

**To:** Philadelphia Housing Authority (PHA) Board of Directors

**From:** Community Legal Services (CLS) and Resident Advisory Board (RAB)

**Re:** Tenant Utility Credit Reimbursements

**Date:** February 20, 2014

**Background:**

In the May 18, 2013 release of the revised Admissions and Continued Occupancy Policy (ACOP), PHA proposed a policy change in regards to utility allowances, whereby it would begin sending negative utility allowance reimbursements directly to the utility company instead of to the tenants. In comments and recommendations dated July 31, 2013, CLS and RAB were concerned, based on discussions with PHA, that if a tenant lowers their consumption and gets a lower bill, PHA would not cooperate with the release of the credit to the tenant, and that it may use the credit to apply to rent arrearages.

In response to the recommendations from CLS and RAB, PHA made additional changes to the policy. The policy now states that “*PHA will cooperate with tenants seeking a release by a utility company of a credit balance on a tenant utility account, but PHA may limit requests for release to once per year, may condition its consent upon payment of delinquent rent and/or upon the utility’s retention of a reserve for seasonal fluctuations in consumption.*” In response to this additional language, CLS and RAB strongly recommended that if a tenant receives a credit due to less consumption, the credit should go directly to the tenant upon the tenant’s request to the utility company. We also recommended that PHA include a policy stating that they will cooperate with the utility company to release the credit, and that credits will not be used to offset rental arrearages or any alleged damages, or held in reserve, as the savings belong to the tenant. We believe that PHA does not have the right to place any conditions on tenants receiving a credit, and should not limit such requests to once per year.

PHA has held inconsistent policies over the years in regards to how it treats utility allowance credits. Prior to 2007, we believe that PHA required that tenants submit a letter of authorization, written by PHA, to the utility companies authorizing release of the credit before the utility would release the credit to the tenant. In cooperation with PHA, PGW and PECO required that a tenant submit this letter prior to releasing the credit.

Apparently, PHA then changed its policies regarding utility credits in 2007, and no longer provided the authorization letter or required that tenants obtain one before seeking a release of a utility credit. However, because this policy change was not effectively communicated to tenants or the utility companies, PHA continued providing the authorization letter to release the credits on a case-by-case basis, and has worked with CLS as needed to communicate the policy change to the utility companies.

The new policy in the ACOP acts to reinstate a policy of requiring consent from PHA before tenant credits are released. PHA now wants to condition its cooperation to release a tenant credit upon payment of delinquent rent and/or upon the utility's retention of a reserve for seasonal fluctuations in consumption. This policy change is directly contrary to legal authority as set forth in *McDowell v. Phila. Hous. Auth.* and *West v. Bowen*, as well as HUD policies and regulations.

### **Discussion:**

*McDowell* makes it clear that tenants are entitled to receive the benefit of credits to their utility bills due to less consumption of utilities. Pursuant to *McDowell*, "if a tenant's utility bill exceeds the allowance, the tenant must make up the difference; if the allowance exceeds the bill, the difference may be pocketed. (*McDowell v. Phila. Hous. Auth.*, 423 F.3d 233, 236 (3d Cir. Pa. 2005)). *McDowell* cites *West v. Bowen* in its discussion, which contains a note providing clarity to the policy of utility reimbursements: "Apparently the policy behind flat rate reimbursements was designed to encourage residents to conserve energy so that if a resident spends less than the flat rate reimbursement, the difference may be pocketed. However, a resident residing in an apartment with poor insulation, or a more expensive than average heating system, may end up losing money under this system." (*West v. Bowen*, 879 F.2d 1122, 1129, n.8 (3d Cir. Pa. 1989)). Credits to a tenant's utility account due to less consumption should go directly to the tenant, just as, conversely, a tenant is expected to cover the balance if there are charges or overages on their utility account that the utility allowance payment does not cover. PHA cannot make the tenant bear the burden of utility overages, but not allow the tenant the benefit of the savings where they have managed to consume less utilities.

PHA also does not have the right to place conditions on tenants receiving utility credits, such as using the credit to offset rental arrearages or alleged damages. HUD defines a utility allowance as follows: "*if the cost of utilities and other housing services for an assisted unit is not included in the tenant rent but is the responsibility of the family occupying the unit, an amount equal to the estimate made or approved by a PHA or HUD of the monthly cost of a reasonable consumption of such utilities and other services for the unit by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.*" (24 C.F.R. 5.603). The utility allowance is a fixed amount allowed to the tenant, and is deducted from the Total Tenant Payment. Tenants are entitled to the utility allowance as calculated with their total tenant payment, irrespective of the tenant's consumption of more or less utilities than is estimated for their unit. PHA does not have discretion to take that money back or condition its use where a tenant consumes less than average, in the same way that it will not raise a tenant's utility allowance where a tenant consumes more than average (unless special circumstances apply).

A similar principle is applied to utility reimbursement checks. If a utility allowance for a unit exceeds the total tenant payment for the family occupying the unit, the tenant is entitled to a reimbursement because the allowance belongs to the tenant as a part of their Total Tenant payment. Policies that condition a tenant's utility allowance entitlement upon their account balances being current may also potentially violate a tenant's due process rights.

CLS and RAB strongly recommend that PHA create a formal policy regarding release of the credits, consistent with the above cited authority. Credits should go directly to the tenant upon the tenant's request to the utility company, and the reimbursement should not require any additional authorization from PHA. PHA should communicate this policy in writing to both PECO and PGW, informing the utility companies that any excess utility credits can be obtained by a tenant without authorization from PHA. If, after clear communication of this policy to the utility companies, there are still occasions where PGW or PECO require additional authorization from PHA, managers should cooperate with the tenant and utility company as needed to get the credit released. Finally, the policy should be clear that tenants are not required to use the credit to offset rental arrearages or alleged damages, or keep the credit in a reserve for seasonal increases in utility consumption.