

Legal Opinion: GCH-0085

Index: 2.245

Subject: PH Due Process Determination: Wisconsin

May 11, 1993

HUD DUE PROCESS DETERMINATION

for the

STATE OF WISCONSIN

TABLE OF CONTENTS

ANALYSIS

I.	Jurisdiction: State of Wisconsin	2
II.	Elements of Due Process	2
III.	Overview of Wisconsin eviction procedures	3
IV.	Analysis of Wisconsin eviction procedures for each of the regulatory due process elements	4
	A. Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction (24 C.F.R. Section 966.53(c)(1))	4
	B. Right to be represented by counsel (24 C.F.R. Section 966.53(c)(2))	6
	C. Opportunity for the tenant to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses (24 C.F.R. Section 966.53(c)(3))	7
	D. Opportunity to present any affirmative legal or equitable defense which the tenant may have (24 C.F.R. Section 966.53(c)(3))	8
	E. A decision on the merits (24 C.F.R. Section 966.53(c)(4))	8
V.	Conclusion.	9

ANALYSIS

I. Jurisdiction: State of Wisconsin

II. Elements of Due Process

Section 6(k) of the United States Housing Act of 1937 (42 U.S.C. 1437d(k), as amended by section 503(a) of the National Affordable Housing Act of 1990, Pub. L. 101-625, approved November 28, 1990), provides that:

For any grievance concerning an eviction or termination of tenancy that involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any drug-related criminal activity on or near such premises, the agency may . . . exclude from its grievance procedure any such grievance, in any jurisdiction which requires that prior to eviction, a tenant be given a hearing in court which the Secretary determines provides the basic elements of due process

The statutory phrase "elements of due process" is defined by HUD at 24 C.F.R. Section 966.53(c) as:

. . . an eviction action or a termination of tenancy in a State or local court in which the following procedural safeguards are required:

- (1) Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction;
- (2) Right of the tenant to be represented by counsel;
- (3) Opportunity for the tenant to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense which the tenant may have; and
- (4) A decision on the merits.

HUD's determination that a State's eviction procedures satisfy this regulatory definition is called a "due process determination."

This due process determination is based on HUD's analysis of the laws of the State of Wisconsin, to determine if an eviction action under those laws requires a hearing with all of the regulatory "elements of due process," as defined in 24 C.F.R. Section 966.53(c).

HUD finds that the requirements of Wisconsin law governing an eviction action in the Wisconsin Circuit Courts under Chapter 799 of the Wisconsin Statutes Annotated ("Eviction Statute") include all of the elements of basic due process, as defined in 24 C.F.R. Section 966.53(c). This conclusion is based on requirements contained in the State Constitution, Wisconsin Statutes, case law and Wisconsin Rules of Civil Procedure.

III. Overview of Wisconsin eviction procedures

An eviction action is a civil action, and must be brought in the Wisconsin circuit court. Wis. Stat. Ann. Sections 799.40(1), 753.03 (West Supp. 1992). An eviction action is used to remove any person who is not entitled to either possession or occupancy of real property. Wis. Stat. Ann. Section 799.40 (West Supp. 1992).

Chapter 704 of the Wisconsin Statutes Annotated governs the relationship of landlord and tenant. Section 704.17 requires a landlord to give a tenant written notice of the landlord's intent to terminate, and the date of termination. Notice of termination must be given before termination of tenancy for breach of any of the covenants or conditions of the tenancy.

If a tenant remains in possession after termination of the tenancy, the landlord may evict the tenant. Section 704.23 provides:

If a tenant remains in possession without consent of his landlord after termination of his tenancy, the landlord may in every case proceed in any manner permitted by law to remove the tenant . . .

Generally, the circuit court has jurisdiction over all civil actions. Article VII of the Wisconsin Constitution; Wis. Stat. Ann. Section 753.03 (West Supp. 1992). Title 42-A of the Wisconsin Statutes, Chapters 801 to 847, constitutes the Wisconsin Rules of Civil Procedure and Real Property Actions. Unless otherwise provided, the general rules of practice and procedure apply to actions and proceedings under Chapter 799. See Wis. Stat. Ann. Section 799.04 (West Supp. 1992).

An eviction action must also comply with the due process requirements of the Wisconsin State Constitution. Article 1, Section 1 of the Wisconsin Constitution states that "[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness" Article 1, Section 9 provides that:

"[e]very person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

The Wisconsin Supreme Court has construed these two provisions of the Wisconsin Constitution as guaranteeing to all persons due process of law. See *State v. Stehlek*, 56 N.W. 2d 514, 262 Wis. 642 (1953).

IV. Analysis of Wisconsin eviction procedures for each of the regulatory due process elements

- A. Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction
(24 C.F.R. Section 966.53(c)(1))

The process of eviction begins with the landlord serving a notice of termination on the tenant. Wis. Stat Ann. Section 704.17. The notice must be in writing and "substantially inform the other party to the landlord-tenant relation of the intent to terminate the tenancy and the date of the termination." Wis. Stat. Ann. Section 704.17 (West Supp. 1992).

The notice of termination must be served personally, by substitute, or if unable to do either after reasonable diligence, by posting and mail. Wis. Stat. Ann. Section 704.21 (West Supp. 1992).

After the termination notice is served and the termination date has passed, the landlord files a written complaint, that identifies the parties, the real property, and the facts authorizing removal of the defendant. Wis.

Stat. Ann. Sections 799.41, 802.01 (West Supp. 1992). The complaint "shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Wis. Stat. Ann Section 802.01(2) (West Supp. 1992). The complaint is served with a summons that notifies the defendant of the date, time and place of the hearing. Wis. Stat. Ann. Section 799.05 (West Supp. 1992), and Section 801.09 (West Supp. 1992).

The complaint and summons in eviction actions are served by personal service or substituted service. See Wis. Stat. Ann. Sections 799.12 (West Supp. 1992). (Substituted service is constructive service by serving a recognized representative or agent of the party to be served.) If a defendant cannot be served with personal or substituted service, service may be made by posting and mail:

In eviction actions, when the defendant has not been served with personal or substituted service . . . , service may be made as follows:

- (a) If the summons is returned more than 7 days prior to the return date with proof that the defendant cannot be served with personal or substituted service the plaintiff may . . . affix a copy of the summons and complaint onto some part of the premises where it may be conveniently read At least 5 days prior to the return date an additional copy of the summons and complaint shall also be mailed to the defendant at the last-known address, even if it is the premises which are the subject of the action.

Wis. Stat. Ann Section 799.16 (West Supp. 1992).

Under Wisconsin law, adequate notice to the tenant of the grounds for terminating the tenancy and for eviction is provided by service of the notice of termination and complaint. Adequate notice also is required by the due process requirements of the Wisconsin State Constitution. Article 1, Sections 1, 9.

B. Right to be represented by counsel
(24 C.F.R. Section 966.53(c)(2))

The right to be represented by counsel in eviction actions is specifically provided for in section 799.06(2), which states:

A person may . . . defend an action or proceeding under this chapter and may appear in his, her or its own proper person or by an attorney regularly authorized to practice in the courts of this state

Wis. Stat. Ann. Section 799.06(2) (West Supp. 1992).

In addition to the explicit statement of this right in the statute, the right to representation by counsel can also be inferred from several references in the Wisconsin Rules of Civil Procedure. Some examples include:

- (1) Every pleading, motion or other paper of a party represented by an attorney shall contain the name and address of the attorney. . . .

Wis. Rule of Civ. Proc. Section 802.05.

- (2) Unless the judge otherwise orders, not more than one attorney for each side shall examine or cross-examine a witness

Wis. Rule of Civ. Proc. Section 802.10.

The right to representation by counsel is also required by the due process provisions of the Wisconsin Constitution. Article 1, Sections 1, 9.

- C. Opportunity for the tenant to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses (24 C.F.R. Section 966.53(c)(3))

A party has the right to question his or her own witnesses, to examine or cross-examine the adverse party, and to cross-examine witnesses of the adverse party. Wis. Stat. Ann. Section 805.10 (West Supp. 1992).

"A subpoena may . . . be issued by any attorney of record in a civil action or special proceeding to compel attendance of witnesses for deposition, hearing or trial" Wis. Stat. Ann. Section 805.07 (West Supp. 1992). The attendance of witnesses may be compelled by subpoena as provided in s. 805.07." Wis. Stat. Ann. Section 804.05 (West Supp. 1992).

"After commencement of the action, any party may take the testimony of any person including a party by deposition upon oral examination. Wis. Stat. Ann. Section 804.05. A party may cross-examine any person whose testimony is taken by oral deposition. "Examination and cross-examination of deponents may proceed as permitted at trial." Wis. Stat. Ann. Section 804.05(4).

In addition, several Wisconsin rules of civil procedure provide the opportunity for the tenant to refute the evidence presented by the PHA. Several examples are:

- (1) The party cross-examining the witness is not concluded by the witness' answer.

Wis. Rule of Civ. Proc. Section 906.09.

- (2) A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

Wis. Rule of Civ. Proc. Section 906.11(2).

Based on the foregoing, and the basic rights under the due process provisions of the Wisconsin State Constitution (Article 1, Sections 1, 9), a tenant in an eviction action has the opportunity to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses.

- D. Opportunity to present any affirmative legal or equitable defense which the tenant may have (24 C.F.R. Section 966.53(c)(3))

In response to the landlord's complaint, a tenant may file an answer. Wis. Stat. Ann. Sections 799.20, 799.43 (West Supp. 1992); Sections 802.02

and 802.07 (West Supp. 1992). Section 802.06(2) provides that:

Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required . . .

Wis. Stat. Ann. Section 802.06(2) (West Supp. 1992); see also Wis. Rule of Civ. Proc. Section 802.06(2).

Available defenses include retaliatory eviction, which is prohibited by Wisconsin statute and case law. See Wis. Stat. Ann. Section 704.45; Bullen v. Fellner, 271 N.W. 2d 673, 676 (1978), citing Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W. 2d 297 (Wis. 1970).

There is no limitation on the right of the defendant to raise any defense to the landlord's claim for possession, regardless of whether the defense may be equitable or legal in character. See Wis. Stat. Ann. Section 802.06(2) (West Supp. 1992).

Based upon the Wisconsin statutes and case law, a tenant must have the opportunity to present any available affirmative defenses.

E. A decision on the merits
(24 C.F.R. Section 966.53(c)(4))

The procedures of the Eviction Statute are intended to lead to "the prompt resolution of the dispute on its merits and according to the substantive law." Wis. Stat. Ann. Section 799.209 (West Supp. 1992). The court's decision shall be given either orally or in writing, and shall "state . . . facts found and the conclusions of law." Wis. Stat. Ann. Section 799.215 (West Supp. 1992). A judgment is "final" for appeal when it terminates litigation on the merits, when it disposes of the entire matter in litigation, precluding further proceeding except enforcement by execution. Thomas/Van Dyken Joint Venture v. Van Dyken, 279 N.W. 2d 459, 90 Wis.2d 236 (1979).

Thus, Wisconsin law requires a decision on the merits - based upon the facts and the law. The due process provisions of the Wisconsin Constitution also require a decision on the merits. Article 1, Sections 1, 9.

V. Conclusion

Wisconsin law governing an Eviction Action in the Wisconsin Circuit Courts under Chapter 799 of the Wisconsin Statutes Annotated requires that the tenant have the opportunity for a pre-eviction hearing in court which provides the basic elements of due process as defined in 24 C.F.R. Section 966.53(c) of the HUD regulations.

By virtue of this determination by HUD under section 6(k) of the U.S. Housing Act of 1937, a PHA in Wisconsin may evict a public housing tenant pursuant to an eviction action in the Wisconsin Circuit Courts for any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the PHA or any drug-related criminal activity on or near the premises. The PHA is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.

