for which a housing authority may bypass the public housing administrative

⁸ The authority of PHAs to adopt lease and grievance policies that allow the omission of administrative grievance hearings in these limited circumstances derives from HUD making a “due process determination” that that a jurisdiction’s state court eviction procedure “provides the basic elements of due process.” 42 U.S.C. §1437d(k). These basic elements of due process, as set forth in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970), are defined in 24 CFR § 966.54(c). HUD’s initial “due process determination” for Washington was subject to litigation. *See, Yesler Terrace Community Council et al. v. Cisneros*, 37 F.3d 442 (9th Cir. 1994) (“Yesler Terrace I”) and *Yesler Terrace Community Council et al. v. Cisneros*, No. C96-1629C (“Yesler Terrace II”). The upshot of the litigation was that HUD issued HUD Circular 97-5 revising its due process determination for Washington and providing that when a Washington housing authority bypasses its grievance procedure where allowed, it cannot use the unlawful detainer show cause procedure and may only use the unlawful detainer trial procedure.

grievance hearing. The notice given to Mr. Terry informed him that the notice was not subject to appeal under the grievance procedure. There is nothing in *Terry* indicating that the Supreme Court would allow an eviction based on allegations of breach of a lease covenant to be brought under RCW 59.12.030(1) instead of RCW 59.12.030(4) if a grievance hearing had been provided to him.

C. **The Procedure Used by Housing Kitsap To Evict Kimbra Was Neither Fair Nor Rational.**

Public housing is housing of last resort for extremely vulnerable tenants and is highly coveted. Kimbra waited six years on Housing Kitsap's wait list before she was able to obtain a housing subsidy that would allow her to have her own apartment for her three children. RP 04/06/15, Vol. II, 138. Courts have long recognized that the consequences of evictions from public housing are far more drastic than evictions from privately owned unsubsidized units because in addition to suffering the loss of one's home, tenants also lose their federal subsidy and thus housing that is affordable. See e.g. *McQueen v. Druker*, 317 F.Supp. 1122 (D. Mass. 1970), *aff'd* on other grounds, *McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971).

Public housing tenants have a constitutionally-protected property interest in the right to continued occupancy and subsidy that cannot be

terminated without due process of law. *Saxton v. Housing Authority of City of Tacoma*, 1 F.3d 881 (9th Cir. 1993). The actions of housing authorities are state action within the meaning of the Fourteenth Amendment to the United States Constitution. *Housing Authority of King Co. v. Saylor*, 19 Wn. App. 871, 578 P. 2d 76 (1978) (“The government as landlord is still the government . . . unlike private landlords, it is subject to the requirements of due process of law.” *Id.*, quoting, *Thorpe v. Housing Authority of Durham*, 386 U.S. 670, 678, (1967) (Douglas, J., concurring), and *Rudder v. United States*, 226 F.2d 51, 53 (1955)). For this reason, “[t]hose who manage public housing must adhere to elementary standards of fairness.” *Saylor*, at 873.

Allowing Housing Kitsap to evict public housing tenants for lease violations by “non-renewal” of their lease without first giving them an opportunity to cure the alleged breach as required by *Terry* violates this elementary standard of fairness. This procedure deprives tenants of a full opportunity to defend an eviction using any legal or equitable defenses or setoffs arising out of the tenancy. RCW 59.18.400.

The procedure used in this case by Housing Kitsap, and erroneously approved by the trial court, also runs afoul of equal protection guarantees under U.S. Const. Amend. XIV § 1 and Wash. Const. Art. 1, § 12. Public housing tenants who received a notice of lease termination breach of a lease

covenant in the middle of their 12-month lease could not be evicted under RCW 59.12.030(1) because their leases would not “expire” until the end the 12-month period. However, tenants who receive a notice of lease termination for the same conduct near the end of the 12-month term will be told that their lease has expired, that it will not be renewed, and that they will be evicted without notice or opportunity to cure under RCW 59.12.030(1). This disparate and irrational treatment of similarly situated tenants violates the constitutional guarantee of equal protection. It also creates a perverse and unfair incentive for Housing Kitsap to delay giving notice of any lease violation notice until the month preceding the expiration of 12-month term. The irrationality of this scenario illustrates why Housing Kitsap’s actions in this case are contrary to the previously briefed statutory and regulatory requirements.

D. Attorney’s Fees

Appellant requests an award of costs and reasonable attorney’s fees under RCW 59.18.290(2) and under Part I, Section XVI ¶ (a)⁹ of the

⁹ Part I, Section XVI ¶ (a) of the lease provides:
“Part I, Section XVI ¶ (a) Attorney’s Fees. In the event of any dispute between the parties arising out or in connection with this Agreement, the substantially prevailing party in any action or proceeding to resolve the same shall be entitled to recover their costs and expenses incurred, including reasonable attorney’s fees.”

lease. A residential tenant who prevails in an unlawful detainer action can be awarded costs of suit and reasonable attorney's fees under RCW 59.18.290(2). *Council House v. Hawk*, 136 Wn. App. 153 (2006); *Soper v. Clibborn*, 31 Wn. App. 767 (1982). Where the lease between landlord and tenant provides for attorney fees and costs to the prevailing party, the prevailing party in an unlawful detainer action is entitled to attorney fees as a matter of law. *Hall v. Feigenbaum*, 178 Wn.App. 811, 827, 319 P.3d 61 (2014). Residential tenants who prevail in unlawful detainer actions can be awarded reasonable attorney's fees under an attorney fee clause in the lease. *Housing Authority of Seattle v. Bin*, 163 Wn.App. 367, 260 P.3d 900 (2011).

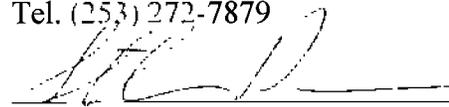
Here, there is both a contractual basis under Part I, Section XVI ¶ (a) of the lease and a statutory basis under RCW 59.18.290(2) for awarding attorney's fees to the prevailing party.

E. Conclusion

The judgment of the trial court should be reversed. The trial court's Judgment should be vacated and the action dismissed. Kimbra should be restored to possession. 1C *Wash.Prac.* 88.43; RAP 12.8.

RESPECTFULLY SUBMITTED this 25th day of January, 2016.

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APPENDIX TO BRIEF OF APPELLANT

- A. RCW 59.12.030
- B. *Housing Authority of Everett v. Terry*,
114 Wn.2d 558, 789 P.2d 489 (1990)
- C. 42 U.S.C. § 1437d(1)
- D. 24 C.F.R. § 966

RCW 59.12.030**Unlawful detainer defined.**

A tenant of real property for a term less than life is guilty of unlawful detainer either:

(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 the expiration of the specified term or period;

(2) When he or she, having leased property for an indefinite time with monthly or other periodic rent reserved, continues in possession thereof, in person or by subtenant, after the end of any such month or period, when the landlord, more than twenty days prior to the end of such month or period, has served notice (in manner in RCW 59.12.040 provided) requiring him or her to quit the premises at the expiration of such month or period;

(3) When he or she continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided) in behalf of the person entitled to the rent upon the person owing it, has remained uncomplished with for the period of three days after service thereof. The notice may be served at any time after the rent becomes due;

(4) When he or she continues in possession in person or by subtenant after a neglect or failure to keep or perform any other condition or covenant of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than one for the payment of rent, and after notice in writing requiring in the alternative the performance of such condition or covenant or the surrender of the property, served (in manner in RCW 59.12.040 provided) upon him or her, and if there is a subtenant in actual possession of the premises, also upon such subtenant, shall remain uncomplished with for ten days after service thereof. Within ten days after the service of such notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform such condition or covenant and thereby save the lease from such forfeiture;

(5) When he or she commits or permits waste upon the demised premises, or when he or she sets up or carries on thereon any unlawful business, or when he or she erects, suffers, permits, or maintains on or about the premises any nuisance, and remains in possession after the service (in manner in RCW 59.12.040 provided) upon him or her of three days' notice to quit;

(6) A person who, without the permission of the owner and without having color of title thereto, enters upon land of another and who fails or refuses to remove therefrom after three days' notice, in writing and served upon him or her in the manner provided in RCW 59.12.040. Such person may also be subject to the criminal provisions of chapter 9A.52 RCW; or

(7) When he or she commits or permits any gang-related activity at the premises as prohibited by RCW 59.18.130.

[1998 c 276 § 6; 1983 c 264 § 1; 1953 c 106 § 1. Prior: 1905 c 86 § 1; 1891 c 96 § 3; 1890 p 73 § 3; RRS § 812.]

NOTES:

Termination of month to month tenancy: RCW 59.04.020, 59.18.200.

Unlawful detainer defined: RCW 59.16.010.

Housing Authority of City of Everett v. Terry, 114 Wash.2d 558 (1990)
789 P.2d 745

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Housing Authority of City of Seattle v
Bin, Wash.App. Div. 1, September 6, 2011
114 Wash.2d 558
Supreme Court of Washington,
En Banc.

HOUSING AUTHORITY OF the CITY OF
EVERETT, Washington, Respondent,
v.
Ray TERRY, Appellant.

No. 56716-6.
|
April 19, 1990.

Reconsideration Denied June 6, 1990.

Landlord brought unlawful detainer action against tenant. The Superior Court, Snohomish County, Paul D. Hansen, J., entered judgment for landlord, and tenant appealed. The Court of Appeals certified the case. The Supreme Court, Smith, J., held that: (1) trial court lacked jurisdiction to entertain case, as tenant had not been given statutorily mandated ten-day period in which to comply with provisions of lease upon which termination was based; (2) cure period provision was not preempted by federal law; and (3) tenant was not entitled to attorney fees.

Reversed and remanded.

West Headnotes (5)

¹¹¹ **Landlord and Tenant**
⚡Notice

In an action for unlawful detainer alleging breach of covenant, a notice which does not give tenant the alternative of performing the covenant or surrendering premises does not comply with provisions of statute. West's RCWA 59.12.030.

21 Cases that cite this headnote

¹²¹ **Landlord and Tenant**
⚡Notice

Trial court lacked jurisdiction to hear unlawful detainer case brought by landlord against tenant; landlord had failed to include in notice of termination mandatory provision allowing tenant ten-day period during which to comply with requirements of lease. West's RCWA 59.12.030(4).

17 Cases that cite this headnote

¹³¹ **Landlord and Tenant**
⚡Statutory provisions
States
⚡Housing; landlord and tenant

Federal statutes requiring notice provision prior to termination of lease and a "reasonable" period not to exceed 30 days during which tenant may attempt to comply with lease agreement, did not preempt state statute requiring that tenants be given a 10-day cure period. West's RCWA 59.12.030(4); United States Housing Act of 1937, § 6(l)(3)(A), as amended, 42 U.S.C.A. § 1437d(l)(3)(A).

12 Cases that cite this headnote

¹⁴¹ **Landlord and Tenant**
⚡Set-off and counterclaim

Counterclaims may not be asserted in an unlawful detainer action. West's RCWA 59.12.010 et seq.

7 Cases that cite this headnote

¹⁵¹ **Landlord and Tenant**
⚡Remedies

Tenant whose adverse decision in unlawful

detainer case was reversed on appeal was nonetheless not entitled to attorney fees under statute allowing such fees to prevailing party in eviction cases; reversal had not been based on merits of case, but rather on landlord's failure to follow procedural steps for unlawful detainer action. West's RCWA 59.18.290(2).

8 Cases that cite this headnote

Attorneys and Law Firms

**746 *560 Evergreen Legal Services, Gregory D. Provenzano, Everett, Robert S. Friedman, Kirkland, for appellant.

Newton, Kight, Adams & Castleberry, Lorna S. Corrigan, Everett, for respondent.

Opinion

SMITH, Judge.

Respondent Housing Authority of the City of Everett brought an unlawful detainer action under our Landlord and Tenant Act, Title 59 RCW, against Appellant Ray Terry, a mentally handicapped person, for breach of a lease covenant by creating a "threat to the health and safety of other residents" of the housing complex. But Respondent did not comply with the notice provisions of RCW 59.12.030(4) which require a 10-day opportunity to comply with a breached covenant in a lease. The trial court ruled that federal law preempts the Washington statutory notice requirements.

We hold that there is no federal preemption of the statutory notice provisions and that there is no jurisdiction without statutory notice. We reverse the trial court and remand the case with instructions to dismiss the complaint.

Appellant Ray Terry has lived in the same apartment in the "Baker Heights" federally subsidized housing complex since 1982. The unit is owned and operated by Respondent Housing Authority of the City of Everett. Mr. Terry is eligible for residence in the complex because, at age 17, he suffered traumatic brain injury which left him handicapped and with limited income.

The trial court, the Honorable Paul D. Hansen, found that

"[a]s a consequence of his injuries, [Ray Terry] is often disagreeable and his conduct has been, from time to time, unpleasant and intimidating." Since 1984, most of Appellant's unpleasant and intimidating conduct has been directed at his neighbor in the housing complex, Ms. Bessie B. Neighbors. On at least one occasion, Mr. Terry tried to run her down with his automobile, driving over the lawn of *561 her sister's home and coming to a stop only one foot away from the porch on which she had taken refuge. Numerous other incidents directed at Ms. Neighbors **747 included "verbal threats, physical intimidation and destruction of property."

In June of 1988, Ms. Neighbors obtained the first of a series of civil protection orders against Mr. Terry. He repeatedly violated those. From June through October 1988, Ms. Neighbors filed approximately 12 written complaints with the Housing Authority against Mr. Terry. On October 19, 1988, the Housing Authority terminated Mr. Terry's lease for violation of the following covenant:

[Tenants agree to c]onduct themselves ... in a manner which will not disturb neighbor's [sic] peaceful enjoyment of their accommodations and will be conducive to maintaining the development in a decent, safe, and sanitary condition....

The Notice of Termination of Tenancy, served October 21, 1988, which demanded surrender of the premises by October 31, 1988, did not provide for the statutory 10-day opportunity to comply with the breached covenant required under RCW 59.12.030(4). It provided:

You are further notified that in that your continued tenancy has created a threat to the health and safety of other residents, the Notice is *not* subject to appeal pursuant to the Housing Authority's Grievance Procedure.

On November 10, 1988, the Housing Authority filed an Unlawful Detainer action pursuant to Chapter 59.12 RCW, based solely upon the October 21, 1988, notice served on Mr. Terry. He raised an objection to subject matter jurisdiction for lack of statutory notice, and filed a motion for judgment on the pleadings. His motion was denied by a Snohomish County Superior Court Commissioner. A Motion for Revision of the Commissioner's Ruling was similarly denied by the Honorable Daniel T. Kershner, Judge, who agreed with

Housing Authority of City of Everett v. Terry, 114 Wash.2d 558 (1990)

789 P.2d 745

the Housing Authority's argument that federal law preempted the notice requirements of RCW 59.12.030(4).

Appellant Terry also raised as an affirmative defense a claim of discrimination based upon the Housing Authority's alleged failure to make a reasonable accommodation for his handicap. He had sought a transfer to alternative "Section *562 8" housing,¹ but was denied the transfer by the Housing Authority. Respondent maintained it was under no duty to accommodate a tenant's handicap.

Appellant Terry did not appeal the Superior Court's denial of his procedural motion, and proceeded to trial. After a 2-day bench trial, the Honorable Paul D. Hansen ruled in favor of the Housing Authority. Mr. Terry appealed.

By Order dated November 22, 1989, the Court of Appeals, Division One, certified the case to this court, identifying the following "issues of broad public import which [require] prompt and ultimate determination:"

1. Did the trial court have subject matter jurisdiction in this unlawful detainer action when the plaintiff public housing authority allegedly failed to serve the tenant with the proper notice of termination of tenancy? [and]
2. Did the trial court err in ruling that federal law preempts the notice requirements of the unlawful detainer statute in housing authority leaseholds?

This court accepted certification on December 13, 1989.

Appellant Ray Terry continues to reside in the same Baker Heights apartment. His behavior towards Ms. Neighbors allegedly persists unabated, although counsel for Mr. Terry denied this in answer to a question during argument before this court.

The following questions are presented by this case:

(1) Whether a trial court has subject matter jurisdiction over an unlawful detainer action when the plaintiff has not complied with the notice provisions of RCW 59.12.030; if not, then

***748** (2) Whether federal law preempts the notice requirements of RCW 59.12.030 in housing authority leaseholds; if so, then

(3) Whether a landlord has a duty to make reasonable accommodations to the handicap of a tenant; and

***563** (4) Whether an award of fees and costs is

appropriate in a case where Appellant elected to go to trial before exhausting procedural appeals, and where Appellant appeals substantive, as well as procedural, questions.

Appellant Terry claims that, without compliance with the statutory notice requirements, the Superior Court does not have subject matter jurisdiction. He further claims that, in refusing to transfer him to "Section 8" community housing, the Housing Authority discriminated against him because it failed to make a reasonable accommodation for his handicap.

Respondent Housing Authority seeks a "best of both worlds" mixture of state and federal procedures. It first sought to substitute a state trial for a federal grievance hearing. This is permissible. It then sought to substitute a federal notice for a state statutory notice. This is not permissible.

In this case, the Housing Authority elected to bring an action for unlawful detainer under Chapter 59.12 RCW. It is undisputed that the Housing Authority did not comply with RCW 59.12.030 which establishes the types of notices that must be given tenants in commencing unlawful detainer actions. The Housing Authority does not suggest that Mr. Terry waived the notice requirements of the unlawful detainer statute.

The unlawful detainer statute is in derogation of common law, and must therefore be strictly construed in favor of the tenant.² "By reason of provisions designed to hasten the recovery of possession, the statutes creating it remove the necessity to which the landlord was subjected at common law, [sic] of bringing an action of ejectment [under Chapter 7.28 RCW] with its attendant delays and expenses."³ However, in order to take advantage of its favorable provisions, ***564** a landlord must comply with the requirements of the statute.⁴

¹ "Where a special statute provides a method of process, compliance [with that method] is jurisdictional."⁵ In an action for unlawful detainer alleging breach of covenant, a notice which does not give the tenant the alternative of performing the covenant or surrendering the premises does not comply with the provisions of the statute.⁶

² In this case, the action was brought because Mr. Terry allegedly breached a covenant in his lease.⁷ Therefore, he was entitled to a notice which would provide him with, and inform him of, a 10-day period during which he could comply with the requirements of his lease.⁸ The document he received did not contain the statutory notice of opportunity-to-correct. Because it gave deficient

Housing Authority of City of Everett v. Terry, 114 Wash.2d 558 (1990)

789 P.2d 745

notice, the Housing Authority could not prove a cause of action **749 for unlawful detainer.⁹ The Snohomish County Superior Court lacked jurisdiction to hear the case. The “jurisdictional condition *565 precedent”¹⁰ of proper statutory notice was not met. Under Washington law, Mr. Terry’s motion to quash the process should have been granted.¹¹

¹³ Although this court has previously stated that there is a “strong presumption against finding congressional intent to preempt,”¹² the Housing Authority argues that the 10–day opportunity to correct a breach of covenant provided by RCW 59.12.030(4) is preempted by a congressional intent to achieve prompt eviction of tenants under circumstances such as those presented in this case.

A party arguing preemption must demonstrate either the “congressional intent to preempt state law” or such a “direct and positive” conflict¹³ that the federal and state acts cannot be reconciled or consistently stand together.¹⁴ The Housing Authority “does not assert the existence of either an express or implied intent to preempt state law requirements.”¹⁵

Facially, there appears to be no conflict between RCW 59.12.030(4) and 42 U.S.C. § 1437d(l)(3)(A).¹⁶ The federal statute provides for a notice before termination of a *566 lease of “a reasonable time, but not to exceed 30 days,” while the state statute requires notice and a 10–day opportunity to correct a breach of covenant to avoid forfeiture of a lease. 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. In any event, compliance with the state statute would not run afoul of Congress’ 30–day limit.

We next consider whether Congress, through its notice provisions, intended to create novel state subject matter jurisdiction, since there is otherwise no jurisdiction without proper notice. We find that Congress did not. Congress may have intended to create its own notice provisions for termination of leases, but, in leaving eviction proceedings to the states for enforcement, Congress necessarily relied upon existing state substantive law.

Washington law provides two alternate methods of removing a tenant from the landlord’s premises: an action in *ejectment* under RCW 7.28; or an action for *unlawful detainer* under RCW 59.12. Compliance with the notice requirements of RCW 59.12.030 is a “jurisdictional condition precedent” to bringing a cause of action in unlawful detainer.¹⁷ Compliance with the federal notice requirements of 42 U.S.C. § 1437d(l)(3)(A) would permit

a landlord to utilize the Washington cause of action in *ejectment* under RCW 7.28, which does not have a 10–day opportunity-to-correct requirement.¹⁸

**750 *567 Here, the Housing Authority elected to pursue its case under the unlawful detainer statute. Significantly, respondent in its brief indicates that the Housing Authority substituted the unlawful detainer trial for the congressionally mandated grievance hearing it would otherwise have been required to conduct before terminating Mr. Terry’s lease. Although the Housing Authority provided notice which may have been sufficient for an action in *ejectment*, it did not provide notice which met the statutory requirements for an *unlawful detainer* action.

Use of a state trial, such as provided by RCW 59.12, instead of the federal grievance hearing, is *permissive*, not mandatory.¹⁹ Thus, respondent has failed to demonstrate either the “congressional intent to preempt state law” or a “direct and positive” conflict²⁰ between RCW 59.12 and 42 U.S.C. § 1437d(l)(3)(A) that is necessary for federal preemption. The Housing Authority could have brought an action in *ejectment* instead of claiming federal preemption of RCW 59.12.030(4). It apparently chose not to pursue that remedy.

Moreover, the federal notice provisions apply to the federal procedures affording tenants due process before termination of their leases and not to state court proceedings based on those terminations. The same statute, 42 U.S.C. 1437d, provides for a federal grievance hearing before final termination of a lease. However, a housing agency may substitute for the grievance hearing a state court hearing “which ... provides the basic elements of due process.”²¹ Nothing in the federal statute suggests that a housing *568 agency is not required to follow state procedural requirements while taking advantage of a state hearing. Nothing in the statute suggests that a procedural requirement in a state hearing which provides more than the “basic elements” of due process, such as the opportunity-to-correct provision of RCW 59.12.030(4), cannot be permissibly substituted for the federal grievance hearing at the option of the Housing Authority. Having enjoyed the federal procedural advantages of a hearing substitution, as well as the substantive advantages of accelerated trial and restitution under our state’s landlord and tenant act, the Housing Authority cannot be relieved of its burden of compliance with Washington’s statutory procedural requirements.

Respondent Housing Authority does not contend that it is impossible to draft a notice which complies with both RCW 59.12.030 and the federal notice provisions.²² This

Housing Authority of City of Everett v. Terry, 114 Wash.2d 558 (1990)

789 P.2d 745

it can do simply by including within the federal notice the 10-day opportunity to correct required by RCW 59.12.030(4). Instead, respondent argues that it would have been futile to do so because Mr. Terry could “correct” his behavior within the 10 days provided by the notice and then breach the lease covenant at subsequent times. If repeated, appellant argues, this could defeat any unlawful detainer action brought against a tenant who repeatedly breaches a covenant.

The question whether a landlord’s efforts to evict under the statute may be permanently ****751** frustrated is not properly before the court at this time. Because of the deficient notice, Mr. Terry was not given an initial opportunity to correct his behavior. The Legislature has provided for a ***569** tenant to have *at least one*²³ opportunity to correct a breach before forfeiture of a lease under the accelerated restitution provisions of RCW 59.12. Although RCW 59.12.030(4) seems to address breaches of covenants concerning physical conditions of premises, and none of the provisions of RCW 59.12.030 seem to address behavior of tenants, that is a problem best addressed by the Legislature. Judicial consideration should await an actual case of “impossible” eviction.

In this case, the Housing Authority could not prove its cause of action under the Washington unlawful detainer statute because it failed to give Mr. Terry proper statutory notice. Federal law does not preempt the notice requirements of RCW 59.12.030 because an alternate cause of action in ejectment is available, because substitution of an unlawful detainer action for a federal grievance hearing was made permissive and not mandatory by Congress, and because it is possible to reconcile the two acts by providing a notice which satisfies the requirements of both.

Appellant Terry’s motion to dismiss the proceedings should have been granted. Therefore, this case is reversed and remanded to the trial court with instructions to dismiss the complaint.

Appellant Terry argued, “as an affirmative defense” in the unlawful detainer action, the counterclaim that a landlord has a duty to make a reasonable accommodation to the handicap of a tenant. A breach of this duty, he argues, constitutes discrimination by expelling a handicapped person from real property in violation of RCW 49.60.030(1)(c).²⁴ The trial court disagreed.

***570** ¹⁴¹ We do not consider the question raised by appellant’s counterclaim because we have long held that counterclaims may not be asserted in an unlawful detainer action.²⁵ Further, as a general rule we will not decide moot

questions or abstract propositions.²⁶ We decline to make an exception in this case. The appeal of this issue is dismissed.

¹⁵¹ Appellant Terry asks this court to award him attorney’s fees and costs for the trial, as well as for this appeal, as the prevailing party. At trial, the court found against Mr. Terry on all bases and awarded the Housing Authority \$109 in statutory attorney’s and service fees.²⁷ Mr. Terry cites RCW 59.18.290(2) and RCW 49.60.030(2) as authority for his assertion.

RCW 49.60.030(2) provides for recovery of damages, costs and fees by one who is injured by discrimination. Since the trial court lacked jurisdiction to hear this case, since the counterclaim was not properly before the court, and since in any event the discrimination issue was resolved against him at trial, no award is due Mr. Terry under this statute.

RCW 59.18.290(2) provides that:

It shall be unlawful for the tenant to hold over in the premises or exclude the landlord therefrom after the termination of the rental agreement except under a valid court order so authorizing. Any landlord so deprived of possession of premises in violation of this section may recover possession of the property and damages sustained by him, and the prevailing ****752** party may recover his costs of suit or arbitration and reasonable attorney’s fees.

In order to be awarded fees and costs as the prevailing party, a tenant must prove either that the lease was not ***571** terminated, or that the tenant held over under a valid court order. Although the Housing Authority failed to prove unlawful detainer, the question whether the lease was “terminated” has neither been litigated by the parties nor briefed by appellant. Mr. Terry did not have a court order authorizing him to hold over in the premises. Therefore, he has not shown that an award of fees and costs is due him under RCW 59.18.290(2) or under RCW 49.60.030(2).

Appellant Terry’s motion to dismiss the unlawful detainer action for lack of jurisdiction was denied by a Snohomish County Court Commissioner. His motion for revision of the Commissioner’s ruling was similarly denied by the Snohomish County Superior Court. Rather than appeal

Housing Authority of City of Everett v. Terry, 114 Wash.2d 558 (1990)

789 P.2d 745

that decision for a definitive ruling on the question of jurisdiction, he elected to go to trial on the merits. He also made the substantive argument as a counterclaim at trial, and again in this appeal, that the Housing Authority has an affirmative duty to accommodate the handicap of a tenant, a question we do not decide. This argument, if resolved in his favor, could have obtained for Mr. Terry preferred "section 8" community housing. Now, having had the benefit of a formal, if adverse, trial decision, he seeks an award of fees and costs for the trial, as well as for this appeal. One party should not be able to seek an affirmative result at trial and, when disappointed, burden the other party with all the expenses.

Appellant Terry has not met the statutory requirements for an award of attorney's fees and costs. Since the trial court did not have jurisdiction to hear this case, its award of fees, costs and past due rent to the Housing Authority must be vacated.

The decision of the trial court is reversed. The case is remanded with instructions to dismiss the complaint. Appellant's request for attorney's fees and costs is denied. *572 The trial court's award of fees, costs and past due rent to the Housing Authority is vacated.

CALLOW, C.J., and DORE, UTTER, ANDERSEN, BRACHTENBACH, DURHAM, DOLLIVER and GUY, JJ., concur.

All Citations

114 Wash.2d 558, 789 P.2d 745

Footnotes

- ¹ This refers to section 8 of the United States Housing Act of 1937, now codified at 42 U.S.C. § 1437f. Under this program, low income persons occupy private rental housing in the community and their rents are subsidized to about 70% of fair market rental value.
- ² *Wilson v. Daniels*, 31 Wash.2d 633, 643, 198 P.2d 496 (1948).
- ³ *Wilson v. Daniels*, 31 Wash.2d 633, 643-44, 198 P.2d 496 (1948).
- ⁴ See *Sowers v. Lewis*, 49 Wash.2d 891, 894, 307 P.2d 1064 (1957).
- ⁵ *Sowers v. Lewis*, 49 Wash.2d 891, 894, 307 P.2d 1064 (1957) citing, *Little v. Catania*, 48 Wash.2d 890, 297 P.2d 255 (1956).
- ⁶ *Woodward v. Blanchett*, 36 Wash.2d 27, 31, 216 P.2d 228 (1950).
- ⁷ RCW 59.12.030 provides, in relevant part:
"Unlawful detainer defined. A tenant of real property for a term less than life is guilty of unlawful detainer ...
(4) When [the tenant] continues in possession ... after a neglect or failure to keep or perform any ... condition or covenant of the lease agreement under which the property is held ... and after notice in writing requiring in the alternative the performance of such condition or covenant or the surrender of the property, served ... upon [the tenant] ... shall remain uncomplained with for ten days after service thereof. Within ten days after the service of such notice the tenant ... may perform such condition or covenant and thereby save the lease from such forfeiture."
- ⁸ See RCW 59.12.030(4).
- ⁹ *Woodward v. Blanchett*, 36 Wash.2d 27, 31, 216 P.2d 228 (1950).
- ¹⁰ *Sowers v. Lewis*, 49 Wash.2d 891, 894, 307 P.2d 1064 (1957)
- ¹¹ *Sowers v. Lewis*, 49 Wash.2d 891, 895, 307 P.2d 1064 (1957)

Housing Authority of City of Everett v. Terry, 114 Wash.2d 558 (1990)

789 P.2d 745

- 12 *Pioneer First Fed. Sav. & Loan Ass'n v. Pioneer Nat'l Bank*, 98 Wash.2d 853, 859, 659 P.2d 481 (1983).
- 13 *See State v. Williams*, 94 Wash.2d 531, 538, 617 P.2d 1012, 24 A.L.R.4th 1191 (1980).
- 14 *State v. Williams*, 94 Wash.2d 531, 538, 617 P.2d 1012, 24 A.L.R.4th 1191 (1980) citing *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 10, 58 S.Ct. 87, 92, 82 L.Ed. 3 (1937).
- 15 Brief of Respondent, at 6.
- 16 42 U.S.C. § 1437d(l)(3)(A) provides in relevant part:
"Each public housing agency shall utilize leases which ... require the public housing agency to give adequate written notice of termination of the lease which shall not be less than ... a reasonable time, but not to exceed 30 days, when the health or safety of other tenants or public housing agency employees is threatened...."
- 17 *Sowers v. Lewis*, 49 Wash.2d 891, 894, 307 P.2d 1064 (1957)
- 18 The Housing Authority does not discuss ejectment. Thus, it does not argue that it could not bring an action in ejectment with the federal notice, nor does it argue that an ejectment trial would not satisfy the congressional grievance hearing requirement. Further, the Housing Authority has not discussed the question whether an ejectment action would satisfy the alleged congressional purpose of prompt eviction. *See* RCW 7.28.010 which provides:
Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession....
- 19 42 U.S.C. § 1437d(k) provides, in relevant part:
"An Agency *may* exclude from its procedure any grievance concerning an eviction or termination of tenancy 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." (Italics ours.)
- 20 *See State v. Williams*, 94 Wash.2d 531, 538, 617 P.2d 1012, 24 A.L.R.4th 1191 (1980).
- 21 42 U.S.C. § 1437d(k).
- 22 Respondent cites *Staten v. Housing Auth.*, 469 F.Supp. 1013 (W.D.Pa.1979) for the proposition that federal and state notices cannot be combined in a single document. However, upon examination that case more appropriately stands for the proposition that, regardless of any parallel or duplicate federal notice requirements, state notice (Pennsylvania) must be given as prescribed by the relevant statute. *See also Ferguson v. Housing Auth.*, 499 F.Supp. 334 (E.D.Ky.1980) (rejecting the 2-notice requirement of *Staten*).
- 23 If, as Mr. Terry himself contends, it is impossible for him to control his behavior, then arguably a court might after 10 days find his breach of covenant not "cured" for purposes of an unlawful detainer proceeding.
- 24 RCW 49.60.030(1)(c) provides, in relevant part, that the "right to be free from discrimination because of ... the presence of any sensory, mental, or physical handicap ... shall include ... [t]he right to engage in real estate transactions without discrimination".
- 25 *Granat v. Keasler*, 99 Wash.2d 564, 570, 663 P.2d 830 cert. denied, 464 U.S. 1018, 104 S.Ct. 549, 78 L.Ed.2d 723 (1983) (citing *Young v. Riley*, 59 Wash.2d 50, 365 P.2d 769 (1961); *Woodward v. Blanchett*, 36 Wash.2d 27, 216 P.2d 228 (1950).
- 26 *Sorenson v. Bellingham*, 80 Wash.2d 547, 558, 496 P.2d 512 (1972).
- 27 The court also awarded \$400.32 in past due rent.

Housing Authority of City of Everett v. Terry, 114 Wash.2d 558 (1990)

789 P.2d 745

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(vi) order other corrective action with respect to the agency.

(B) **TERMINATION OF COMPLIANCE ACTION.**—If the Secretary takes action under subparagraph (A) with respect to a public housing agency, the Secretary shall—

(i) in the case of action under subparagraph (A)(i), resume payments of assistance amounts under section 1437g of this title to the agency in the full amount of the total allocations under section 1437g of this title for the agency at the time that the Secretary first determines that the agency will comply with the provisions of this chapter relating to the public housing program;

(ii) in the case of action under clause (ii) or (v) of subparagraph (A), make withheld amounts available as the Secretary considers appropriate to ensure that the agency complies with the provisions of this chapter relating to such program;

(iii) in the case of action under subparagraph (A)(iv), release such restrictions at the time that the Secretary first determines that the agency will comply with the provisions of this chapter relating to such program; or

(iv) in the case of action under subparagraph (vi), cease such action at the time that the Secretary first determines that the agency will comply with the provisions of this chapter relating to such program.

(5) The Secretary shall submit to the Congress annually, as a part of the report of the Secretary under section 3536 of this title, a report that—

(A) identifies the public housing agencies that have been designated as troubled under paragraph (2);

(B) describes the grounds on which such public housing agencies were designated as troubled and continue to be so designated;

(C) describes the agreements that have been entered into with such agencies under such paragraph;

(D) describes the status of progress under such agreements;

(E) describes any action that has been taken in accordance with paragraph (3), including an accounting of the authorized funds that have been expended to support such actions; and

(F) describes the status of any public housing agency designated as troubled with respect to the program for assistance from the Capital Fund under section 1437g(d) of this title and specifies the amount of assistance the agency received under such program.

(6)(A) To the extent that the Secretary determines such action to be necessary in order to ensure the accuracy of any certification made under this section, the Secretary shall require an independent auditor to review documentation or other information maintained by a public housing agency pursuant to this section to substantiate each certification submitted by the agency or corporation relating to the performance of that agency or corporation.

(B) The Secretary may withhold, from assistance otherwise payable to the agency or corporation under section 1437g of this title,

amounts sufficient to pay for the reasonable costs of any review under this paragraph.

(7) The Secretary shall apply the provisions of this subsection to resident management corporations in the same manner as applied to public housing agencies.

(k) Administrative grievance procedure regulations: grounds of adverse action, hearing, examination of documents, representation, evidence, decision; judicial hearing; eviction and termination procedures

The Secretary shall by regulation require each public housing agency receiving assistance under this chapter to establish and implement an administrative grievance procedure under which tenants will—

(1) be advised of the specific grounds of any proposed adverse public housing agency action;

(2) have an opportunity for a hearing before an impartial party upon timely request within any period applicable under subsection (l) of this section;

(3) have an opportunity to examine any documents or records or regulations related to the proposed action;

(4) be entitled to be represented by another person of their choice at any hearing;

(5) be entitled to ask questions of witnesses and have others make statements on their behalf; and

(6) be entitled to receive a written decision by the public housing agency on the proposed action.

For any grievance concerning an eviction or termination of tenancy that involves any 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 violent or drug-related criminal activity on or off such premises, or any activity resulting in a felony conviction, the agency may (A) establish an expedited grievance procedure as the Secretary shall provide by rule under section 553 of title 5, or (B) 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 (which the Secretary shall establish by rule under section 553 of title 5). Such elements of due process shall not include a requirement that the tenant be provided an opportunity to examine relevant documents within the possession of the public housing agency. The agency shall provide to the tenant a reasonable opportunity, prior to hearing or trial, to examine any relevant documents, records, or regulations directly related to the eviction or termination.

(l) Leases; terms and conditions; maintenance; termination

Each public housing agency shall utilize leases which—

(1) have a term of 12 months and shall be automatically renewed for all purposes except for noncompliance with the requirements under section 1437j(c) of this title (relating to community service requirements); except that

nothing in this subchapter shall prevent a resident from seeking timely redress in court for failure to renew based on such noncompliance;

(2) do not contain unreasonable terms and conditions;

(3) obligate the public housing agency to maintain the project in a decent, safe, and sanitary condition;

(4) require the public housing agency to give adequate written notice of termination of the lease which shall not be less than—

(A) a reasonable period of time, but not to exceed 30 days—

(i) if the health or safety of other tenants, public housing agency employees, or persons residing in the immediate vicinity of the premises is threatened; or

(ii) in the event of any drug-related or violent criminal activity or any felony conviction;

(B) 14 days in the case of nonpayment of rent; and

(C) 30 days in any other case, except that if a State or local law provides for a shorter period of time, such shorter period shall apply;

(5) require that the public housing agency may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause, and that an incident or incidents of actual or threatened domestic violence, dating violence, or stalking will not be construed as a serious or repeated violation of the lease by the victim or threatened victim of that violence and will not be good cause for terminating the tenancy or occupancy rights of the victim of such violence;

(6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy; except that: (A) criminal activity directly relating to domestic violence, dating violence, or stalking, engaged in by a member of a tenant's household or any guest or other person under the tenant's control, shall not be cause for termination of the tenancy or occupancy rights, if the tenant or immediate member of the tenant's family is a victim of that domestic violence, dating violence, or stalking; (B) notwithstanding subparagraph (A) or any Federal, State, or local law to the contrary, a public housing agency may bifurcate a lease under this section, or remove a household member from a lease under this section, without regard to whether a household member is a signatory to a lease, in order to evict, remove, terminate occupancy rights, or terminate assistance to any individual who is a tenant or lawful occupant and who engages in criminal acts of physical violence against family members or others, without evicting, removing, terminating assistance to, or otherwise penalizing the victim of

such violence who is also a tenant or lawful occupant and such eviction, removal, termination of occupancy rights, or termination of assistance shall be effected in accordance with the procedures prescribed by Federal, State, and local law for the termination of leases or assistance under the relevant program of HUD-assisted housing; (C) nothing in subparagraph (A) may be construed to limit the authority of a public housing agency, when notified, to honor court orders addressing rights of access to or control of the property, including civil protection orders issued to protect the victim and issued to address the distribution or possession of property among the household members in cases where a family breaks up; (D) nothing in subparagraph (A) limits any otherwise available authority of a public housing agency to evict a tenant for any violation of a lease not premised on the act or acts of violence in question against the tenant or a member of the tenant's household, provided that the public housing agency does not subject an individual who is or has been a victim of domestic violence, dating violence, or stalking to a more demanding standard than other tenants in determining whether to evict or terminate; (E) nothing in subparagraph (A) may be construed to limit the authority of a public housing agency to terminate the tenancy of any tenant if the public housing agency can demonstrate an actual and imminent threat to other tenants or those employed at or providing service to the property if that tenant's tenancy is not terminated; and (F) nothing in this section shall be construed to supersede any provision of any Federal, State, or local law that provides greater protection than this section for victims of domestic violence, dating violence, or stalking.;

(7) specify that with respect to any notice of eviction or termination, notwithstanding any State law, a public housing tenant shall be informed of the opportunity, prior to any hearing or trial, to examine any relevant documents, records, or regulations directly related to the eviction or termination;

(7)⁹ provide that any occupancy in violation of section 13661(b) of this title (relating to ineligibility of illegal drug users and alcohol abusers) or the furnishing of any false or misleading information pursuant to section 13662 of this title (relating to termination of tenancy and assistance for illegal drug users and alcohol abusers) shall be cause for termination of tenancy;¹⁰

(9) provide that it shall be cause for immediate termination of the tenancy of a public housing tenant if such tenant—

(A) is fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the individual flees, for a crime, or attempt to commit a crime, which is a felony under the laws of the place from which the individual flees, or which, in the case of the State of New Jersey, is a high misdemeanor under the laws of such State; or

⁸So in original. The period probably should not appear.

⁹So in original. Probably should be "(8)".

¹⁰So in original. Probably should be followed by "and".

(2)¹¹ is violating a condition of probation or parole imposed under Federal or State law.

For purposes of paragraph (5),¹² the term “drug-related criminal activity” means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 802 of title 21).

(m) Reporting requirements; limitation

The Secretary shall not impose any unnecessarily duplicative or burdensome reporting requirements on tenants or public housing agencies assisted under this chapter.

(n) Notice to post office regarding eviction for criminal activity

When a public housing agency evicts an individual or family from a dwelling unit for engaging in criminal activity, including drug-related criminal activity, the public housing agency shall notify the local post office serving that dwelling unit that such individual or family is no longer residing in the dwelling unit.

(o) Public housing assistance for foster care children

In providing housing in low-income housing projects, each public housing agency may coordinate with any local public agencies involved in providing for the welfare of children to make available dwelling units to—

(1) families identified by the agencies as having a lack of adequate housing that is a primary factor—

(A) in the imminent placement of a child in foster care; or

(B) in preventing the discharge of a child from foster care and reunification with his or her family; and

(2) youth, upon discharge from foster care, in cases in which return to the family or extended family or adoption is not available.

(p) Repealed. Pub. L. 105-276, title V, § 519(b), Oct. 21, 1998, 112 Stat. 2561

(q) Availability of records

(1) In general

(A) Provision of information

Notwithstanding any other provision of law, except as provided in subparagraph (C), the National Crime Information Center, police departments, and other law enforcement agencies shall, upon request, provide information to public housing agencies regarding the criminal conviction records of adult applicants for, or tenants of, covered housing assistance for purposes of applicant screening, lease enforcement, and eviction.

(B) Requests by owners of project-based section 8 [42 U.S.C. 1437f] housing

A public housing agency may make a request under subparagraph (A) for information regarding applicants for, or tenants of, housing that is provided project-based as-

sistance under section 1437f of this title only if the housing is located within the jurisdiction of the agency and the owner of such housing has requested that the agency obtain such information on behalf of the owner. Upon such a request by the owner, the agency shall make a request under subparagraph (A) for the information. The agency may not make such information available to the owner but shall perform determinations for the owner regarding screening, lease enforcement, and eviction based on criteria supplied by the owner.

(C) Exception

A law enforcement agency described in subparagraph (A) shall provide information under this paragraph relating to any criminal conviction of a juvenile only to the extent that the release of such information is authorized under the law of the applicable State, tribe, or locality.

(2) Opportunity to dispute

Before an adverse action is taken with regard to assistance under this subchapter on the basis of a criminal record, the public housing agency shall provide the tenant or applicant with a copy of the criminal record and an opportunity to dispute the accuracy and relevance of that record.

(3) Fees

A public housing agency may be charged a reasonable fee for information provided under paragraph (1). In the case of a public housing agency obtaining information pursuant to paragraph (1)(B) for another owner of housing, the agency may pass such fee on to the owner initiating the request and may charge additional reasonable fees for making the request on behalf of the owner and taking other actions for owners under this subsection.

(4) Records management

Each public housing agency shall establish and implement a system of records management that ensures that any criminal record received by the public housing agency is—

(A) maintained confidentially;

(B) not misused or improperly disseminated; and

(C) destroyed, once the purpose for which the record was requested has been accomplished.

(5) Confidentiality

A public housing agency receiving information under this subsection may use such information only for the purposes provided in this subsection and such information may not be disclosed to any person who is not an officer, employee, or authorized representative of the agency and who has a job-related need to have access to the information in connection with admission of applicants, eviction of tenants, or termination of assistance. For judicial eviction proceedings, disclosures may be made to the extent necessary. The Secretary shall, by regulation, establish procedures necessary to ensure that information provided under this subsection to a public housing agency is used, and confidentiality of such information is

¹¹So in original. Probably should be “(B)”

¹²See References in Text note below

part 5, subpart G. For each PHA, HUD will perform an independent physical inspection of a statistically valid sample of such housing based upon the physical condition standards in 24 CFR part 5, subpart G.

[63 FR 46580, Sept. 1, 1998]

Subpart G [Reserved]

Subpart H—Lead-Based Paint Poisoning Prevention

§ 965.701 Lead-based paint poisoning prevention.

The requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851-4856), and implementing regulations at part 35, subparts A, B, L, and R of this title apply to this program.

[64 FR 50229, Sept. 15, 1999]

Subpart I—Fire Safety

SOURCE: 57 FR 33853, July 30, 1992, unless otherwise noted.

§ 965.800 Applicability.

This subpart applies to all PHA-owned or -leased housing housing, including Mutual Help and Turnkey III.

§ 965.805 Smoke detectors.

(a) *Performance requirement.* (1) After October 30, 1992, each unit covered by this subpart must be equipped with at least one battery-operated or hard-wired smoke detector, or such greater number as may be required by state or local codes, in working condition, on each level of the unit. In units occupied by hearing-impaired residents, smoke detectors must be hard-wired.

(2) After October 30, 1992, the public areas of all housing covered by this subpart must be equipped with a sufficient number, but not less than one for each area, of battery-operated or hard-wired smoke detectors to serve as adequate warning of fire. Public areas include, but are not limited to, laundry rooms, community rooms, day care centers, hallways, stairwells, and other common areas.

(b) *Acceptability criteria.* (1) The smoke detector for each individual unit must be located, to the extent practicable, in a hallway adjacent to the bedroom or bedrooms. In units occupied by hearing-impaired residents, hard-wired smoke detectors must be connected to an alarm system designed for hearing-impaired persons and installed in the bedroom or bedrooms occupied by the hearing-impaired residents. Individual units that are jointly occupied by both hearing and hearing-impaired residents must be equipped with both audible and visual types of alarm devices.

(2) If needed, battery-operated smoke detectors, except in units occupied by hearing-impaired residents, may be installed as a temporary measure where no detectors are present in a unit. Temporary battery-operated smoke detectors must be replaced with hard-wired electric smoke detectors in the normal course of a PHA's planned CIAP or CGP program to meet the required HUD Modernization Standards or state or local codes, whichever standard is stricter. Smoke detectors for units occupied by hearing-impaired residents must be installed in accordance with the acceptability criteria in paragraph (b)(1) of this section.

(c) *Funding.* PHAs shall use operating funds to provide battery-operated smoke detectors in units that do not have any smoke detector in place. If operating funds or reserves are insufficient to accomplish this, PHAs may apply for emergency CIAP funding. The PHAs may apply for CIAP or CGP funds to replace battery-operated smoke detectors with hard-wired smoke detectors in the normal course of a planned modernization program.

PART 966—PUBLIC HOUSING LEASE AND GRIEVANCE PROCEDURE

Subpart A—Dwelling Leases, Procedures and Requirements

Sec.

- 966.1 Purpose and applicability.
- 966.2 Definitions.
- 966.3 Tenants' opportunity for comment.
- 966.4 Lease requirements.
- 966.5 Posting of policies, rules and regulations.
- 966.6 Prohibited lease provisions.

§ 966.1

966.7 Accommodation of persons with disabilities.

Subpart B—Grievance Procedures and Requirements

966.50 Purpose and scope.
966.51 Applicability.
966.52 Requirements.
966.53 Definitions.
966.54 Informal settlement of grievance.
966.55 Procedures to obtain a hearing.
966.56 Procedures governing the hearing.
966.57 Decision of the hearing officer or hearing panel.

AUTHORITY: 42 U.S.C. 1437d and 3535(d).

Subpart A—Dwelling Leases, Procedures and Requirements

SOURCE: 40 FR 33402, Aug. 7, 1975, unless otherwise noted. Redesignated at 49 FR 6714, Feb. 23, 1984.

§ 966.1 Purpose and applicability.

(a) This part is applicable to public housing.

(b) Subpart A of this part prescribes the provisions that must be incorporated in leases for public housing dwelling units.

(c) Subpart B of this part prescribes public housing grievance hearing requirements.

[66 FR 28802, May 24, 2001]

§ 966.2 Definitions.

The following terms are defined in part 5, subpart A of this title: *1937 Act*, *covered person*, *drug*, *drug-related criminal activity*, *federally assisted housing*, *guest*, *household*, *HUD*, *other person under the tenant's control*, *public housing*, *premises*, *public housing agency*, *Section 8*, *violent criminal activity*.

[66 FR 28802, May 24, 2001]

§ 966.3 Tenants' opportunity for comment.

Each PHA shall provide at least 30 days notice to tenants and resident organizations setting forth proposed changes in the lease form used by the PHA, and providing an opportunity to present written comments. Subject to requirements of this rule, comments submitted shall be considered by the

24 CFR Ch. IX (4-1-12 Edition)

PHA before formal adoption of any new lease form.

[56 FR 51576, Oct. 11, 1991]

§ 966.4 Lease requirements.

A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereinafter.

(a) *Parties, dwelling unit and term.* (1) The lease shall state:

(i) The names of the PHA and the tenant;

(ii) The unit rented (address, apartment number, and any other information needed to identify the dwelling unit);

(iii) The term of the lease (lease term and renewal in accordance with paragraph (a)(2) of this section);

(iv) A statement of what utilities, services, and equipment are to be supplied by the PHA without additional cost, and what utilities and appliances are to be paid for by the tenant;

(v) The composition of the household as approved by the PHA (family members and any PHA-approved live-in aide). 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;

(vi) HUD's regulations in 24 CFR part 5, subpart L, apply, if a current or future tenant is or becomes a victim of domestic violence, dating violence, or stalking, as provided in 24 CFR part 5, subpart L.

(2) *Lease term and renewal.* (i) The lease shall have a twelve month term. Except as provided in paragraph (a)(2)(ii) of this section, the lease term must be automatically renewed for the same period.

(ii) The PHA may not renew the lease if the family has violated the requirement for resident performance of community service or participation in an economic self-sufficiency program in accordance with part 960, subpart F of this chapter.

(iii) At any time, the PHA may terminate the tenancy in accordance with § 966.4(1).

(3) *Execution and modification.* The lease must be executed by the tenant

and the PHA, except for automatic renewals of a lease. The lease may be modified at any time by written agreement of the tenant and the PHA.

(b) *Payments due under the lease*—(1) *Tenant rent.* (i) The tenant shall pay the amount of the monthly tenant rent determined by the PHA in accordance with HUD regulations and other requirements. The amount of the tenant rent is subject to change in accordance with HUD requirements.

(ii) The lease shall specify the initial amount of the tenant rent at the beginning of the initial lease term. The PHA shall give the tenant written notice stating any change in the amount of tenant rent, and when the change is effective.

(2) *PHA charges.* The lease shall provide for charges to the tenant for maintenance and repair beyond normal wear and tear and for consumption of excess utilities. The lease shall state the basis for the determination of such charges (e.g., by a posted schedule of charges for repair, amounts charged for utility consumption in excess of the allowance stated in the lease, etc.). The imposition of charges for consumption of excess utilities is permissible only if such charges are determined by an individual check meter servicing the leased unit or result from the use of major tenant-supplied appliances.

(3) *Late payment penalties.* At the option of the PHA, the lease may provide for payment of penalties for late payment.

(4) *When charges are due.* The lease shall provide that charges assessed under paragraph (b) (2) and (3) of this section shall not be due and collectible until two weeks after the PHA gives written notice of the charges. Such notice constitutes a notice of adverse action, and must meet the requirements governing a notice of adverse action (see § 966.4(e)(8)).

(5) *Security deposits.* At the option of the PHA, the lease may provide for security deposits which shall not exceed one month's rent or such reasonable fixed amount as may be required by the PHA. Provision may be made for gradual accumulation of the security deposit by the tenant. Subject to applicable laws, interest earned on security deposits may be refunded to the tenant

on vacation of the dwelling unit or used for tenant services or activities.

(c) *Redetermination of rent and family composition.* The lease shall provide for redetermination of rent and family composition which shall include:

(1) The frequency of regular rental redetermination and the basis for interim redetermination.

(2) An agreement by the tenant to furnish such information and certifications regarding family composition and income as may be necessary for the PHA to make determinations with respect to rent, eligibility, and the appropriateness of dwelling size.

(3) An agreement by the tenant to transfer to an appropriate size dwelling unit based on family composition, upon appropriate notice by the PHA that such a dwelling unit is available.

(4) When the PHA redetermines the amount of rent (Total Tenant Payment or Tenant Rent) payable by the tenant, not including determination of the PHA's schedule of Utility Allowances for families in the PHA's Public Housing Program, or determines that the tenant must transfer to another unit based on family composition, the PHA shall notify the tenant that the tenant may ask for an explanation stating the specific grounds of the PHA determination, and that if the tenant does not agree with the determination, the tenant shall have the right to request a hearing under the PHA grievance procedure.

(d) *Tenant's right to use and occupancy.* (1) The lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased unit by the members of the household authorized to reside in the unit in accordance with the lease, including reasonable accommodation of their guests. The term *guest* is defined in 24 CFR 5.100.

(2) With the consent of the PHA, members of the household may engage in legal profitmaking activities in the dwelling unit, where the PHA determines that such activities are incidental to primary use of the leased unit for residence by members of the household.

(3)(i) With the consent of the PHA, a foster child or a live-in aide may reside

§966.4

24 CFR Ch. IX (4-1-12 Edition)

in the unit. The PHA may adopt reasonable policies concerning residence by a foster child or a live-in-aide, and defining the circumstances in which PHA consent will be given or denied. Under such policies, the factors considered by the PHA may include:

(A) Whether the addition of a new occupant may necessitate a transfer of the family to another unit, and whether such units are available.

(B) The PHA's obligation to make reasonable accommodation for handicapped persons.

(i) *Live-in aide* means a person who resides with an elderly, disabled or handicapped person and who:

(A) Is determined to be essential to the care and well-being of the person;

(B) Is not obligated for the support of the person; and

(C) Would not be living in the unit except to provide the necessary supportive services.

(e) *The PHA's obligations.* The lease shall set forth the PHA's obligations under the lease, which shall include the following:

(1) To maintain the dwelling unit and the project in decent, safe, and sanitary condition;

(2) To comply with requirements of applicable building codes, housing codes, and HUD regulations materially affecting health and safety;

(3) To make necessary repairs to the dwelling unit;

(4) To keep project buildings, facilities, and common areas, not otherwise assigned to the tenant for maintenance and upkeep, in a clean and safe condition;

(5) To maintain in good and safe working order and condition electrical, plumbing, sanitary, heating, ventilating, and other facilities and appliances, including elevators, supplied or required to be supplied by the PHA;

(6) To provide and maintain appropriate receptacles and facilities (except containers for the exclusive use of an individual tenant family) for the deposit of ashes, garbage, rubbish, and other waste removed from the dwelling unit by the tenant in accordance with paragraph (f)(7) of this section;

(7) To supply running water and reasonable amounts of hot water and reasonable amounts of heat at appropriate

times of the year (according to local custom and usage), except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or where heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct utility connection; and

(8)(i) To notify the tenant of the specific grounds for any proposed adverse action by the PHA. (Such adverse action includes, but is not limited to, a proposed lease termination, transfer of the tenant to another unit, or imposition of charges for maintenance and repair, or for excess consumption of utilities.)

(ii) When the PHA is required to afford the tenant the opportunity for a hearing under the PHA grievance procedure for a grievance concerning a proposed adverse action:

(A) The notice of proposed adverse action shall inform the tenant of the right to request such hearing. In the case of a lease termination, a notice of lease termination, in accordance with paragraph (1)(3) of this section, shall constitute adequate notice of proposed adverse action.

(B) In the case of a proposed adverse action other than a proposed lease termination, the PHA shall not take the proposed action until the time for the tenant to request a grievance hearing has expired, and (if a hearing was timely requested by the tenant) the grievance process has been completed.

(9) To consider lease bifurcation, as provided in 24 CFR 5.2009, in circumstances involving domestic violence, dating violence, or stalking addressed in 24 CFR part 5, subpart L.

(f) *Tenant's obligations.* The lease shall provide that the tenant shall be obligated:

(1) Not to assign the lease or to sublease the dwelling unit;

(2) Not to provide accommodations for boarders or lodgers;

(3) To use the dwelling unit solely as a private dwelling for the tenant and the tenant's household as identified in the lease, and not to use or permit its use for any other purpose;

(4) To abide by necessary and reasonable regulations promulgated by the PHA for the benefit and well-being of

the housing project and the tenants which shall be posted in the project office and incorporated by reference in the lease;

(5) To comply with all obligations imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety;

(6) To keep the dwelling unit and such other areas as may be assigned to the tenant for the tenant's exclusive use in a clean and safe condition;

(7) To dispose of all ashes, garbage, rubbish, and other waste from the dwelling unit in a sanitary and safe manner;

(8) To use only in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appurtenances including elevators;

(9) To refrain from, and to cause the household and guests to refrain from destroying, defacing, damaging, or removing any part of the dwelling unit or project;

(10) To pay reasonable charges (other than for wear and tear) for the repair of damages to the dwelling unit, or to the project (including damages to project buildings, facilities or common areas) caused by the tenant, a member of the household or a guest.

(11) To act, and cause household members or guests to act, in a manner which will not disturb other residents' peaceful enjoyment of their accommodations and will be conducive to maintaining the project in a decent, safe and sanitary condition;

(12) (i) To assure that no tenant, member of the tenant's household, or guest engages in:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or

(B) Any drug-related criminal activity on or off the premises;

(ii) To assure that no other person under the tenant's control engages in:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or

(B) Any drug-related criminal activity on the premises;

(iii) To assure that no member of the household engages in an abuse or pattern of abuse of alcohol that affects the health, safety, or right to peaceful enjoyment of the premises by other residents.

(g) *Tenant maintenance.* The lease may provide that the tenant shall perform seasonal maintenance or other maintenance tasks, as specified in the lease, where performance of such tasks by tenants of dwellings units of a similar design and construction is customary: *Provided*, That such provision is included in the lease in good faith and not for the purpose of evading the obligations of the PHA. The PHA shall exempt tenants who are unable to perform such tasks because of age or disability.

(h) *Defects hazardous to life, health, or safety.* The lease shall set forth the rights and obligations of the tenant and the PHA if the dwelling unit is damaged to the extent that conditions are created which are hazardous to life, health, or safety of the occupants and shall provide that:

(1) The tenant shall immediately notify project management of the damage;

(2) The PHA shall be responsible for repair of the unit within a reasonable time: *Provided*, That if the damage was caused by the tenant, tenant's household or guests, the reasonable cost of the repairs shall be charged to the tenant;

(3) The PHA shall offer standard alternative accommodations, if available, where necessary repairs cannot be made within a reasonable time; and

(4) Provisions shall be made for abatement of rent in proportion to the seriousness of the damage and loss in value as a dwelling if repairs are not made in accordance with paragraph (h)(2) of this section or alternative accommodations not provided in accordance with paragraph (h)(3) of this section, except that no abatement of rent shall occur if the tenant rejects the alternative accommodation or if the damage was caused by the tenant, tenant's household or guests.

(i) *Pre-occupancy and pre-termination inspections.* The lease shall provide that the PHA and the tenant or representative shall be obligated to inspect the

§ 966.4

24 CFR Ch. IX (4-1-12 Edition)

dwelling unit prior to commencement of occupancy by the tenant. The PHA will furnish the tenant with a written statement of the condition of the dwelling unit, and the equipment provided with the unit. The statement shall be signed by the PHA and the tenant, and a copy of the statement shall be retained by the PHA in the tenant's folder. The PHA shall be further obligated to inspect the unit at the time the tenant vacates the unit and to furnish the tenant a statement of any charges to be made in accordance with paragraph (b)(2) of this section. Provision shall be made for the tenant's participation in the latter inspection, unless the tenant vacates without notice to the PHA.

(j) *Entry of dwelling unit during tenancy.* The lease shall set forth the circumstances under which the PHA may enter the dwelling unit during the tenant's possession thereof, which shall include provision that:

(1) The PHA shall, upon reasonable advance notification to the tenant, be permitted to enter the dwelling unit during reasonable hours for the purpose of performing routine inspections and maintenance, for making improvement or repairs, or to show the dwelling unit for re-leasing. A written statement specifying the purpose of the PHA entry delivered to the dwelling unit at least two days before such entry shall be considered reasonable advance notification;

(2) The PHA may enter the dwelling unit at any time without advance notification when there is reasonable cause to believe that an emergency exists; and

(3) If the tenant and all adult members of the household are absent from the dwelling unit at the time of entry, the PHA shall leave in the dwelling unit a written statement specifying the date, time and purpose of entry prior to leaving the dwelling unit.

(k) *Notice procedures.* (1) The lease shall provide procedures to be followed by the PHA and the tenant in giving notice one to the other which shall require that:

(i) Except as provided in paragraph (j) of this section, notice to a tenant shall be in writing and delivered to the tenant or to an adult member of the

tenant's household residing in the dwelling or sent by prepaid first-class mail properly addressed to the tenant; and

(ii) Notice to the PHA shall be in writing, delivered to the project office or the PHA central office or sent by prepaid first-class mail properly addressed.

(2) If the tenant is visually impaired, all notices must be in an accessible format.

(1) *Termination of tenancy and eviction—(1) Procedures.* The lease shall state the procedures to be followed by the PHA and by the tenant to terminate the tenancy.

(2) *Grounds for termination of tenancy.* The PHA may terminate the tenancy only for:

(i) Serious or repeated violation of material terms of the lease, such as the following:

(A) Failure to make payments due under the lease;

(B) Failure to fulfill household obligations, as described in paragraph (f) of this section;

(ii) Being over the income limit for the program, as provided in 24 CFR 960.261.

(iii) Other good cause. Other good cause includes, but is not limited to, the following:

(A) Criminal activity or alcohol abuse as provided in paragraph (1)(5) of this section;

(B) Discovery after admission of facts that made the tenant ineligible;

(C) Discovery of material false statements or fraud by the tenant in connection with an application for assistance or with reexamination of income;

(D) Failure of a family member to comply with service requirement provisions of part 960, subpart F, of this chapter—as grounds only for non-renewal of the lease and termination of tenancy at the end of the twelve-month lease term; and

(E) Failure to accept the PHA's offer of a lease revision to an existing lease: that is on a form adopted by the PHA in accordance with § 966.3; with written notice of the offer of the revision at least 60 calendar days before the lease revision is scheduled to take effect; and with the offer specifying a reasonable

time limit within that period for acceptance by the family.

(3) *Lease termination notice.* (i) The PHA must give written notice of lease termination of:

(A) 14 days in the case of failure to pay rent;

(B) A reasonable period of time considering the seriousness of the situation (but not to exceed 30 days):

(1) If the health or safety of other residents, PHA employees, or persons residing in the immediate vicinity of the premises is threatened; or

(2) If any member of the household has engaged in any drug-related criminal activity or violent criminal activity; or

(3) If any member of the household has been convicted of a felony;

(C) 30 days in any other case, except that if a State or local law allows a shorter notice period, such shorter period shall apply.

(ii) The notice of lease termination to the tenant shall state specific grounds for termination, and shall inform the tenant of the tenant's right to make such reply as the tenant may wish. The notice shall also inform the tenant of the right (pursuant to § 966.4(m)) to examine PHA documents directly relevant to the termination or eviction. When the PHA is required to afford the tenant the opportunity for a grievance hearing, the notice shall also inform the tenant of the tenant's right to request a hearing in accordance with the PHA's grievance procedure.

(iii) A notice to vacate which is required by State or local law may be combined with, or run concurrently with, a notice of lease termination under paragraph (1)(3)(i) of this section.

(iv) When the PHA is required to afford the tenant the opportunity for a hearing under the PHA grievance procedure for a grievance concerning the lease termination (see § 966.51(a)(1)), the tenancy shall not terminate (even if any notice to vacate under State or local law has expired) until the time for the tenant to request a grievance hearing has expired, and (if a hearing was timely requested by the tenant) the grievance process has been completed.

(v) When the PHA is not required to afford the tenant the opportunity for a

hearing under the PHA administrative grievance procedure for a grievance concerning the lease termination (see § 966.51(a)(2)), and the PHA has decided to exclude such grievance from the PHA grievance procedure, the notice of lease termination under paragraph (1)(3)(i) of this section shall:

(A) State that the tenant is not entitled to a grievance hearing on the termination.

(B) Specify the judicial eviction procedure to be used by the PHA for eviction of the tenant, and state that HUD has determined that this eviction procedure provides the opportunity for a hearing in court that contains the basic elements of due process as defined in HUD regulations.

(C) State whether the eviction is for a criminal activity as described in § 966.51(a)(2)(1)(A) or for a drug-related criminal activity as described in § 966.51(a)(2)(1)(B).

(4) *How tenant is evicted.* The PHA may evict the tenant from the unit either:

(i) By bringing a court action or;

(ii) By bringing an administrative action if law of the jurisdiction permits eviction by administrative action, after a due process administrative hearing, and without a court determination of the rights and liabilities of the parties. In order to evict without bringing a court action, the PHA must afford the tenant the opportunity for a pre-eviction hearing in accordance with the PHA grievance procedure.

(5) *PHA termination of tenancy for criminal activity or alcohol abuse—(1) Evicting drug criminals.* (A) *Methamphetamine conviction.* The PHA must immediately terminate the tenancy 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.

(B) *Drug crime on or off the premises.* The lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy. In

addition, the lease must provide that a PHA may evict a family when the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(ii) *Evicting other criminals.* (A) *Threat to other residents.* The lease must provide that any criminal activity by a covered person that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including PHA management staff residing on the premises) or threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises is grounds for termination of tenancy.

(B) *Fugitive felon or parole violator.* The PHA may terminate the tenancy if a tenant is fleeing to avoid prosecution, or custody or confinement after conviction, for a crime, or attempt to commit a crime, that is a felony under the laws of the place from which the individual flees, or that, in the case of the State of New Jersey, is a high misdemeanor; or violating a condition of probation or parole imposed under Federal or State law.

(iii) *Eviction for criminal activity.* (A) *Evidence.* The PHA may evict the tenant by judicial action for criminal activity in accordance with this section if the PHA determines that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction.

(B) *Notice to Post Office.* When a PHA evicts an individual or family for criminal activity, the PHA must notify the local post office serving the dwelling unit that the individual or family is no longer residing in the unit.

(iv) *Use of criminal record.* If the PHA seeks to terminate the tenancy 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 before a PHA grievance hearing

or court trial concerning the termination of tenancy or eviction. The tenant must be given an opportunity to dispute the accuracy and relevance of that record in the grievance hearing or court trial.

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

(vi) *Evicting alcohol abusers.* The PHA must establish standards that allow termination of tenancy if the PHA determines that a household member has:

(A) Engaged in abuse or pattern of abuse of alcohol that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents; or

(B) Furnished false or misleading information concerning illegal drug use, alcohol abuse, or rehabilitation of illegal drug users or alcohol abusers.

(vii) *PHA action, generally.* (A) *Assessment under PHAS.* Under the Public Housing Assessment System (PHAS), PHAs that have adopted policies, implemented procedures and can document that they appropriately evict any public housing residents who engage in certain activity detrimental to the public housing community receive points. (See 24 CFR 902.43(a)(5).) This policy takes into account the importance of eviction of such residents to public housing communities and program integrity, and the demand for assisted housing by families who will adhere to lease responsibilities.

(B) *Consideration of circumstances.* In a manner consistent with such policies, procedures and practices, the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.

(C) *Exclusion of culpable household member.* The PHA may require a tenant to exclude a household member in

order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.

(D) *Consideration of rehabilitation.* In determining whether to terminate tenancy for illegal drug use or a pattern of illegal drug use by a household member who is no longer engaging in such use, or for abuse or a pattern of abuse of alcohol by a household member who is no longer engaging in such abuse, the PHA may 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. 13662). For this purpose, the PHA may require the 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.

(E) *Length of period of mandatory prohibition on admission.* If a statute requires that the PHA prohibit admission of persons for a prescribed period of time after some disqualifying behavior or event, the PHA may apply that prohibition for a longer period of time.

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

(m) *Eviction: Right to examine PHA documents before hearing or trial.* The PHA shall provide the tenant a reasonable opportunity to examine, at the tenant's request, before a PHA grievance hearing or court trial concerning a termination of tenancy or eviction, any documents, including records and regulations, which are in the possession of the PHA, and which are directly relevant to the termination of tenancy or eviction. The tenant shall be allowed to copy any such document at the tenant's expense. A notice of lease termination pursuant to §966.4(l) (3) shall inform the tenant of the tenant's right to examine PHA documents concerning the termination of tenancy or eviction. If the PHA does not make documents available for examination upon request by the tenant (in accord-

ance with this §966.4(m)), the PHA may not proceed with the eviction.

(n) *Grievance procedures.* The lease shall provide that all disputes concerning the obligations of the tenant or the PHA shall (except as provided in §966.51(a)(2)) be resolved in accordance with the PHA grievance procedures. The grievance procedures shall comply with subpart B of this part.

(o) *Provision for modifications.* The lease shall provide that modification of the lease must be accomplished by a written rider to the lease executed by both parties, except for paragraph (c) of this section and §966.5.

(p) *Signature clause.* The lease shall provide a signature clause attesting that the lease has been executed by the parties.

[56 FR 51576, Oct. 11, 1991, as amended at 61 FR 13273, Mar. 26, 1996; 65 FR 16730, Mar. 29, 2000; 66 FR 28802, May 24, 2001; 66 FR 32875, June 18, 2001; 66 FR 33134, June 20, 2001; 69 FR 68791, Nov. 26, 2004; 75 FR 66262, Oct. 27, 2010]

§ 966.5 Posting of policies, rules and regulations.

Schedules of special charges for services, repairs and utilities and rules and regulations which are required to be incorporated in the lease by reference shall be publicly posted in a conspicuous manner in the Project Office and shall be furnished to applicants and tenants on request. Such schedules, rules and regulations may be modified from time to time by the PHA provided that the PHA shall give at least 30-day written notice to each affected tenant setting forth the proposed modification, the reasons therefor, and providing the tenant an opportunity to present written comments which shall be taken into consideration by the PHA prior to the proposed modification becoming effective. A copy of such notice shall be:

(a) Delivered directly or mailed to each tenant; or

(b) Posted in at least three (3) conspicuous places within each structure or building in which the affected dwelling units are located, as well as in a conspicuous place at the project office, if any, or if none, a similar central business location within the project.

§ 966.6

§ 966.6 Prohibited lease provisions.

Lease clauses of the nature described below shall not be included in new leases between a PHA and a tenant and shall be deleted from existing leases either by amendment thereof or execution of a new lease:

(a) *Confession of judgment.* Prior consent by the tenant to any lawsuit the landlord may bring against him in connection with the lease and to a judgment in favor of the landlord.

(b) *Distraint for rent or other charges.* Agreement by the tenant that landlord is authorized to take property of the tenant and hold it as a pledge until the tenant performs the obligation which the landlord has determined the tenant has failed to perform.

(c) *Exculpatory clauses.* Agreement by the tenant not to hold the landlord or landlord's agent liable for any acts or omissions whether intentional or negligent on the part of the landlord or the landlord's authorized representatives or agents.

(d) *Waiver of legal notice by tenant prior to actions for eviction or money judgments.* Agreements by the tenant that the landlord may institute suit without any notice to the tenant that the suit has been filed, thus preventing the tenant from defending against the lawsuit.

(e) *Waiver of legal proceedings.* Authorization to the landlord to evict the tenant or hold or sell the tenant's possessions whenever the landlord determines that a breach or default has occurred without notice to the tenant or any determination by a court of the rights and liabilities of the parties.

(f) *Waiver of jury trial.* Authorization of the landlord's lawyer to appear in court for the tenant and waive the right to a trial by jury.

(g) *Waiver of right to appeal judicial error in legal proceeding.* Authorization to the landlord's lawyer to waive the right to appeal for judicial error in any suit or to waive the right to file a suit in equity to prevent the execution of a judgment.

(h) *Tenant chargeable with cost of legal actions regardless of outcome.* Provision that the tenant agrees to pay attorney's fees or other legal costs whenever the landlord decides to take action against the tenant even though the

24 CFR Ch. IX (4-1-12 Edition)

court determines that the tenant prevails in the action. Prohibition of this type of provision does not mean that the tenant as a party to the lawsuit may not be obligated to pay attorney's fees or other costs if he loses the suit.

§ 966.7 Accommodation of persons with disabilities.

(a) For all aspects of the lease and grievance procedures, a handicapped person shall be provided reasonable accommodation to the extent necessary to provide the handicapped person with an opportunity to use and occupy the dwelling unit equal to a non-handicapped person.

(b) The PHA shall provide a notice to each tenant that the tenant may, at any time during the tenancy, request reasonable accommodation of a handicap of a household member, including reasonable accommodation so that the tenant can meet lease requirements or other requirements of tenancy.

[56 FR 51579, Oct. 11, 1991]

Subpart B—Grievance Procedures and Requirements

SOURCE: 40 FR 33406, Aug. 7, 1975, unless otherwise noted. Redesignated at 49 FR 6714, Feb. 23, 1984.

§ 966.50 Purpose and scope.

The purpose of this subpart is to set forth the requirements, standards and criteria for a grievance procedure to be established and implemented by public housing agencies (PHAs) to assure that a PHA tenant is afforded an opportunity for a hearing if the tenant disputes within a reasonable time any PHA action or failure to act involving the tenant's lease with the PHA or PHA regulations which adversely affect the individual tenant's rights, duties, welfare or status.

[56 FR 51579, Oct. 11, 1991]

§ 966.51 Applicability.

(a)(1) The PHA grievance procedure shall be applicable (except as provided in paragraph (a)(2) of this section) to all individual grievances as defined in § 966.53 of this subpart between the tenant and the PHA.

(2)(i) The term *due process determination* means a determination by HUD that law of the jurisdiction requires that the tenant must be given the opportunity for a hearing in court which provides the basic elements of due process (as defined in § 966.53(c)) before eviction from the dwelling unit. If HUD has issued a due process determination, a PHA may exclude from the PHA administrative grievance procedure under this subpart any grievance concerning a termination of tenancy or eviction that involves:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises of other residents or employees of the PHA;

(B) Any violent or drug-related criminal activity on or off such premises; or

(C) Any criminal activity that resulted in felony conviction of a household member.

(iii) For guidance of the public, HUD will publish in the FEDERAL REGISTER a notice listing the judicial eviction procedures for which HUD has issued a due process determination. HUD will make available for public inspection and copying a copy of the legal analysis on which the determinations are based.

(iv) If HUD has issued a due process determination, the PHA may evict the occupants of the dwelling unit through the judicial eviction procedures which are the subject of the determination. In this case, the PHA is not required to provide the opportunity for a hearing under the PHA's administrative grievance procedure.

(b) The PHA grievance procedure shall not be applicable to disputes between tenants not involving the PHA or to class grievances. The grievance procedure is not intended as a forum for initiating or negotiating policy changes between a group or groups of tenants and the PHA's Board of Commissioners.

[40 FR 33406, Aug. 7, 1975 Redesignated at 49 FR 6714, Feb. 23, 1984, and amended at 56 FR 51579, Oct. 11, 1991; 61 FR 13273, Mar. 26, 1996; 66 FR 28804, May 24, 2001]

§ 966.52 Requirements.

(a) Each PHA shall adopt a grievance procedure affording each tenant an op-

portunity for a hearing on a grievance as defined in § 966.53 in accordance with the requirements, standards, and criteria contained in this subpart.

(b) The PHA grievance procedure shall be included in, or incorporated by reference in, all tenant dwelling leases pursuant to subpart A of this part.

(c) The PHA shall provide at least 30 days notice to tenants and resident organizations setting forth proposed changes in the PHA grievance procedure, and providing an opportunity to present written comments. Subject to requirements of this subpart, comments submitted shall be considered by the PHA before adoption of any grievance procedure changes by the PHA.

(d) The PHA shall furnish a copy of the grievance procedure to each tenant and to resident organizations.

[56 FR 51579, Oct. 11, 1991]

§ 966.53 Definitions.

For the purpose of this subpart, the following definitions are applicable:

(a) *Grievance* shall mean any dispute which a tenant may have with respect to PHA action or failure to act in accordance with the individual tenant's lease or PHA regulations which adversely affect the individual tenant's rights, duties, welfare or status.

(b) *Complainant* shall mean any tenant whose grievance is presented to the PHA or at the project management office in accordance with §§ 966.54 and 966.55(a).

(c) *Elements of due process* shall mean 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;

(4) A decision on the merits.

(d) *Hearing officer* shall mean a person selected in accordance with § 966.55 of this subpart to hear grievances and render a decision with respect thereto.

§ 966.54

24 CFR Ch. IX (4-1-12 Edition)

(e) *Hearing panel* shall mean a panel selected in accordance with § 966.55 of this subpart to hear grievances and render a decision with respect thereto.

(f) *Tenant* shall mean the adult person (or persons) (other than a live-in aide):

(1) Who resides in the unit, and who executed the lease with the PHA as lessee of the dwelling unit, or, if no such person now resides in the unit,

(2) Who resides in the unit, and who is the remaining head of household of the tenant family residing in the dwelling unit.

(g) *Resident organization* includes a resident management corporation.

[40 FR 33406, Aug. 7, 1975. Redesignated at 49 FR 6714, Feb. 23, 1984, and amended at 56 FR 51579, Oct. 11, 1991]

§ 966.54 Informal settlement of grievance.

Any grievance shall be personally presented, either orally or in writing, to the PHA office or to the office of the project in which the complainant resides so that the grievance may be discussed informally and settled without a hearing. A summary of such discussion shall be prepared within a reasonable time and one copy shall be given to the tenant and one retained in the PHA's tenant file. The summary shall specify the names of the participants, dates of meeting, the nature of the proposed disposition of the complaint and the specific reasons therefor, and shall specify the procedures by which a hearing under § 966.55 may be obtained if the complainant is not satisfied.

§ 966.55 Procedures to obtain a hearing.

(a) *Request for hearing.* The complainant shall submit a written request for a hearing to the PHA or the project office within a reasonable time after receipt of the summary of discussion pursuant to § 966.54. For a grievance under the expedited grievance procedure pursuant to § 966.55(g) (for which § 966.54 is not applicable), the complainant shall submit such request at such time as is specified by the PHA for a grievance under the expedited grievance procedure. The written request shall specify:

- (1) The reasons for the grievance; and
- (2) The action or relief sought.

(b) *Selection of Hearing Officer or Hearing Panel.* (1) A grievance hearing shall be conducted by an impartial person or persons appointed by the PHA, other than a person who made or approved the PHA action under review or a subordinate of such person.

(2) The method or methods for PHA appointment of a hearing officer or hearing panel shall be stated in the PHA grievance procedure. The PHA may use either of the following methods to appoint a hearing officer or panel:

(i) A method approved by the majority of tenants (in any building, group of buildings or project, or group of projects to which the method is applicable) voting in an election or meeting of tenants held for the purpose.

(ii) Appointment of a person or persons (who may be an officer or employee of the PHA) selected in the manner required under the PHA grievance procedure.

(3) The PHA shall consult the resident organizations before PHA appointment of each hearing officer or panel member. Any comments or recommendations submitted by the tenant organizations shall be considered by the PHA before the appointment.

(c) *Failure to request a hearing.* If the complainant does not request a hearing in accordance with this paragraph, then the PHA's disposition of the grievance under § 966.54 shall become final: *Provided*, That failure to request a hearing shall not constitute a waiver by the complainant of his right thereafter to contest the PHA's action in disposing of the complaint in an appropriate judicial proceeding.

(d) *Hearing prerequisite.* All grievances shall be personally presented either orally or in writing pursuant to the informal procedure prescribed in § 966.54 as a condition precedent to a hearing under this section: *Provided*, That if the complainant shall show good cause why he failed to proceed in accordance with § 966.54 to the hearing officer or hearing panel, the provisions of this subsection may be waived by the hearing officer or hearing panel.

(e) *Escrow deposit.* (1) Before a hearing is scheduled in any grievance involving the amount of rent (as defined in § 966.4(b)) that the PHA claims is

due, the family must pay an escrow deposit to the PHA. When a family is required to make an escrow deposit, the amount is the amount of rent the PHA states is due and payable as of the first of the month preceding the month in which the family's act or failure to act took place. After the first deposit, the family must deposit the same amount monthly until the family's complaint is resolved by decision of the hearing officer or hearing panel.

(2) A PHA must waive the requirement for an escrow deposit where required by § 5.630 of this title (financial hardship exemption from minimum rent requirements) or § 5.615 of this title (effect of welfare benefits reduction in calculation of family income). Unless the PHA waives the requirement, the family's failure to make the escrow deposit will terminate the grievance procedure. A family's failure to pay the escrow deposit does not waive the family's right to contest in any appropriate judicial proceeding the PHA's disposition of the grievance.

(f) *Scheduling of hearings.* Upon complainant's compliance with paragraphs (a), (d) and (e) of this section, a hearing shall be scheduled by the hearing officer or hearing panel promptly for a time and place reasonably convenient to both the complainant and the PHA. A written notification specifying the time, place and the procedures governing the hearing shall be delivered to the complainant and the appropriate PHA official.

(g) *Expedited grievance procedure.* (1) The PHA may establish an expedited grievance procedure for any grievance concerning a termination of tenancy or eviction that involves:

(i) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or

(ii) Any drug-related criminal activity on or near such premises.

(2) In the case of a grievance under the expedited grievance procedure, § 966.54 (informal settlement of grievances) is not applicable.

(3) Subject to the requirements of this subpart, the PHA may adopt special procedures concerning a hearing under the expedited grievance procedure,

including provisions for expedited notice or scheduling, or provisions for expedited decision on the grievance.

[40 FR 33406, Aug. 7, 1975, as amended at 42 FR 5573, Jan. 28, 1977. Redesignated at 49 FR 6714, Feb. 23, 1984, and amended at 56 FR 51579, Oct. 11, 1991; 65 FR 16731, Mar. 29, 2000]

§ 966.56 Procedures governing the hearing.

(a) The hearing shall be held before a hearing officer or hearing panel, as appropriate.

(b) The complainant shall be afforded a fair hearing, which shall include:

(1) The opportunity to examine before the grievance hearing any PHA documents, including records and regulations, that are directly relevant to the hearing. (For a grievance hearing concerning a termination of tenancy or eviction, see also § 966.4(m).) The tenant shall be allowed to copy any such document at the tenant's expense. If the PHA does not make the document available for examination upon request by the complainant, the PHA may not rely on such document at the grievance hearing.

(2) The right to be represented by counsel or other person chosen as the tenant's representative, and to have such person make statements on the tenant's behalf;

(3) The right to a private hearing unless the complainant requests a public hearing;

(4) The right to present evidence and arguments in support of the tenant's complaint, to controvert evidence relied on by the PHA or project management, and to confront and cross-examine all witnesses upon whose testimony or information the PHA or project management relies; and

(5) A decision based solely and exclusively upon the facts presented at the hearing.

(c) The hearing officer or hearing panel may render a decision without proceeding with the hearing if the hearing officer or hearing panel determines that the issue has been previously decided in another proceeding.

(d) If the complainant or the PHA fails to appear at a scheduled hearing, the hearing officer or hearing panel may make a determination to postpone

§966.57

24 CFR Ch. IX (4-1-12 Edition)

the hearing for not to exceed five business days or may make a determination that the party has waived his right to a hearing. Both the complainant and the PHA shall be notified of the determination by the hearing officer or hearing panel: *Provided*, That a determination that the complainant has waived his right to a hearing shall not constitute a waiver of any right the complainant may have to contest the PHA's disposition of the grievance in an appropriate judicial proceeding.

(e) At the hearing, the complainant must first make a showing of an entitlement to the relief sought and thereafter the PHA must sustain the burden of justifying the PHA action or failure to act against which the complaint is directed.

(f) The hearing shall be conducted informally by the hearing officer or hearing panel and oral or documentary evidence pertinent to the facts and issues raised by the complaint may be received without regard to admissibility under the rules of evidence applicable to judicial proceedings. The hearing officer or hearing panel shall require the PHA, the complainant, counsel and other participants or spectators to conduct themselves in an orderly fashion. Failure to comply with the directions of the hearing officer or hearing panel to obtain order may result in exclusion from the proceedings or in a decision adverse to the interests of the disorderly party and granting or denial of the relief sought, as appropriate.

(g) The complainant or the PHA may arrange, in advance and at the expense of the party making the arrangement, for a transcript of the hearing. Any interested party may purchase a copy of such transcript.

(h) *Accommodation of persons with disabilities.* (1) The PHA must provide reasonable accommodation for persons with disabilities to participate in the hearing. Reasonable accommodation may include qualified sign language interpreters, readers, accessible locations, or attendants.

(2) If the tenant is visually impaired, any notice to the tenant which is re-

quired under this subpart must be in an accessible format.

[40 FR 33406, Aug. 7, 1975. Redesignated at 49 FR 6714, Feb. 23, 1984, and amended at 56 FR 51580, Oct. 11, 1991]

§ 966.57 Decision of the hearing officer or hearing panel.

(a) The hearing officer or hearing panel shall prepare a written decision, together with the reasons therefor, within a reasonable time after the hearing. A copy of the decision shall be sent to the complainant and the PHA. The PHA shall retain a copy of the decision in the tenant's folder. A copy of such decision, with all names and identifying references deleted, shall also be maintained on file by the PHA and made available for inspection by a prospective complainant, his representative, or the hearing panel or hearing officer.

(b) The decision of the hearing officer or hearing panel shall be binding on the PHA which shall take all actions, or refrain from any actions, necessary to carry out the decision unless the PHA Board of Commissioners determines within a reasonable time, and promptly notifies the complainant of its determination, that

(1) The grievance does not concern PHA action or failure to act in accordance with or involving the complainant's lease on PHA regulations, which adversely affect the complainant's rights, duties, welfare or status;

(2) The decision of the hearing officer or hearing panel is contrary to applicable Federal, State or local law, HUD regulations or requirements of the annual contributions contract between HUD and the PHA.

(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.

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Transmittal Letter

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Case Name: Kitsap County Consolidated Housing Authority v. Kimbra Henry-Levingston
Court of Appeals Case Number: 47696-7

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Appendix A-D to Brief of Appellant

Sender Name: Steve J Parsons - Email: Stevep@nwjustice.org

A copy of this document has been emailed to the following addresses:

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