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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

OLIVER CASWELL

Plaintiff – Appellant

v.

Case No. 04-1540

**CITY OF DETROIT HOUSING COMMISSION;
TAYLOR C. SEGUE, III, Interim Executive Director**

Defendants – Appellees

APPELLANT'S BRIEF

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

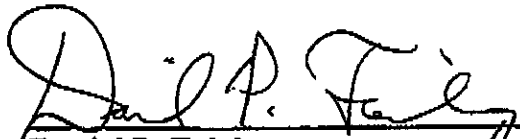
Pursuant to 6th Cir. R. 26.1, Oliver Caswell makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

No.



Daniel P. Feinberg
Attorney for Plaintiff-Appellant

09/02/2004

Date

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff/Appellant, Oliver Caswell, requests that oral argument be heard in this matter for the reason that the case appears to involve issues of first impression in this Circuit, and the decision making process could be enhanced if counsel is permitted to emphasize and clarify the written argument.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant, Oliver Caswell, was terminated from the Section 8 Tenant-Based Assistance Housing Choice Voucher Program by the City of Detroit Housing Commission. He brought this action against the Housing Commission and its Interim Director, Taylor C. Segue, III, contending that the termination violated his rights under the Fifth and Fourteenth Amendments of the United States Constitution, contrary to 42 USC 1983; as well as the United States Housing Act of 1937, 42 USC 1437 *et seq.*, and the regulations promulgated thereunder by the United States Department of Housing and Urban Development. Accordingly, the District Court had subject-matter jurisdiction pursuant to 28 USC 1331 and 1343, and 42 USC 3613.

Jurisdiction is conferred upon this Court pursuant to 28 USC 1291. The Notice of Appeal was timely filed on April 13, 2004, following the entry, on March 15, 2004, of a final Judgment of the United States District Court for the Eastern District of Michigan, dismissing the cause of action with prejudice.

**STATEMENT OF ISSUES
PRESENTED FOR REVIEW**

- (1) Did the informal hearing procedure employed by the Detroit Housing Commission provide Oliver Caswell with an opportunity to be heard at a meaningful time, in a meaningful manner in light of the fact that the process to evict him in court was pending, and concluded in his favor?

- (2) Did the Detroit Housing Commission comply with the mandate of 24 CFR 982.311(b) to continue making housing assistance payments to the landlord/owner until the owner had obtained a court judgment allowing the owner to evict Oliver Caswell?

- (3) Did Oliver Caswell continue to reside in his rental property after the landlord/owner began the process to evict him?

STATEMENT OF THE CASE

Plaintiff-Appellant, Oliver Caswell, brought this action for the wrongful termination of his participation in the Section 8 Tenant-Based Assistance Housing Choice Voucher Program by the City of Detroit Housing Commission. Mr. Caswell alleged that the Housing Commission, and its Interim Director, Taylor C. Segue, III, violated his right to due process of law under the 5th and 14th Amendments to the United States Constitution; and also violated his rights under the United States Housing Act of 1937.

Mr. Caswell filed a Motion for Summary Judgment on both these Counts on October 24, 2003. The Defendants/Appellees filed a response on November 17, 2003.

On March 15, 2004, the District Court issued an Opinion and Order denying Mr. Caswell's Motion, and granting Summary Judgment in favor of the Defendants/Appellees.

A Judgment dismissing the case with prejudice was entered on March 15, 2004. It is from that Judgment that Mr. Caswell brings this appeal.

STATEMENT OF FACTS

From November, 1986 until November 2, 2000, Plaintiff-Appellant, Oliver Caswell, was a participant in the tenant based Housing Choice Voucher Program administered by the Defendant-Appellee, City of Detroit Housing Commission, under Section 8 of the United States Housing Act of 1937, 42 USC 1437f (R. 13, Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment, pg. 1, Apx. pg. 23).

Utilizing his voucher, Mr. Caswell rented 1660 W. Grand Blvd., Apartment #2, Detroit, MI 48208, a unit in an apartment building owned by "McGraw/W. Grand Blvd." (R. 12, Plaintiff's Motion for Summary Judgment with Brief, pg. 4, Apx. pg. 11). Mr. Caswell and McGraw/W. Grand Blvd. entered into the HUD Model Form Lease (R. 12, Plaintiff's Motion, Exh. A, Apx, pg. 15), which provided for automatic renewals following the initial one year term. McGraw/W. Grand Blvd. also entered into the requisite Housing Assistance Payments (HAP) contract with the Detroit Housing Commission (R. 12, Plaintiff's Motion, Exh. F, Apx, pg. 22). Mr. Caswell began occupying the rental unit in August, 1999 (R. 12, Plaintiff's Motion, Exh. A, Apx, pg. 15).

On September 16, 2000, McGraw/W. Grand Blvd. served Mr. Caswell with a Notice to Quit, alleging "violation of lease" (R. 12, Plaintiff's Motion, Exh. B,

pg. 1, Apx. pg. 17) and "non-compliance to lease" (R. 12, Plaintiff's Motion, Exh. B, pg. 2, Apx. pg. 18). As required by 24 CFR 982.310, McGraw/W. Grand Blvd. also served a copy of the Notice on the Detroit Housing Commission (R. 13, Defendant's Brief, pg. 2-3, Apx. pg. 24-25).

After receiving the Notice to Quit, Mr. Caswell continued residing in his apartment (R. 12, Plaintiff's Motion, pg. 4, Apx. pg. 11). He contested the eviction in Michigan's 36th Judicial District Court (R. 12, Plaintiff's Motion, pg. 4, Apx. pg. 11).

The eviction action was tried on November 27, 2000. Judge C. Lorene Royster of the 36th District Court found that the Landlord/Plaintiff, McGraw/W. Grand Blvd., failed to meet its burden of proof that Mr. Caswell had committed serious or repeated violations of the terms and conditions of the lease. A Judgment of Possession in favor of the Tenant/Defendant Mr. Caswell was entered (R. 12, Plaintiff's Motion, Exh. C, Apx. pg. 19). A Motion for New Trial filed was denied (R. 12, Plaintiff's Motion, Exh. D, Apx. pg. 20).

Upon receiving a copy of the Notice to Quit (which, in Michigan, commences the process to evict), the Detroit Housing Commission mailed a Termination of Assistance notice dated September 23, 2000 to Mr. Caswell *at his rental property address of 1660 W. Grand Blvd #2, Detroit, MI 48208* (R. 13,

Defendant's Brief, Exh. 3, Apx. pg. 42). The reason for terminating Mr. Caswell's assistance was stated as "non compliance of lease".

Mr. Caswell requested a hearing regarding the termination of his Section 8 housing assistance payments. An "informal hearing" was held by the Housing Commission on November 1, 2000 (R. 13, Defendant's Brief, pg. 3, Apx. pg. 25), 26 days prior to the trial in the 36th District Court.

By letter dated November 2, 2000, again mailed to Mr. Caswell *at 1660 W. Grand Boulevard, Apt. 2, Detroit, MI 48208*, the Detroit Housing Commission notified Mr. Caswell that "the termination of your Section 8 housing assistance cannot be reversed" (R. 12, Plaintiff's Motion, Exh. E, Apx. pg. 21).

The Housing Commission did, in fact, stop making the Sec. 8 housing assistance payments as of November 1, 2000, resulting in Mr. Caswell ultimately being evicted for non-payment of rent. He became homeless for a period of time, and has since paid an amount for rent of approximately \$10,000.00, that would otherwise have been paid by the Housing Commission.

SUMMARY OF ARGUMENT

Plaintiff/Appellant, Oliver Caswell, advances three arguments.

First, the informal hearing provided by the Housing Commission, in contravention of the HUD regulatory scheme, violated Mr. Caswell's right to due process of law under the 5th and 14th Amendments. Section 8 housing benefits, specifically, and leasehold interests, in general, constitute property interests protected by the due process clause. The regulations provide for the safeguards attendant with a court proceeding, which are not present in an informal hearing. The informal hearing fails to provide due process under the three-pronged analysis set forth in *Denko v Immigration and Naturalization Serv.*, 351 F.3d 717 (6th Cir 2003). In addition, the notice sent to Mr. Caswell did not adequately inform him of the grounds for termination.

Secondly, 24 CFR 982.311 creates a private right of action, is clear on its face, and does not require tenants to notify Public Housing Associations of their continued residency.

Finally, the trial court erred in concluding that the Detroit Housing Commission had no notice of Mr. Caswell's continuing tenancy, when the documentary evidence shows otherwise and Defendants/Appellees' Response Brief concedes as much.

ARGUMENT

INTRODUCTION

The tenant based Housing Choice Voucher Program is authorized by Section 8 of the United States Housing Act of 1937, 42 USC 1437f, and is implemented through Title 24 of the Code of Federal Regulations, Subpart B, Chapter IX, Part 982.

The goal of the program is, of course, "providing decent and affordable housing for all citizens". 42 USC 1437. An explanation of the program is succinctly set forth in 24 CFR 982.1:

"(a)(1) In the HUD Housing Choice Voucher Program (Voucher Program) and the HUD certificate program, HUD pays rental subsidies so eligible families can afford decent, safe and sanitary housing. Both programs are generally administered by State or local governmental entities called public housing agencies (PHAs). HUD provides housing assistance funds to the PHA. HUD also provides funds for PHA administration of the programs.

(b)(1) ... With tenant-based assistance, the assisted unit is selected by the family. The family may rent a unit anywhere in the United States in the jurisdiction of a PHA that runs a voucher program.

(2) To receive tenant-based assistance, the family selects a suitable unit. After approving the tenancy, the PHA enters into a contract to make rental subsidy payments to the owner to subsidize occupancy by the family. The PHA contract with the owner only covers a single unit and a specific assisted family."

“Family” is defined to include “A person or group of persons, as determined by the PHA, approved to reside in a unit with assistance under the program.” 24 CFR 982.5.

The Public Housing Association (PHA), in this case, the Detroit Housing Commission, is under certain obligations in administering the program. “The PHA *must comply with HUD regulations* and other HUD requirements for the program.” 24 CFR 982.52. (Emphasis supplied.)

In its November 2, 2000 letter to Mr. Caswell, the Housing Commission relied upon 24 CFR 982.311(b) to terminate his voucher. According to this letter, “a tenant’s HAP contract [which is actually a contract between the Housing Commission and the *owner*] may be terminated ‘When an owner terminates the lease in accordance with the terms of the lease.’” (R. 12, Plaintiff’s Motion, Exh. E, Apx. pg. 21).

24 CFR 982.311(b) actually states:

“Housing assistance payments terminate when the lease is terminated by the owner in accordance with the lease. **However, if the owner has commenced the process to evict the tenant, and if the family continues to reside in the unit, the PHA must continue to make housing assistance payments to the owner in accordance with the HAP contract until the owner has obtained a court judgment or other process allowing the owner to evict the tenant.**” (Emphasis supplied.)

**THE INFORMAL HEARING PROCEDURE EMPLOYED
BY THE DETROIT HOUSING COMMISSION DID NOT
PROVIDE OLIVER CASWELL WITH DUE PROCESS.**

In granting summary judgment in favor of Defendants, the District Court concluded that Mr. Caswell had failed to demonstrate a violation of this due process rights. This Court reviews *de novo* the application of legal principles to factual determinations.

It is undisputed that Mr. Caswell's landlord commenced court process to evict him by sending a Notice to Quit on September 16, 2000 to both Mr. Caswell and the Housing Commission. It is also undisputed that during this eviction process Mr. Caswell continued to reside in his Section 8 housing unit.

Under the unambiguous language of 24 CFR 982.311, the Housing Commission had no authority to terminate Mr. Caswell's housing assistance payments. Yet, they did so summarily upon receiving a Notice to Quit. After which, they offered Mr. Caswell the opportunity to appeal this termination by way of an informal hearing. Moreover, Mr. Caswell prevailed in the court action, and was, by Judgment of the 36th District Court, awarded possession of his Section 8 housing unit, due to the landlord/owner's failure to meet its burden of proof.

The Housing Commission's premature informal hearing in the face of the pending court process, not only rendered meaningless the 36th District Court

proceeding, but violated Mr. Caswell's right to due process of law under the 5th and 14th Amendments of the United States Constitution.

In considering claims for violations of due process rights, "this court undertakes a two-step analysis. First, we determine whether the plaintiffs have a property interest that entitles them to due process protection. ... Second, if the plaintiffs have such an interest, this court must then determine 'what process is due.'" *Leary v Daeschner*, 228 F3d 729, 741-742 (6th Cir, 2000).

Tenants in subsidized housing have a property interest in their tenancy. *Greene v Lindsey*, 456 US 444; 102 S.Ct 1874; 72 L.Ed.2d 249 (1982). Tenants in a subsidized housing program are assured by statute that they will continue in occupancy in the absence of good cause for eviction, consequently, a subsidized tenancy is a property interest protected by the due process clause. See *Swann v Gastonia Housing Authority*, 675 F.2d 1372 (4th Cir, 1982); *Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919 (11th Cir, 1982), cert. den., 459 US 971 (1982).

Moreover, this Court has held that tenants, in general, have protected privacy and possessory interests in their tenancies. *Thomas v Cohen*, 304 F3d 565 (6th Cir, 2002). As to "what process is due", the Court in *Thomas* noted,

"As the Fourth Circuit stated, due process in the eviction context requires the following: (1) timely and adequate notice detailing reasons for proposed termination, (2) an opportunity on part of tenant to confront and cross-examine adverse witnesses, (3) right of tenant to

be represented by counsel provided by him to delineate issues, present factual contentions in an orderly manner, conduct cross-examination and generally to safeguard his interest, (4) a decision, based on evidence adduced at hearing, in which reasons for decision and evidence relied on are set forth, and (5) an impartial decision maker. *Caulder v. Durham Hous. Auth.*, 433 F.2d 998, 1004 (4th Cir.1970) (citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)).” *Thomas* at 576, fn 10.

Since a revocation of a Section 8 voucher is tantamount to an eviction, the HUD regulation is obviously designed to afford such tenants the process to which they are due, by allowing them to have their day in court. The “informal hearing” provided by the Detroit Housing Commission, particularly at the time it was provided, is simply does not afford the same protections.

The District Court, in its opinion, noted that, “ ‘The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in meaningful manner.’ *Denko v Immigration and Naturalization Serv.*, 351 F.3d 717, 730 (6th Cir 2003) (quoting *Mathews v Etheridge*, 424 US 319, 335 (1976)).” (R. 16, Opinion and Order, pg. 6, Apx. pg. 51). In accordance with *Denko* and *Mathews*, the following three factors must be evaluated in determining whether administrative procedures comport with due process:

- “(1) [T]he private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and
- (3) the Government’s interest, including the function involved and

the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

The District Court acknowledged that Mr. Caswell’s interest was strong, since his termination from the voucher program “would cause Plaintiff to lose his leasehold interest.” (R. 16, Opinion and Order, pg. 7, Apx. pg. 52). Nevertheless, the District Court concluded that a due process violation had not been shown under the second and third factors, primarily because “Plaintiff failed to propose any additional or substitute procedural safeguards” (R. 16, Opinion and Order, pg. 7, Apx. pg. 52).

It was not incumbent on Mr. Caswell to propose additional or substitute procedural safeguards, when they are already provided by the regulatory scheme. HUD requires the PHA to continue the voucher payments until an order of eviction is entered. Consequently, 24 CFR 982.311 already provides the additional and substitute procedural safeguards present in a formal court proceeding.

In addition, the regulations recognize that in order to provide “the opportunity to be heard at meaningful time and in a meaningful manner”, a pre-deprivation hearing is generally required. 24 CFR 982.555(2), provides:

“In the cases [among other things, of a determination to terminate assistance for a participant because of serious or repeated violation of the lease], the PHA *must* give the opportunity for an informal hearing *before* the PHA terminates housing assistance payments for the family under an outstanding HAP contract.” (Emphasis supplied.)

Again, by requiring a hearing before the termination of a voucher, the HUD

regulatory scheme requires procedural safeguards in addition to the procedure employed by the Housing Commission. Terminating Mr. Caswell's voucher based solely on the Notice to Quit, with no hearing of any kind, and then putting the burden on him to appeal this decision and disprove the owner's allegations, is simply not adequate.

Moreover, the fact that Mr. Caswell ultimately prevailed at trial, demonstrates that the risk of erroneous deprivation through the Housing Commission's informal hearing procedure was, in fact, high. The value of allowing for a proceeding in court, instead, becomes readily apparent.

Regarding the third factor, it is submitted that the Government's interest could more properly be characterized as ensuring that recipients of Section 8 housing benefits do not have those benefits wrongfully terminated. Nevertheless, assuming that the District Judge was correct in stating that the government's interest is "to eliminate participants who violate their lease terms", and to do so "in an efficient manner so as to minimize the expenses and time involved" (R. 16, Opinion and Order, pg. 7, Apx. pg. 52). Such an interest is served by the regulations.

First, by allowing the matter to proceed in court, rather than by informal hearing, the Housing Commission is saved the time and expense of conducting the informal hearing. Secondly, since Michigan, like most states, has summary

proceedings in landlord/tenant eviction cases, any difference in the time involved is negligible. Here, for example, the informal hearing was conducted on November 1, and the trial in court occurred on November 27 (and could have been held sooner had the owner, who has the real incentive to move quickly to remove a disruptive tenant, proceeded more promptly).

Finally, even if this informal hearing, in lieu of the safeguards provided by a hearing in court as required by the regulations, could somehow be deemed sufficient, the notice used by the housing Commission was clearly defective. The reason given for the termination was "Non compliance of lease." Such notice, in no way, provided "adequate notice detailing reasons for proposed termination", thereby denying him of an "effective opportunity to be heard." *Goldberg v Kelly*, 397 US 254, 268; 90 S.Ct 1011, 25 L.Ed.2d 287 (1970). See *Hamby v Neel*, 368 F3d 549 (6th Cir, 2004).

THE DETROIT HOUSING COMMISSION DID NOT COMPLY WITH THE MANDATE OF 24 CFR 982.311(B) TO CONTINUE MAKING HOUSING ASSISTANCE PAYMENTS UNTIL THE LANDLORD/OWNER HAD OBTAINED A COURT JUDGMENT.

In granting summary judgment in favor of Defendants on this issue, the District Court concluded that 24 CFR 982.311 imposed a duty on Mr. Caswell to notify the Housing Commission of his continued residence. A district court's construction of a regulation is a question of law, which this Court reviews *de novo*.

Appellant concurs with the District Court's analysis that under *Loschiavo v City of Dearborn*, 33 F.3d 548 (6th Cir 1994), 24 CFR 982.311 creates a private right of action, enforceable under 42 USC 1983. He disputes, however, the court's conclusion that "Plaintiff had a duty to inform Defendants of the status of his residence and his failure to do so releases Defendants from any responsibility regarding subsequent housing payments." (R. 16, Opinion and Order, pg. 11, Apx. pg. 56).

24 CFR 982.311 is clear, it contains no language imposing such a duty. "It is a well settled canon of statutory construction that when interpreting statutes, '[t]he language of the statute is the starting point for interpretation, and it should be the ending point if the plain meaning of that statute is clear.' " *United States v Boucha*, 236 F.3d 768, 774 (6th cir 2001) (quoting *United States v Choice*, 201 F.3d 837, 840 (6th Cir 2000) (citing *United States v Rob Pairs Enters., Inc.*, 489 US 235; 109 S.Ct 1026; 103 L.Ed.2d 290 (1989))).

Contrary to the Housing Commission's contention, and the District Court's ruling, the regulation required the Housing Commission to continue making Mr. Caswell's assistance payments "until the owner has obtained a court judgment". It does not allow the Housing Commission to terminate benefits unless the tenant notifies it that he is still residing in the premises.

The condition, that the tenant must notify the PHA that he is continuing to reside in the unit, imposed by the District Court, is not only absent from this regulation, it is the opposite of that imposed by other regulations. For example, 24 CFR 982.309(c)(2) provides: "The family must notify the PHA and the owner before the family moves out of the unit." Similarly, 24 CFR 982.314(d)(2) states: "If the family wants to move to a new unit, the family must notify the PHA and the owner before moving from the old unit." Finally, in 24 CFR 982.551(f), under the heading "Obligations of Participant", "The family must notify the PHA and the owner before the family moves out of the unit." While participants are required to notify the PHA when they move out, there is no obligation listed, anywhere, that the family must notify the PHA that they are continuing to reside in the unit.

Moreover, the District Court's rationale for imposing the condition, that the absence of notice "would in practice require [PHAs] to determine the status of the residence of each participant in the Program after the participant's lease had been terminated on a case by case basis", thereby resulting in "an undue administrative burden" (R. 16, Opinion and Order, pg. 11, Apx. 56), is unsupported by the regulations. When read together, 24 CFR 982.311(a) ("Housing assistance payments may only be paid to the owner ... while the family is residing in the unit."), 24 CFR 982.311(d)(2) ("If the family moves out of the unit, the PHA may not make any housing assistance payment to the owner for any month after the