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The Shadow of Criminal Records

What's a Civil Lawyer to Do?

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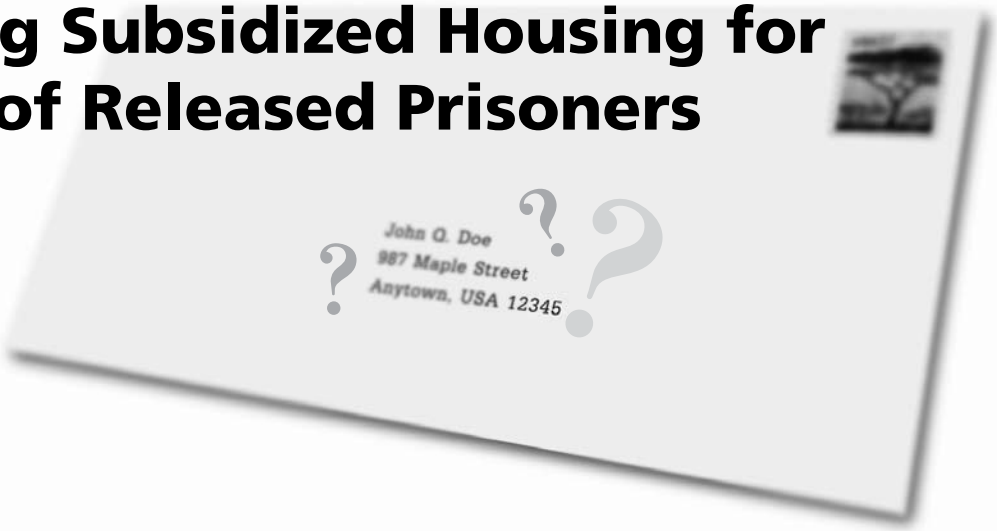
Protecting Subsidized Housing for Families of Released Prisoners

By Robert A. Stalker



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Individuals released from prisons and jails are not the only ones who are affected by current "hard-line" policies and attitudes: families of persons with criminal records are also often caught in the wake of excessively punitive approaches toward this population. Family members who are public housing residents or Section 8 program participants are especially vulnerable.[1]

This is the common scenario: The parole or probation department requires a person exiting jail to give an address to the department in order to monitor him.[2] Having no regular address but needing to receive support or assistance from the state or county, he gives the department his mother's address or the address of his children's mother. Problems can arise if his mother or his children's mother is a public housing tenant or Section 8 voucher holder. Although he does not intend to return permanently to his mother's or his children's mother's address, he expects to visit family there and hopes that the actual residents will forward communications and cover for him if necessary.

With the scrutiny that parolees and probationers face, at some point someone from the supervising department or the police (or a neighbor or family member) typically notifies the housing authority that the former prisoner is living with a family receiving housing subsidy. The housing authority then terminates housing assistance because of the presence of an unauthorized household member. For Section 8 participants, the housing authority generally relies on one of the following regulations:

- The information from the participating family must be true and complete.[3]
- The housing authority must approve the composition of the family unit.[4]
- The family must request housing authority approval to add a family member as an occupant; with few exceptions, no one other than the participating family may reside in the unit.[5]

[1]In this article I focus on participants in the Section 8 program and refer to these participants as "participating families." See 42 U.S.C. § 1437f(o) (2007); 24 C.F.R. pt. 982 (2006). The arguments that I make also apply to participants in other subsidized housing programs, although the governing regulations contain some differences in language. For a Clearinghouse Review resource on defending tenants in public and subsidized housing from criminal-activity evictions, see the sidebar.

[2]See, e.g., 15 Cal. Admin. Code § 2511(b) (2007).

[3]24 C.F.R. § 982.551(b)(4) (2006).

[4]*Id.* § 982.551(h)(2).

[5]*Id.*

Less sympathetic housing authorities may claim that the participating family's failure to notify them of the "new" resident is fraud.[6] Fraud is grounds for permanently barring the family from other assisted housing.[7]

The family is entitled to an informal hearing to challenge—under both U.S. Department of Housing and Urban Development (HUD) regulations and due process requirements—the housing authority's actions.[8] Not infrequently, however, that hearing is stacked against the family. Housing authority hearing officers routinely rely exclusively on hearsay evidence, such as police reports or documents from the probation office, to "prove" that an unauthorized person lives with the participating family.[9] Furthermore, hearing officers often require the participant to prove that the probationer does not live with the family in light of police documents that say he does. The family's advocate should argue both that uncorroborated hearsay evidence may not support a housing agency decision and that, as with any other administrative hearing, the burden of proof is on the moving party, in this case the housing authority, to show that the facts supporting the proposed termination of housing assistance are true.

Hearsay and the Right to Confront and Cross-Examine

Representatives from the police, parole, or probation departments rarely appear at the informal housing authority hearing. Nevertheless, the housing authority representative often relies on records from one of those departments to show that the parolee or probationer resides with the participating family as shown on department records. The family's advocate should challenge such hearsay evidence. The housing authority and its hearing officer, however, often rely on HUD regulations to claim that hearsay evidence is admissible in informal hearings.[10] While the evidentiary rules that apply in the courtroom do not apply in administrative hearings, there are some rules for administrative hearings. For example, "[f]lexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."[11]

When the housing authority relies on police, probation, or parole records to show that the parolee lists the family address as the parolee's address, the hearing officer may overrule (or ignore) hearsay objections by finding that those records are official records or business records and are admissible as exceptions to the hearsay rule.[12] Advocates should argue that, unless the records are properly authenticated, the records are not admissible.[13]

Even if the official records are properly admitted, the participating family's advocate must carefully scrutinize the records to determine that the information that is being used against the family is within the hearsay exemption. For example, a police report may claim that the officer learned from the probation department that the probationer listed the family home as his address; because

[6]See *id.* § 982.551(k).

[7]See *id.* § 982.552(c)(1)(iv).

[8]*Id.* § 982.555(a)(v); *Goldberg v. Kelly*, 397 U.S. 254, 261–62 (1970) (procedural due process applicable to termination of welfare benefits); *Edgecomb v. Housing Authority of Vernon*, 824 F. Supp. 312, 314 (D. Conn. 1993) (*Goldberg* applied in a case involving termination of housing assistance).

[9]See, e.g., *Basco v. Machin,* No. 8:06-cv-260-T-24 MSS, 2007 WL 433404, at *3–4. (M.D. Fla. Feb. 6, 2007); *Edgecomb,* 824 F. Supp. at 315.

[10]24 C.F.R. § 982.555(e)(5) (2006) ("Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings.").

[11]*Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197, 230 (1938); see also *Walker v. City of San Gabriel*, 129 P.2d 349, 351 (Cal. 1942).

[12]See, e.g., Fed. R. Evid. 803(8); Cal. Evid. Code § 1280.

[13]See, e.g., Fed. R. Evid. 902(4); Cal. Evid. Code §1530.

the police officer is relying on this hearsay statement to conclude that the probationer does live with the family, the statement may be excludable as hearsay, just as the officer would not be permitted to testify as to what the probation department had told the officer.[14]

HUD regulations and due process requirements give the participating family the right to question witnesses.[15] Without live witnesses who have actual knowledge of information contained in the police or probation reports, the right of confrontation and cross-examination is meaningless.[16] The family's advocate should raise these arguments to challenge hearsay evidence.

Shifting the Burden of Proof

A second common problem in termination hearings is that, to satisfy the housing authority's burden of showing that a program violation occurred, the housing authority and the hearing officer often rely on documentation (or, in rare cases, testimony) that shows only that the parolee lists the family's address as the parolee's own. The hearing officer shifts the burden of proof to the participating family and requires the family to prove that the person using the family's address does not actually live there. Usually the housing authority or hearing officer requires documentation, such as a lease or rent receipt or utility bill in the probationer's name, that the probationer lives somewhere else. But the probationer—who is often homeless—has no way of producing such documentation; even when it does exist, it is not always available to the Section 8 family, who may have very little contact with the probationer.[17]

Families faced with loss of their subsidized housing assistance always should argue that they should not have to prove that the "unauthorized occupant" lives somewhere else but that the housing authority must prove, using competent evidence, that the person who listed the address actually does live with the family.[18] When the housing authority can present competent evidence that the probationer not only uses the family's address for probation department purposes but also actually lives with the family, then the family needs to overcome that evidence.

At least two factors make the burden-shifting argument difficult for housing authorities and their hearing officers to understand. First, the administrative plan adopted by the local housing authority and used as day-to-day guidance by many of the housing authority workers commonly contains language that purports to require the family to prove that a long-term visitor is not a resident. For example, the Vacaville, California, Housing Authority administrative plan states that persons not included on the

[14]See Fed. R. Evid. 805 (hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule). But see *Gananian v. Zolin,* 39 Cal. Rptr. 2d 384, 386–87 (Cal. Ct. App. 1995) (permitting introduction of record that included observations of second police officer).

[15]24 C.F.R. § 982.555(e)(5) (2006); *Goldberg,* 397 U.S. at 268.

[16]*Edgecomb*, 824 F. Supp. at 316 (housing authority improperly terminated tenant's Section 8 housing assistance; court orders reinstatement of assistance because decision upholding termination relied exclusively on hearsay evidence). The court found that "[d]enying the tenant the opportunity to confront and cross-examine persons who supplied information upon which the housing authority's action is grounded is improper." *Id*. See also *McLeod v. Board of Pension Commissioners of Los Angeles*, 94 Cal. Rptr. 58 (Cal. Ct. App. 1970) (right to cross-examination in administrative hearing). But see *Basco*, 2007 WL 433404, at *7 (regulations and due process satisfied if tenant given opportunity to question witnesses in attendance at the hearing even though no witnesses had direct knowledge of facts used to terminate assistance).

[17]For a discussion of the importance of housing in breaking the cyclical relationship between incarceration and homelessness, including advocacy to change public housing policies from automatically excluding individuals with criminal records, see Maria Foscarinis & Rebecca K. Troth, *Reentry and Homelessness: Alternatives to Recidivism*, 39 Clearinghouse Review 440 (Nov.–Dec. 2005).

[18]See, e.g., *McCoy v. Board of Retirement*, 228 Cal. Rptr. 567, 571 n.5 (Cal. Ct. App. 1986) ("As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence."). But see *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (Clearinghouse No. 55,891); this Individuals with Disabilities Education Act case holds that, when statute is silent as to burden of proof, normal rules apply: party seeking relief or who seeks to change "the present state of affairs" bears the burden (quoting McCormick on Evidence § 337, at 412 (5th ed. 1999)). For more on the *Schaffer* case, see Gary F. Smith et al., *The 2005–2006 U.S. Supreme Court Decisions on Access to the Federal Courts: The First Term of the John Roberts Era,* 40 Clearinghouse Review 394, 399–401 (Nov.–Dec. 2006).

approved lease but who have "been in the unit for more than 30 consecutive days … will be considered to be living in the unit as an unauthorized family member. Absence of evidence of any other permanent address will be considered verification that the visitor is an unauthorized member of the household."[19] The participating family's advocate should argue that this sort of language does not alter the familiar rule discussed above that governs administrative hearings: the burden is on the housing authority to prove that the person actually lives in the unit.

Second, housing authorities often adopt elaborate schemes for verifying information regarding participants' eligibility. For example, the Vacaville Housing Authority established the following hierarchy to verify information: "1. Up-Front Verification; 2. Third-Party Written; 3. Third-Party Oral; 4. Review of Original Documents; 5. Self-Certification/Declaration."[20] The housing authority or the hearing officer can conclude from this hierarchy that oral testimony from a participant may never trump a document, such as a police report, that is from a third party. The concepts of hearsay and the right to confront witnesses seem to take a backseat to the magic words in the administrative plan. Advocates should nonetheless attempt to educate hearing officers about legal principles regarding reliability of evidence.

■ ■ ■

Persistent advocacy is often necessary to convince housing authorities, especially smaller agencies that conduct few hearings, that not every communication from a police, parole, or probation department is sufficient to justify terminating a family's subsidized housing benefit. Concepts of evidentiary rules, due process, and burdens of proof may be unfamiliar to a minimally trained hearing officer. Advocates should insist that competent evidence be introduced, participants have an opportunity to confront and cross-examine witnesses, and the housing authority prove its case. Seeking judicial review of administrative hearings is often necessary to obtain these fundamental protections for those who may be innocent bystanders in the wake of excessively punitive approaches toward individuals who have been released from prisons and jails.

How to Defend Tenants in Public and Subsidized Housing from Criminal-Activity Evictions

Defending tenants in public and subsidized housing from criminal-activity evictions reached a new urgency following the U.S. Supreme Court's 2002 decision in *U.S. Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002) (Clearinghouse No. 52,806). Although some argue that tenants facing such evictions have no choice but to move, tenants have many available (and easily overlooked) federal, state, and local law defenses. For a discussion of post-*Rucker* cases, issues, and defenses, see Lawrence R. McDonough & Mac McCreight, *Wait a Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, 41 Clearinghouse Review 55 (May–June 2007).

McDonough and Mac McCreight, after noting the narrowness of relevant Legal Services Corporation restrictions, analyze the *Rucker* case and discuss the required elements for eviction from public housing and each federally subsidized program and relevant defenses. They cover the exercise of discretion in eviction decisions, notice and procedure requirements, the interrelationship between criminal and civil proceedings, and defenses not specific to criminal activity. They explain state statutes and local ordinances providing tenants more protection than federal law and consider whether federal law preempts them. They focus on what else attorneys and advocates for tenants in public and subsidized housing can do to protect and expand the rights of tenants facing allegations of criminal activity.

[19]Vacaville, California, Housing Authority Housing Choice Voucher Program Administrative Plan 6–8 (in my files); see also *Basco*, 2007 WL 433404, at *8 (Administrative Plan for Section 8 Program, Health and Social Services Department of Hillsborough County, Florida, containing similar, burden-shifting language).

[20]Vacaville Administrative Plan, *supra* note 19, at 7-2.

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