

# “Unauthorized Occupant” Voucher Terminations: Common Legal Issues\*

Some of the most challenging cases for housing advocates representing Section 8 voucher tenants are those where a public housing agency (PHA) alleges that an unauthorized occupant is living in the unit. Typically, the PHA claims that the alleged occupant joined the household and resided in the unit without the PHA’s permission, while the voucher tenant claims that the person was a guest or visitor. For advocates, a primary concern is the type of evidence that may be introduced at voucher informal hearings, and whether that evidence sufficiently demonstrates that the alleged occupant did or did not reside in the unit. Another common legal issue is whether the PHA will bear the burden of demonstrating that the alleged occupant resided in the unit, or whether the tenant will bear the burden of showing that the person lived elsewhere. This article reviews a number of unauthorized occupant cases involving Section 8 voucher tenants and identifies common legal arguments used by advocates.<sup>1</sup>

## Background

The Department of Housing and Urban Development (HUD) has issued little guidance to help advocates and tenants understand the distinction between a guest and an unauthorized occupant. The voucher regulations provide that a PHA may terminate program assistance to a tenant who violates any of the family obligations listed in the program regulations.<sup>2</sup> These family obligations state that the family must request PHA approval to add an occupant to the unit and that no other person but members of the assisted family may “reside” in the unit.<sup>3</sup> Although the voucher regulations do not define “reside,”

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<sup>1</sup>Unauthorized occupancy also may occur in the public housing or project-based Section 8 context. See HUD, HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, REV-1, CHG-3, Glossary (June 2009), available at [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_35639.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35639.pdf) (defining unauthorized occupant as “a person who, with the consent of a tenant, is staying in the unit, but is not listed on the lease documents or approved by the owner to dwell in the unit”); HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK, § 9.5 (June 2003) [hereinafter HUD Public Housing Occupancy Guidebook], available at [www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf](http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf) (stating that a tenant that “allows an unauthorized occupant to reside in their unit is not in compliance with the lease and is subject to termination of tenancy”). Thus, some of the arguments discussed in this article also may be used by analogy in the public housing and project-based Section programs.

<sup>2</sup>See 24 C.F.R. §§ 982.552(c)(1)(i), 982.551(h)(2) (2012).

<sup>3</sup>*Id.*

HUD's general program requirements define "guest" as "a person temporarily staying in the unit with the consent of a tenant or other member of the household."<sup>4</sup> The regulations do not indicate how many days a person may stay in a unit before he is no longer considered a guest.

Given the lack of guidance from HUD, PHAs have significant discretion to adopt policies that dictate how long a guest or visitor may stay in a voucher tenant's unit.<sup>5</sup> Each PHA should establish a policy that clearly defines how long a person may stay in the unit before he becomes an unauthorized occupant rather than a guest.<sup>6</sup> PHA policies vary considerably regarding how long a person may stay in the unit before being considered an unauthorized occupant.<sup>7</sup> Many PHAs' Administrative Plans also include provisions with some variation of the following: the absence of another permanent address is considered evidence of unauthorized residence, statements by landlords or neighbors may be considered by the PHA, use of a tenant's address for any non-temporary purpose is considered evidence of unauthorized residence, and the burden of proof that the person is a visitor or guest rests on the tenant.<sup>8</sup> Some PHAs provide exceptions to guest policies for children who stay less than 50% of the year at the unit and for care of a relative who is recovering from a medical procedure and has documentation of a separate residence.<sup>9</sup>

<sup>4</sup>See 24 C.F.R. § 5.100 (2012).

<sup>5</sup>See HUD Public Housing Occupancy Guidebook, *supra* note 1, § 9.5 ("Residents of any public housing community have the right to receive visitors and guests at their homes if they follow the policies established by the PHA for this purpose."). While the Guidebook governs public housing, it may be helpful to consider how HUD has addressed guests and unauthorized occupants in this context.

<sup>6</sup>See 24 C.F.R. § 982.54(a) (2012) ("The PHA must adopt a written administrative plan that establishes local policies for administration of the program in accordance with HUD requirements... The administrative plan states PHA policy on matters for which the PHA has discretion to establish local policies.").

<sup>7</sup>Compare *Hammond v. Akron Metro. Hous. Auth.*, 2011 WL 2175801, at \*2 (Ohio Ct. App. June 1, 2011) (no more than 15 days in a 12-month period) and *Boston Housing Authority, Leased Housing Division Administrative Plan for Section 8 Programs 245* (Dec. 6, 2011) (no more than 14 cumulative days in a year), available at <http://www.bostonhousing.org/pdfs/LHS2012AdminPlan.pdf>, with *San Francisco Housing Authority, Housing Choice Voucher Administrative Plan 31* (July 2011) [hereinafter *San Francisco Housing Authority Administrative Plan*] (no more than 15 consecutive days), available at [http://sfha.org/SFHA\\_Admin\\_Plan\\_2011.pdf](http://sfha.org/SFHA_Admin_Plan_2011.pdf), and *Chicago Housing Authority, Administrative Plan for the Housing Choice Voucher Program* ¶ 3-I.J. (May 8, 2012) [hereinafter *Chicago Housing Authority Administrative Plan*] (no more than 30 consecutive days or 90 cumulative days in a 12-month period), available at [http://www.thecha.org/filebin/hcv/5.8.12\\_HCV\\_Administrative\\_Plan\\_Final\\_Uploaded\\_to\\_web.pdf](http://www.thecha.org/filebin/hcv/5.8.12_HCV_Administrative_Plan_Final_Uploaded_to_web.pdf).

<sup>8</sup>See *Cuyahoga Metropolitan Housing Authority, Administrative Plan for the Housing Choice Voucher Program 2012*, § 6.8 (Aug. 2011), available at <http://www.cmha.net/hcvp/docs/cmhahcvp2012AdminPlan.pdf>; *San Francisco Housing Authority Administrative Plan*, *supra* note 7, at 31; *Tampa Housing Authority, Assisted Housing Admin Plan*, § 6.10 (May 29, 2012), available at [http://www.thafl.com/depts/assist\\_housing/adminplan/Admin-Plan.pdf](http://www.thafl.com/depts/assist_housing/adminplan/Admin-Plan.pdf); C. Martin (Marty) Lawyer, III, *Eleventh Circuit Limits Section 8 Housing Subsidy Terminations and Defines and Applies "Burden of Persuasion"*, 42 CLEARINGHOUSE REV. 194 (July-Aug. 2008).

<sup>9</sup>See *Chicago Housing Authority Administrative Plan*, *supra* note 7,

HUD regulations govern voucher terminations in unauthorized occupant cases.<sup>10</sup> A PHA must offer the tenant an informal hearing when the PHA determines that assistance will be terminated for the tenant's alleged violation of family obligations.<sup>11</sup> The purpose of the informal hearing is to review the potential termination to determine the validity of the decision and prevent erroneous terminations.<sup>12</sup> At the hearing, the PHA and the family "must be given the opportunity to present evidence, and may question any witnesses."<sup>13</sup> However, "evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings."<sup>14</sup> Factual determinations are to be based on the preponderance of evidence presented at the hearing.<sup>15</sup> The hearing officer must issue a written decision that includes the reasons for the decision.<sup>16</sup>

The issues that arise most often in voucher terminations based on unauthorized occupancy include assignment of the burden of proof, sufficiency of the evidence, use of hearsay evidence, and the tenant's right to cross-examine adverse witnesses. Advocates have raised these issues in affirmative litigation against PHAs and, where state procedure permits, in judicial proceedings appealing a PHA's administrative hearing decision. Each of these issues is discussed in detail below.

## Assignment of the Burden of Proof

In several unauthorized occupant cases, advocates have argued that the burden of proof at the informal hearing was improperly placed on the voucher participant, violating the participant's right to due process under the 14th Amendment. Federal regulations do not dictate which party bears the burden of proof in voucher termination hearings.<sup>17</sup> However, Supreme Court precedent suggests that "where deprivations of benefits necessary for survival are concerned, the initial burden of proof must fall on the government."<sup>18</sup> Further, in the landmark case *Basco v. Machin* the 11th Circuit held that PHAs bear the burden of persuasion at Section 8 voucher termination hearings.<sup>19</sup>

¶ 3-I.J; *Hawaii Public Housing Authority, Administrative Plan*, ¶ 3-I.J (Nov. 23, 2011) available at <http://www.hcdch.hawaii.gov/housingplans/Section8AdminPlan/S8%20Admin%20Plan%2011-11.pdf>; *San Antonio Housing Authority, Administrative Plan for the Section 8 Housing Choice Voucher Program*, ¶ 3-I.J (July 1, 2011) available at [www.saha.org/aboutsaha/pdfs/2011\\_Administrative\\_Plan.pdf](http://www.saha.org/aboutsaha/pdfs/2011_Administrative_Plan.pdf).

<sup>10</sup>See 24 C.F.R. § 982.555 (2012).

<sup>11</sup>*Id.* § 982.555(a).

<sup>12</sup>See HUD, HOUSING CHOICE VOUCHER GUIDEBOOK, 7420.10G, Ch. 16 (Apr. 2001), available at [portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_11760.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11760.pdf).

<sup>13</sup>24 C.F.R. § 982.555(e)(5) (2012).

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* § 982.555(e)(6).

<sup>16</sup>*Id.*

<sup>17</sup>*Carter v. Olmsted County Hous. & Redev. Auth.*, 574 N.W.2d 725, 731 (Minn. Ct. App. 1998).

<sup>18</sup>*Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970)).

<sup>19</sup>514 F.3d 1177, 1183 (11th Cir. 2008).

This means that the PHA must “initially present sufficient evidence to establish a prima facie case that an unauthorized individual” has resided in the unit in violation of the PHA’s policies.<sup>20</sup> Once a PHA has met its burden of persuasion, the tenant has the burden of production to rebut the evidence by showing that the alleged unauthorized occupant is a visitor or guest.<sup>21</sup> Other courts have followed the *Basco* holding in assigning the initial burden of persuasion to the PHA.<sup>22</sup> However, courts may disagree on how much evidence a PHA must present to meet this burden. If a court requires that the PHA offer only a minimal amount of evidence to establish a prima facie case that an unauthorized occupant resided in the unit, the burden effectively shifts to the tenant to defend against the allegation.

*Basco v. Machin* illustrates the importance of requiring the PHA to bear the initial burden of persuasion to demonstrate the presence of an unauthorized occupant. In *Basco*, the PHA terminated the tenant’s voucher after obtaining two police reports stating that a man was living in the tenant’s unit.<sup>23</sup> While the man’s last name was the same in both police reports, each report had a different first name.<sup>24</sup> At the informal hearing, the PHA’s evidence consisted only of copies of the two police reports.<sup>25</sup> The tenant presented testimony and notarized letters from various sources stating that the individual in question did not live at the residence.<sup>26</sup> At the voucher termination hearing, the hearing officer upheld the PHA’s decision to terminate the tenant’s benefits.<sup>27</sup> The tenant filed an action in federal district court, alleging deprivation of procedural due process because the burden of proof was improperly placed on her at the hearing.<sup>28</sup> The district court granted summary judgment in favor of the PHA.<sup>29</sup> On appeal, the 11th Circuit noted that the PHA offered no evidence establishing that the two men named in the police reports were the same person.<sup>30</sup> As a result, the PHA failed to offer evidence establishing the amount of time the alleged unauthorized occupant had stayed in the unit.<sup>31</sup> Accordingly, the 11th Circuit concluded that the two police reports the PHA relied upon were legally

insufficient to establish a prima facie case and, therefore, the PHA did not meet its burden of persuasion.<sup>32</sup>

In contrast to the *Basco* decision, the court in *Hammond v. Akron Metropolitan Housing Authority* found that the PHA met its initial burden of persuasion to demonstrate the presence of an unauthorized occupant.<sup>33</sup> The tenant argued that the hearing officer’s decision violated her right to due process by improperly placing the burden of proof on her.<sup>34</sup> At the hearing, the PHA presented evidence that the alleged unauthorized occupant used the tenant’s address as his mailing address, the tenant admitted that the occupant stayed at the unit one or two nights a week over a period of several months, and the alleged occupant’s mother complained to the PHA that her son was living at the tenant’s residence.<sup>35</sup> The court found that this evidence established a prima facie case that an unauthorized occupant resided in the unit.<sup>36</sup> The court distinguished the PHA’s evidence from the two police reports presented in *Basco*, noting that the tenant did not dispute that the individual had stayed at the unit and received mail at her address.<sup>37</sup> Accordingly, the court upheld the hearing officer’s termination decision.<sup>38</sup>

## Sufficiency of the Evidence

In unauthorized occupant cases, questions often arise as to whether the PHA presented sufficient evidence to demonstrate that the alleged occupant resided with the voucher holder. PHAs typically rely on police reports, testimony from landlords and neighbors, or the use of the unit’s address to receive mail to prove that an individual is an unauthorized occupant, raising questions as to the types of evidence and the amount needed to prove occupancy.<sup>39</sup> HUD regulations provide that “factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing.”<sup>40</sup> However, courts may limit review to a question of whether the decision was against “the manifest weight of the evidence” rather than a question of “where the preponderance lies.”<sup>41</sup> Even when a

<sup>20</sup>*Id.* at 1182.

<sup>21</sup>*Id.*

<sup>22</sup>*See Lane v. Fort Walton Beach Hous. Auth.*, 2011 WL 5826040 (N.D. Fla. Nov. 18, 2011) (finding that the Section 8 case manager’s testimony about sex offender registration was sufficient to meet the initial burden of persuasion); *Williams v. Hous. Auth. of Raleigh*, 595 F. Supp. 2d 627, 633 (E.D.N.C. 2008), *aff’d*, 2009 WL 321628 (4th Cir. Feb. 10, 2009) (the PHA had the ultimate burden of proof on the substantive decision to terminate tenant’s voucher).

<sup>23</sup>*Basco*, 514 F.3d at 1179.

<sup>24</sup>*Id.* (the first police report listed “Emanuel Jones” while the second police report listed “Elonzel Jones”).

<sup>25</sup>*Id.* at 1180.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>*Id.* at 1181.

<sup>30</sup>*Id.* at 1183.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>2011 WL 2175801, at \*1 (Ohio Ct. App. June 1, 2011). Although the tenant also argued that the termination violated her rights under the federal Violence Against Women Act, the court did not consider this issue because the tenant did not raise the issue at the informal hearing or present sufficient evidence of domestic violence.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.* at \*2.

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* at \*3.

<sup>38</sup>*Id.* at \*4.

<sup>39</sup>Margaretta E. Homsey, *Procedural Due Process and Hearsay Evidence in Section 8 Housing Voucher Termination Hearings*, 51 B.C. L. REV. 517, 520 (2010).

<sup>40</sup>24 C.F.R. § 982.555(e)(6) (2012).

<sup>41</sup>*Kurdi v. DuPage County Hous. Auth.*, 514 N.E.2d 802, 807 (Ill. App. Ct. 1987) (reversing the hearing officer’s decision because the record did not show evidentiary support for the termination).

PHA presents some evidence at the hearing, a court nonetheless may find the evidence to be insufficient if it does not actually show that the person lived in the unit for the required period of time to violate the PHA's guest policy.<sup>42</sup>

*Carter v. Olmsted County Housing and Redevelopment Authority* is an example of a case where a tenant successfully challenged the sufficiency of the evidence used as a basis for terminating her voucher.<sup>43</sup> The hearing officer relied on the following in determining that an unauthorized person lived in the tenant's unit: (1) a phone message from the landlord's daughter stating that the alleged occupant was living with the tenant; (2) lack of evidence of a permanent address for the occupant; (3) a letter the occupant sent to the PHA stating that he was "moving out"; and (4) the occupant's receipt of mail at the address.<sup>44</sup> The appellate court determined that the phone message from the landlord's daughter was insufficient because there was no record of the facts that led the daughter to believe that the individual was residing in the tenant's unit rather than visiting.<sup>45</sup> The court determined that the alleged occupant's use of the phrase "moving out" amounted to semantics and therefore was not a sufficient basis for termination.<sup>46</sup> The court also noted that the mail received at the tenant's address stated that the alleged occupant failed to respond to previous mail sent to that address.<sup>47</sup> Further, the record contained evidence demonstrating that the alleged occupant received and responded to mail sent to a different address.<sup>48</sup> The court reversed the termination, holding that there was not substantial evidence in the record from which a reasonable fact-finder could conclude that the individual lived with the tenant as an unauthorized occupant.<sup>49</sup>

To make a successful insufficient evidence claim, a tenant may need to show more than that the evidence is subject to multiple interpretations. A court may find evidence to be sufficient even where the hearing officer relies

mainly on circumstantial evidence of unauthorized occupancy.<sup>50</sup> Courts may accept a hearing officer's decision if it is reasonable and supported by substantial evidence even if there are other plausible interpretations of the evidence.<sup>51</sup>

In *Robinson v. District of Columbia Housing Authority*, a federal district court rejected a voucher tenant's argument that there was insufficient evidence to support the hearing officer's decision to terminate assistance.<sup>52</sup> The PHA terminated the tenant's voucher after police arrested an individual at her apartment who stated he was living with his girlfriend in the unit for two years.<sup>53</sup> The warrant issued for the arrest indicated that the individual could be found at the tenant's address.<sup>54</sup> During the informal hearing, the PHA presented a police officer's note about the statement made by the tenant's boyfriend, a letter from the HUD Office of Investigation and the testimony of the PHA's investigator.<sup>55</sup> In granting the PHA's motion to dismiss the tenant's federal lawsuit, the court noted that the hearing officer properly weighed and balanced numerous pieces of evidence and testimony presented about the alleged unauthorized occupant's residence in the unit.<sup>56</sup> The court stated that it "must accept decisions based on substantial evidence even if a plausible alternative interpretation of the evidence would support another view."<sup>57</sup> Although the arrest warrant was circumstantial evidence of the boyfriend's residence, the court concluded that the hearing officer's decision conformed to the proper evidentiary standard because other evidence supported the conclusion that the boyfriend was an unauthorized occupant in the unit.<sup>58</sup> The court also noted that it is unlikely an arrest warrant would be issued without a reasonable belief that the person is likely to be at the address.<sup>59</sup> Although the tenant presented evidence at the hearing, the court determined that it was not sufficient to reverse the termination decision.<sup>60</sup>

<sup>42</sup>See *Basco v. Machin*, 514 F.3d 1177, 1183 (11th Cir. 2008) (reversing a hearing officer's decision to terminate where two police reports did not speak to the length of the alleged unauthorized occupant's stay at the subsidized unit); *Sanders v. Sellers-Earrest*, 768 F. Supp. 2d 1180, 1188 (M.D. Fla. 2010) (finding "scant evidence of record" where the only evidence provided by the PHA was a domestic violence incident report where the abuser told the arresting officer that he was living with the tenant); *Carter v. Olmsted County Hous. & Redev. Auth.*, 574 N.W.2d 725 (Minn. Ct. App. 1998) (finding the evidence insubstantial in light of the record where the PHA presented evidence that the individual did not have another permanent address, received mail at the tenant's address, and wrote in a letter that he was "moving out" of the tenant's home); *Kurdi*, 514 N.E.2d at 802 (finding that the hearing officer's decision was not supported by evidence where the only direct evidence presented by the PHA was anonymous statements by people who "believed" that the tenant had a man living with her).

<sup>43</sup>574 N.W.2d at 729.

<sup>44</sup>*Id.*

<sup>45</sup>*Id.* at 732.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.* at 731.

<sup>48</sup>*Id.*

<sup>49</sup>*Id.* at 733.

<sup>50</sup>See *Lane v. Fort Walton Beach Hous. Auth.*, 2011 WL 5826040 (N.D. Fla. Nov. 18, 2011) (individual used address for sex offender registry and responded to a sheriff's telephone call shortly after an initial call was made to the residence).

<sup>51</sup>See *Robinson v. District of Columbia Hous. Auth.*, 660 F. Supp. 2d 6, 19 (D.D.C. 2009) (upholding the decision to terminate where the hearing officer reviewed all the evidence in detail and the finding was reasonable and supported by "ample evidence").

<sup>52</sup>*Id.* at 11 (the tenant also claimed that the PHA improperly relied on hearsay evidence, deprived her of the opportunity to cross-examine adverse witnesses and failed to consider mitigating factors).

<sup>53</sup>*Id.* at 9.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at 10.

<sup>56</sup>*Id.* at 13.

<sup>57</sup>*Id.* at 18.

<sup>58</sup>*Id.* at 19 (the other evidence supporting the hearing officer's conclusion included the tenant's own testimony and the boyfriend's statement to the police).

<sup>59</sup>*Id.* at 18.

<sup>60</sup>*Id.* at 19 (the tenant's evidence included her own testimony and six letters from community members stating that the individual did not reside in the unit).

## Failure to Consider Relevant Evidence

Another potential ground for challenging a voucher termination may arise if the hearing officer disregarded the tenant's evidence without reason.<sup>61</sup> For example, voucher tenants have challenged termination decisions where the hearing officer disregarded credible evidence of the alleged occupant's actual permanent address.<sup>62</sup> While evidence to rebut the PHA's claim may not always be available, a tenant should try to present any evidence or testimony to show that an individual was a guest or visitor. This evidence may include a copy of the individual's lease, copies of bills sent to the individual at another address, testimony by the individual about another residence, an explanation of why the individual was at the unit, or evidence of how long the individual actually stayed at the unit. A tenant may satisfy her burden of production under the *Basco* standard if she presents un rebutted testimony that the individual did not reside in the unit,<sup>63</sup> especially where the testimony is supported by other witnesses.<sup>64</sup>

*Hassan v. Dakota County Community Development Agency* is an example of a case where the court reversed a termination decision because the hearing officer failed to consider all relevant evidence presented at the informal hearing.<sup>65</sup> At the hearing, the PHA presented evidence that the tenant requested to add her husband to the unit and a child support document stating that the husband was residing in the unit.<sup>66</sup> The tenant testified that her husband was not yet living in the unit and that she indicated his residence in the unit on other documents in anticipation of the PHA's approval of his occupancy.<sup>67</sup> The tenant also presented a verification letter from the husband's landlord after the record of the hearing closed.<sup>68</sup> In reversing the hearing officer's decision, the court noted that a hearing officer must consider "contrary evidence or evi-

dence from which conflicting inferences can be drawn."<sup>69</sup> In this case, the hearing officer did not consider or address the letter from the husband's landlord even though other post-hearing evidence was accepted.<sup>70</sup> Because the hearing officer failed to consider the tenant's evidence, and the PHA did not produce sufficient evidence to prove that the husband resided in the unit, the court reversed the termination decision.<sup>71</sup>

However, a court may uphold a hearing officer's decision to disregard a tenant's evidence if it is based on credibility determinations.<sup>72</sup> In *Johnson v. Washington County Housing and Redevelopment Authority*, a PHA terminated a tenant's voucher on the basis of a sheriff's investigation and anonymous report that an unauthorized individual lived in the tenant's unit.<sup>73</sup> At the informal hearing, the investigating sheriff testified that the tenant made statements in a domestic assault report that her boyfriend lived with her for eight months.<sup>74</sup> The tenant testified that the police report statement was inaccurate and that her boyfriend had never lived in her unit.<sup>75</sup> After the hearing officer concluded that the tenant violated her family obligations, the tenant challenged the decision.<sup>76</sup> The court affirmed the hearing officer's decision because it was supported by substantial evidence.<sup>77</sup> The court noted that the hearing officer rejected the tenant's testimony in favor of the previous statements she made to police.<sup>78</sup> The court stated that based on the record, "a rational conclusion clearly may follow: [the tenant's] self-serving testimony at the hearing was not as believable as the statement she gave to an officer responding to her call for help after a domestic assault report."<sup>79</sup>

## Use of Hearsay Evidence

In many unauthorized occupant cases, advocates have raised constitutional due process claims to challenge PHAs' use of hearsay evidence during voucher termina-

<sup>61</sup>*Carter v. Olmsted County Hous. & Redev. Auth.*, 574 N.W.2d 725 (Minn. Ct. App. 1998) (concluding that a hearing officer's findings were legally insufficient where the tenant's evidence was disregarded without any explanation).

<sup>62</sup>*See Hassan v. Dakota County Cmty. Dev. Agency*, 2009 WL 437775 (Minn. Ct. App. Feb. 24, 2009) (hearing officer failed to consider tenant's testimony and a letter from husband's landlord); *Rinzin v. Olmsted County Hous. & Redev. Auth.*, 2008 WL 4977576 (Minn. Ct. App. Nov. 25, 2008) (hearing officer failed to credit alleged unauthorized occupant's testimony and a letter from her new landlord).

<sup>63</sup>*See Sanders v. Sellers-Earrest*, 768 F. Supp. 2d 1180 (M.D. Fla. 2010).

<sup>64</sup>*Kurdi v. DuPage County Hous. Auth.*, 514 N.E.2d 802 (Ill. App. Ct. 1987) (finding a hearing officer's decision to be against the "manifest weight of evidence" where the tenant's testimony was supported by two other witnesses).

<sup>65</sup>2009 WL 437775, \*1 (Minn. Ct. App. Feb. 24, 2009). The court also concluded that the termination decision was arbitrary and capricious because the hearing officer failed to consider relevant mitigating circumstances, including the tenant's limited English proficiency and the negative effect of the termination on her five children.

<sup>66</sup>*Id.* at \*2.

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

<sup>69</sup>*Id.* at \*1.

<sup>70</sup>*Id.* at \*2.

<sup>71</sup>*Id.* at \*1.

<sup>72</sup>*See Williams v. Hous. Auth. of Raleigh*, 595 F. Supp. 2d 627, 631 (E.D.N.C. 2008) (noting that a hearing officer is permitted to assess the tenant's credibility); *Jones v. Dakota County Cmty. Dev. Agency*, 2009 WL 2151158 (Minn. Ct. App. July 21, 2009) (rejecting the argument that the hearing decision was unsupported by the record where the hearing officer's decision could be fairly interpreted to find that the tenant did not provide a credible explanation); *Johnson v. Wash. County Hous. & Redev. Auth.*, 2001 WL 214190, at \*2 (Minn. Ct. App. Mar. 6, 2001) (noting that a rational conclusion that the tenant was not credible could follow where a tenant provided "self-serving testimony" at the hearing that conflicted with her previous statement given to police).

<sup>73</sup>2001 WL 214190, at \*1.

<sup>74</sup>*Id.*

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>*Id.* at \*3.

<sup>78</sup>*Id.* at \*2.

<sup>79</sup>*Id.*

tion hearings.<sup>80</sup> HUD regulations state that “evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings.”<sup>81</sup> Federal district courts have interpreted both Supreme Court precedent and HUD regulations differently as to whether a termination may be based solely on hearsay evidence.<sup>82</sup> Advocates should expect PHAs to argue that HUD regulations expressly state that formal rules of evidence do not apply in voucher termination hearings and, therefore, a decision may be based solely on hearsay evidence.<sup>83</sup> Additionally, advocates should determine whether the hearsay evidence is reliable or supported by other evidence when assessing whether to challenge a hearing officer’s termination decision.

Courts have held that hearsay may constitute sufficient evidence if certain factors are met that ensure the “underlying reliability and probative value” of the hearsay evidence.<sup>84</sup> These factors include whether “(1) the out-of-court declarant was not biased and had no interest in the result of the case; (2) the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) the information was not inconsistent on its face; and (4) the information has been recognized by courts as inherently reliable.”<sup>85</sup> Courts also may consider “whether statements are signed and sworn as opposed to anonymous, oral, or unsworn” and “whether the hearsay is corroborated.”<sup>86</sup>

Depending on the reliability of the hearsay and the other evidence that was presented, tenants may be able to challenge termination decisions that were based on hearsay evidence. For example, in cases where the hearsay evidence is a domestic violence perpetrator’s statement to the police, a tenant may be able to claim that any statements made by the perpetrator that he resides in the unit are biased and therefore unreliable, especially where there is no chance to cross-examine the perpetrator at the hearing.<sup>87</sup> In addition, anonymous statements of a “belief” of the presence of an unauthorized occupant may be considered inadmissible hearsay where the declarant is unidentified and unavailable at the hearing.<sup>88</sup> Hearsay evidence

that is not authenticated by other evidence also may result in a court overturning a hearing officer’s decision to terminate assistance.<sup>89</sup> Various courts have compared hearsay evidence to the unauthenticated police reports in *Basco* to decide whether to uphold the termination.<sup>90</sup> A tenant has a stronger case when the hearsay evidence lacks reliability or probative value.<sup>91</sup>

In *Kurdi v. DuPage County Housing Authority*, a tenant successfully challenged the use of hearsay evidence at her voucher termination hearing.<sup>92</sup> The PHA terminated the tenant’s subsidy because of her failure to report her husband as a member of her residence.<sup>93</sup> At the hearing, the PHA presented public aid forms completed by the husband’s former employers and testimony by a PHA employee that unidentified persons believed that a man was living with the tenant.<sup>94</sup> The court determined that the hearsay evidence in the form of unidentified persons’ beliefs was not sufficiently reliable.<sup>95</sup> Additionally, the court determined that the other evidence against the tenant was circumstantial and therefore insufficient to support the hearing officer’s decision.<sup>96</sup> Accordingly, the court reversed the termination decision.<sup>97</sup>

It may be more difficult for a tenant to overturn a termination decision in the following cases: the hearsay evidence is accompanied by direct evidence and testimony, the hearsay statements are reliable or the tenant had an opportunity to cross-examine any hearsay declarants.<sup>98</sup> For example, the court in *Lane v. Fort Walton Beach Housing Authority* granted the PHA’s motion to dismiss a voucher tenant’s federal lawsuit where the hearing officer’s decision was supported by reliable hearsay evidence.<sup>99</sup> The hearsay evidence included a Section 8 case manager’s testimony regarding a record of sheriff’s calls to the voucher tenant’s residence and the Florida sex offender registry, which listed the tenant’s address as the alleged unauthor-

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of hearsay evidence that is “immaterial, irrelevant, or unreliable”).

<sup>80</sup>See *Basco v. Machin*, 514 F.3d 1177 (11th Cir. 2008) (concluding that two police reports were legally insufficient to support the claim that a single individual resided in the unit where the names in the report were not the same and no other facts supported the hearsay evidence).

<sup>81</sup>*Homsey*, *supra* note 39, at 543-45.

<sup>82</sup>See *Litsey v. Hous. Auth. of Bardstown*, 1999 WL 33604017 (W.D. Ky. Apr. 1, 1999) (finding hearsay evidence insufficient where letters did not support inference that unauthorized occupant lived with voucher tenant); *Carter v. Olmsted County Hous. & Redev. Auth.*, 574 N.W.2d 725, 731 (Minn. Ct. App. 1998) (finding the hearsay evidence insufficient where there were no facts stated to support the belief that an unauthorized occupant was residing in the unit).

<sup>83</sup>514 N.E.2d at 803.

<sup>84</sup>*Id.* at 804.

<sup>85</sup>*Id.*

<sup>86</sup>*Id.* at 806.

<sup>87</sup>*Id.*

<sup>88</sup>*Id.* at 807.

<sup>89</sup>See *Lane v. Fort Walton Beach Hous. Auth.*, 2011 WL 5826040 (N.D. Fla. Nov. 18, 2011); *Robinson v. District of Columbia Hous. Auth.*, 660 F. Supp. 2d 6 (D.D.C. 2009); *Thomas v. Hernando County Hous. Auth.*, 2008 WL 4844761 (M.D. Fla. Nov. 6, 2008); *Williams v. Hous. Auth. of Raleigh*, 595 F. Supp. 2d 627 (E.D.N.C. 2008).

<sup>90</sup>2011 WL 5826040, at \*6.

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<sup>80</sup>Depending on the state’s rules regarding the use of hearsay evidence in administrative hearings, advocates also may consider bringing a state law claim.

<sup>81</sup>24 C.F.R. § 982.555(e)(5) (2012).

<sup>82</sup>*Homsey*, *supra* note 39, at 532-35.

<sup>83</sup>*Homsey*, *supra* note 39, at 530 (noting that the HUD regulations do not explicitly ban hearsay evidence and that a tenant has no power to subpoena witnesses).

<sup>84</sup>*Basco v. Machin*, 514 F.3d 1177, 1182 (11th Cir. 2008).

<sup>85</sup>*Id.* (noting that the most important factor that advises against basing a termination decision solely on hearsay statements is whether the tenant may subpoena the witness).

<sup>86</sup>*Kurdi v. DuPage County Hous. Auth.*, 514 N.E.2d 802, 806 (Ill. App. Ct. 1987) (citing *Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980)).

<sup>87</sup>See *Sanders v. Sellers-Earnest*, 768 F. Supp. 2d 1180, 1187 (M.D. Fla. 2010) (stating that a person arrested for domestic violence based on the tenant’s accusation has potential bias against the tenant).

<sup>88</sup>See *Kurdi*, 514 N.E.2d at 806 (noting that courts have restricted the use

ized occupant's residence.<sup>100</sup> The tenant argued that the evidence was insufficient because the PHA did not present "personal, direct knowledge" of the occupant's residence in the unit.<sup>101</sup> The court determined that the sex offender registry was reliable hearsay evidence because state law makes it a felony to misreport a residential address in the registry.<sup>102</sup> The court also determined that the sheriff's call log supported the inference that the tenant was in communication with the occupant.<sup>103</sup> According to the log, when the sheriff's office phoned the tenant's residence, the person answering stated that the alleged unauthorized occupant "was not in."<sup>104</sup> Within hours, the occupant called the sheriff's office to inquire "why deputies were looking for [him]."<sup>105</sup> The court concluded that the hearsay evidence was adequate to support the hearing officer's decision because the identity of the individual referenced in the sheriff's call log was clear, and that individual's permanent address was listed as the tenant's residence.<sup>106</sup>

### Cross-Examination of Adverse Witnesses

When challenging the reliability of hearsay evidence in unauthorized occupant cases, advocates often raise related arguments regarding the tenant's right to cross-examine adverse witnesses. In several unauthorized occupant cases, voucher tenants have argued that their due process rights were violated where the hearing officer's decision was substantially based on evidence from adverse witnesses who were not present at the termination hearing. HUD regulations state that a tenant may "question any witnesses,"<sup>107</sup> although some courts have held that a Section 8 tenant has a limited right to cross-examine only those witnesses who are present at the hearing.<sup>108</sup> The ability to cross-examine witnesses becomes most relevant where a PHA offers evidence in the form of police reports, statements, or other hearsay evidence without presenting the declarant as a witness to testify at the hearing. Advocates should consider what hearsay evidence will be relied upon prior to a hearing and request that any hearsay declarants be present at the hearing to minimize the potential negative impact the hearsay evidence may have.

In *Sanders v. Sellers-Earnest*, a tenant successfully argued that termination of her voucher violated due process requirements because she did not have an oppor-

tunity to cross-examine adverse witnesses.<sup>109</sup> At the voucher termination hearing, the PHA presented police reports and documents containing statements from the alleged unauthorized occupant that he lived with the voucher tenant and that they were cohabitants.<sup>110</sup> The tenant argued that the hearing officer's decision was based solely on unreliable hearsay.<sup>111</sup> The court noted that the police reports were not in the hearing's record, and the only evidence supporting the decision was the hearing officer's description of the reports.<sup>112</sup> Because the tenant was unable to cross-examine the reporting officers or the alleged unauthorized occupant at the hearing, the evidence in the police reports could not be tested for reliability.<sup>113</sup> The court concluded that the tenant's right to due process was violated because the hearsay evidence was not reliable and the tenant was not given the opportunity to cross-examine the hearsay declarants.<sup>114</sup> Accordingly, the court granted a preliminary injunction enjoining the PHA from terminating the tenant's voucher.<sup>115</sup>

In contrast, the court in *Williams v. Housing Authority of the City of Raleigh* determined that the inability to cross-examine a witness did not violate the tenant's right to due process because the tenant denied an offered continuance of the hearing.<sup>116</sup> The hearing officer considered three written statements by the tenant's former landlord, who was not present at the hearing.<sup>117</sup> The tenant objected to the written statements because she did not have an opportunity to cross-examine the landlord.<sup>118</sup> The PHA and the hearing officer agreed to continue the hearing to allow the the tenant the opportunity to cross-examine the landlord, but the tenant declined the continuance.<sup>119</sup> The court determined that the tenant waived her right to cross-examine the landlord when she declined the opportunity to continue the hearing.<sup>120</sup> Therefore, the hearing officer properly considered the landlord's written statements and "followed a procedurally fair process."<sup>121</sup>

### Conclusion

Advocates representing tenants in unauthorized occupancy cases can assert several due process arguments to avoid unnecessary terminations or to challenge terminations that already have occurred. Ensuring that the burden of proof is at least initially on the PHA to show

<sup>100</sup>*Id.* at \*1.

<sup>101</sup>*Id.* at \*3.

<sup>102</sup>*Id.* at \*4.

<sup>103</sup>*Id.* at \*5.

<sup>104</sup>*Id.*

<sup>105</sup>*Id.*

<sup>106</sup>*Id.*

<sup>107</sup>24 C.F.R. § 982.555(e)(5) (2012).

<sup>108</sup>See *Gammons v. Mass. Dep't of Hous. & Cmty. Dev.*, 523 F. Supp. 2d 76 (D. Mass. 2007); *Tomlinson v. Machin*, 2007 WL 141192 (M.D. Fla. Jan. 16, 2007).

<sup>109</sup>768 F. Supp. 2d 1180 (M.D. Fla. 2010).

<sup>110</sup>*Id.* at 1183.

<sup>111</sup>*Id.* at 1186.

<sup>112</sup>*Id.* at 1187.

<sup>113</sup>*Id.*

<sup>114</sup>*Id.* at 1188.

<sup>115</sup>*Id.*

<sup>116</sup>595 F. Supp. 2d 627, 634 (E.D.N.C. 2008).

<sup>117</sup>*Id.* at 629.

<sup>118</sup>*Id.* at 635.

<sup>119</sup>*Id.*

<sup>120</sup>*Id.*

<sup>121</sup>*Id.* at 633.

that the tenant resided with an unauthorized occupant is critical to preventing unfair accusations and terminations. Advocates also should assess the reliability of any hearsay evidence that the PHA intends to rely upon and determine whether there will be an opportunity to cross-examine hearsay declarants. A hearing officer's refusal to consider all of the relevant evidence or failure to base a termination decision on sufficient evidence of unauthorized occupancy provide additional grounds for challenging the decision. ■