Third Circuit Requires Philadelphia Housing Authority to Increase Utility Allowance for Rate Hikes[1]

The United States Court of Appeals for the Third Circuit recently issued an extremely important decision on the calculation of utility allowances in public housing. The court's ruling holds promise for all federally assisted housing in this period of imminent post-Katrina skyrocketing utility bills. McDowell v. Philadelphia Hous. Auth., 423 F.3d 233 (3d Cir. 2005).

The appellate decision involved a long-running case in which tenants had sued the housing authority in 1997 pursuant to 42 U.S.C. § 1983 for its failure to adjust its utility allowances for rate increases as required by federal law. After certification of a tenant class, the parties executed a settlement agreement, which was incorporated into a consent decree under the continuing jurisdiction of the district court. The settlement essentially required the housing authority to follow the federal regulations for the annual review and adjustment of allowances, including the requirement to revise allowances when utility rates increase by 10% or more from those used to calculate the prior allowances.

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When natural gas rates increased in December of 2000 by 11%, and then increased again one month later, tenants repeatedly requested an allowance adjustment but the Philadelphia Housing Authority refused to act. The tenants, represented by Community Legal Services, finally sought to enforce the consent decree through a civil contempt motion in October of 2002. The parties again reached another settlement two months later, with increased allowances effective January 1, 2003, but no resolution of the tenants' request for sanctions during the two-year period of noncompliance.

The district court subsequently denied the tenants' motion, finding no showing of any actual provable injury from the violation of the decree. This finding was based upon its acceptance of the Philadelphia Housing Authority's revised gas consumption calculations for the period between 1999 and 2002, which retroactively decreased the base allowances, more than offsetting the impact of the rate shortfalls. Thus, the district court accepted the housing authority's contention that tenants were owed nothing despite its admitted violation of the consent decree and rate regulations.

On appeal, the Third Circuit, with Supreme Court nominee Judge Alito writing for the panel, rejected this position out of hand. Using contract principles to construe the terms of the consent decree, the court found its terms unambiguous, requiring and permitting only prospective adjustments.[2] The court stated:

> When [the utility provider] raised its rates, the tenants were entitled under paragraph 8 of the decree to have their allowances recalculated based on the increased rates and the consumption factor in effect at the time. The difference between the allowances so calculated and the allowances the tenants received is the loss the tenants suffered and the benefit the PHA reaped as a result of the latter's contempt.[3]

This reasoning is directly applicable to millions of federally assisted tenants because, although the regulatory citations vary, the conditions set forth in paragraph 8 of the consent decree are largely the same as those embodied within HUD's utility allowance regulations for all of its programs.[4] Therefore, when utility rates go up, "tenants [a]re entitled. . . . to have their allowances recalculated based on the increased rates and the consumption factor in effect at the time."[5] If a housing authority or property owner does not do this, "the difference between the allowances so calculated and the allowances the tenants received is the loss the tenants suffered."[6] That loss is "actual provable injury" to be assessed against the noncomplying public housing agency or owner.

Consequently, the utility allowances provided to public and assisted housing tenants throughout the country over the past several years warrant careful scrutiny, as natural gas, fuel oil and electricity prices have increased

[1]Much of this article is based on an analysis by Roger D. Colton, of Fisher, Sheehan and Colton (FSC) in Boston, about whom more can be found at http://www.fsconline.com.

[2]The court's conclusion on this point was reinforced by the extrinsic evidence provided by HUD's regulations that require prior notice of adjusted allowances, except in the case of those required for rate increases. *See* 24 C.F.R. § 965.502(c) (2005).

[3]423 F.3d at 241.

[4]*Compare* 423 F.3d at 238, *with* 24 C.F.R. § 965.507(b) (2005) (PHAs); *and* 24 C.F.R. §§ 880.610 and 881.601 (2005) (project-based Section 8 program); *and* 24 C.F.R. § 982.517(c) (2005) (housing choice voucher program).

[5]423 F.3d at 241.

[6]*Id*.

substantially. Inadequate utility allowance adjustments effectively result in hundreds of millions of dollars of rent overcharges in the subsidized housing programs.[7] Indeed, the Philadelphia case alone involved overcharges estimated at more than $4 million. The recently announced rate hikes by many utility companies as a result of the hurricane's interruption of supplies only heighten the urgency of prompt review, analysis, and remedial action on this problem. ■

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[7] *See generally* NHLP, *Shifting Affordable Housing Cost Burdens to Tenants: A Historical Perspective*, 35 HOUS. L. BULL. 8, 9 (2005).