August 23, 2010

Via electronic mail and hand-delivery

Hans Froelicher
General Counsel
D.C. Housing Authority
1133 North Capitol St. NE
Washington, D.C. 20002

Re: Notice of Proposed Rulemaking – Title 14, DCMR, Chapter 90
Termination of participation and assistance in the Housing Choice Voucher Program (HCVP) for criminal activity
(D.C. Register, Vol. 59, No. 28, July 9, 2010)

Dear Mr. Froelicher:

Thank you for the opportunity to comment on the proposed changes to DCHA's rules for the Housing Choice Voucher Program regarding criminal activity by participants. We have reviewed the proposed rulemaking, and we have a number of suggestions for revision in both language and concept.

As a general matter, we have serious concerns about the scope of these regulations, particularly as compared to the current rules in the Administrative Plan. We acknowledge that the Administrative Plan lacks clarity in several respects, and should be rewritten and updated into regulatory form. But the proposed regulations include a number of substantive changes that we believe would be detrimental to HCVP participants – particularly those who struggle with substance abuse, for whom housing is a critical component to an effective recovery.

The following is a summary of our comments:

- The draft expands the timeframe for termination after criminal activity from one year to three. The reason for this change is not apparent and, in many cases, could contradict with current law that is rehabilitative in nature, such as expungement provisions of the criminal law.
- The draft expands the category of criminal activity warranting termination to include misdemeanors as well as felonies. This change, like the preceding one, is inconsistent with the District's approach to criminal law and rehabilitation.
- The draft would permit termination based on unreliable and potentially inaccurate information.
- The draft misses an important opportunity to craft standards for the presentation and application of mitigating circumstances in the termination context.
- The draft fails to include important provisions regarding the Fair Housing Act and the Violence Against Women Act.

Detail on each of these items follows.

1) **The regulation regarding drug-related criminal activity should be rewritten for consistency with D.C. and federal law, including the distinction between felonious and misdemeanor crimes.**

The revision removes the term "felonious" from the type of criminal activity warranting termination. Under the current draft, even misdemeanor activity constitutes grounds for termination from the program. This change makes the rule far too broad. The District of Columbia follows the common law rule that any offense that is punishable by death or imprisonment for a term exceeding one year is a felony, while all other offenses are misdemeanors.[1] See Stephens v. United States, 271 F.2d 832, 835 (1959).

Authorizing termination based on misdemeanors – for which the criminal penalty is, by definition, not severe – is far more punitive in nature than what the D.C. Council envisioned in distinguishing these two types of crimes. For example, possession of a controlled substance for personal use is a misdemeanor that has a provision for expungement under D.C. law. A policy of terminating a family based on simple possession is in direct contradiction with the Council's rehabilitative goals reflected in D.C. Code §48-904.01(e) (providing for probation and dismissal of charges for first-time drug offenders).

For these reasons, we suggest that this section limit the definition of drug-related criminal activity to felonious activity, and detail the crimes that constitute such activity – possession with intent to distribute and distribution of a controlled substance. Appendix A includes our specific suggestions for revision of the language.

2) **The regulation regarding violent criminal activity is overbroad and should be more narrowly tailored to capture only the behavior that warrants termination.**

The current regulation on violent criminal activity poses at least two legal problems. First, 9001.1(a) and (b) both encompass misdemeanor offenses, which – as discussed above – should not be a basis for termination from the voucher program.

Worse, 9001.1(b) in particular captures activity that is not only not a felony, but would not even constitute a crime of violence. The definition of *threatened use of physical force* – "any verbal or written, or physical gestures that communicate an intent to cause serious bodily injury or property damage" – includes behavior that may be offensive but is nonetheless harmless and legal, such as shouting or cursing. This definition is overbroad, overly subjective, and fails to provide adequate notice as to precisely what behavior warrants termination.

To address these difficulties, we suggest that 9001.1(a) be rewritten to reflect the D.C. statutory language on "crimes of violence," (D.C. Code § 23-1331(4)), and that 9001.1(b) incorporate the definition of Threats To Do Bodily Harm (D.C. Code § 22-407). This would have the advantage of tailoring termination to actual criminal threatening behavior and placing

[1] Misdemeanor possession (for personal use) is punishable by a maximum penalty of 180 days in jail and/or a $1000 fine.

participants on proper notice of what behavior is covered.

In addition, Section 9001.1(b) improperly covers threats of property damage as well as bodily harm. Threatening the destruction of property in itself is not a criminal offense. Therefore, it is not a valid basis for termination under this section. Instead, participants should be subject to termination for actually destroying the property of another, and only in situations by which DCHA can prove that a family member destroyed property in connection with a felonious crime of violence as defined above.

Finally, Section 9001.3, which lists the type of crime that serves as evidence of "violent criminal activity," is overinclusive and inconsistent with D.C. law. The crimes listed should correspond with those in D.C. Code § 23-1331(4), which lists offenses classified as "crimes of violence" in the District of Columbia. The statute excludes misdemeanor offenses.

Our specific suggestions for revision of this section appear in Appendix A.

3) <u>The regulations should clarify the type of evidence that may prove criminal activity.</u>

The draft revision includes several troubling items related to evidence and the procedure for termination. As a preliminary matter, the draft should clarify – for the benefit of both hearing officers and all hearing participants – that in all cases, HCVP bears the burden of establishing a family obligation violation by a preponderance of the evidence. To the extent that DCHA finds it necessary to define that term, the rule should incorporate the widely accepted definition of "preponderance of the evidence" that appears in the standardized Civil jury instructions.[2]

[2] That definition would read as follows:

> The DCHA has the burden of proof. This burden of proof means that the DCHA must prove every element of its claim by a preponderance of the evidence. To establish a preponderance of the evidence is to prove that it is more likely so than not so. In other words, a preponderance of the evidence means that the evidence produces the belief that the thing in question is more likely true than not true.
>
> If, after considering all of the evidence, the evidence favoring the DCHA's side of the issue is more convincing to the hearing officer, and causes the hearing officer to believe that the probability of the truth favors DCHA on that issue, then the DCHA will have succeeded in carrying its burden of proof on that issue.
>
> The term "preponderance of the evidence" does not mean that the proof must produce absolute or mathematical certainty. For example, it does not mean proof beyond a reasonable doubt as is required in criminal cases.
>
> Where there is a preponderance of the evidence depends on the quality, and not the quantity, of evidence. In other words, merely having a greater number of witnesses or documents bearing on a certain version of the facts does not necessarily constitute a preponderance of the evidence.
>
> If you believe that the evidence is evenly balance, on an issue the DCHA had to prove, then the DCHA has not carried the burden of proof and the hearing officer's finding on that issue must be for the participant.

<u>See</u> Standardized Civil Jury Inst. for the District of Columbia § 2.08.

Regarding Sections 9000.4 and 9001.3, we have concerns about the types of evidence that would be admissible – to say nothing of "sufficient" to prove criminal activity:

- Both of these provisions list evidence that would be "sufficient to show [that] a family member has violated their family obligations." This formulation is too broad, misstates the burdens of proof, and is inconsistent with due process. Under this language, termination would have to be upheld in every case if DCHA produced one of the listed pieces of evidence – regardless of the information presented by the participant or the hearing officer's determination of credibility. For example, in any case where DCHA submits a "police report listing drug related criminal activity," the hearing officer would have to sustain the termination – even if the participant was later acquitted of the crime, had the arrest report expunged, and persuades the hearing officer that he or she did not do the act in question. This is nonsensical.

  To address this problem, we suggest that this provision be rewritten as follows: "Evidence that may be relevant to show that a family member has violated their family obligation includes . . ." This language would preserve DCHA's ability to introduce evidence it considers persuasive, but would preserve the hearing officer's ultimate and HUD-required role as arbiter of credibility and finder of fact.

- We also suggest deleting the provision referencing "credible evidence provided by persons qualified to make such determinations." This phrase is so vague as to be meaningless. It also leaves far too much open to interpretation: "Qualified" how, and by whom? To make what "determinations"? "Credible" as determined by whom – the hearing officer, or HCVP personnel?

- The last provision, permitting admission as evidence of a "search warrant for the property listing drugs, illegal weapons, illegal ammunition, or drug paraphernalia," should be struck entirely. A search warrant, which is issued prior to a search and lists items that police *believe* to be concealed inside a unit, is not evidence of anything. The search warrant return, which is completed following the search, lists the items that were actually recovered during the search. If anything, it is the return and not the warrant itself that reflects the presence of illegal items in the rental unit.

  For the reasons discussed below, we would object on hearsay grounds to a categorical admission of the warrant return. But if HCVP is inclined to include something of this nature, it must be limited to the actual return, and not the search warrant.

- We also have concerns about the scope of hearsay evidence that the regulations would allow. While we acknowledge that hearsay evidence is permitted in administrative proceedings regardless of the formal rules of evidence, its admissibility is not unlimited. The evidence still must be essentially reliable. See Basco v. Machin, 514 F.3d 1174, 1181-1184 (11th Cir. 2008). The current draft

would admit all manner of hearsay evidence, regardless of its source or its unreliable nature.

To address these deficiencies, we would rewrite these regulations in the manner suggested in Appendix A.

Finally, to be consistent with D.C. law, these rules should also exclude from admissibility any evidence regarding Family Court proceedings, including juvenile or abuse and neglect proceedings. See D.C. Code §§ 16-2331-2333 (prohibiting the disclosure of juvenile records to anyone not authorized by statute to receive such records); In re TIB, 762 A.2d 20 (D.C. 2000). These confidentiality statutes were created to foster rehabilitation in juvenile and neglect proceedings rather than to be punitive in nature; it follows that using records from those proceedings to terminate an HCVP family would be a misuse of that confidential information.

4) The regulations should include a process for considering mitigating circumstances in each case.

We are extremely disappointed that HCVP has undertaken this revision of its criminal activity regulations without implementing any rules regarding mitigating circumstances. For many HCVP participants, criminal activity – particularly drug-related activity – is often a manifestation of other underlying problems, such as addiction, mental illness, or family strife. To enact rules regarding criminal behavior that fail to recognize this fact, or to account for it in a consistent and humane fashion, is irresponsible. As discussed below, it is also inconsistent with both federal law and DCHA's own approach to the admissions process. We suggest that consideration of mitigating circumstances be a routine and required part of the termination process.

The federal regulations governing termination from the HCVP explicitly authorize the agency to consider all circumstances, even in cases of drug-related criminal activity, when deciding whether to terminate a voucher holder from the program. Relevant circumstances include, but are not limited to, "the seriousness of the case, the extent of participation or culpability of individual family members, mitigating family circumstances related to the disability of a family member, and the effects of denial or termination on other family members who were not involved in the action or failure." 24 C.F.R. § 982.552(c)(2). And, specifically with regard to drug-related criminal activity, the federal regulations permit HCVP to consider whether the culpable household member "is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been rehabilitated successfully." Id.

Although the current draft of the Plan makes reference to considering such factors, it provides no way for participants to present evidence of this nature. Nor does the chapter – or anything else in HCVP's standard practices – provide a process by which the agency can consider such evidence before deciding to terminate.

The lack of any such step in the termination process is in contrast with the agency's procedure for admissions decisions, which incorporates a way for every applicant to present

mitigating circumstances and for the agency to exercise its discretion before issuing a final denial. See generally 14 D.C.M.R. § 6107. For example, when Client Placement makes an initial determination of ineligibility, it mails a notice to the applicant with information about the right to an informal conference; the right to present additional information at the conference that might alter the agency's decision; and the type of information that might be relevant. Id. § 6107.3. The admissions rules also detail the sort of mitigating information that an applicant might present at the informal conference, such as "evidence of favorable changes in the applicant's pattern of behavior"; "evidence of successful rehabilitation"; "evidence of the applicant's participation in or willingness to participate in relevant social service activities or other appropriate counseling services"; and "indications of continuing support intended to assist the applicant in modifying the disqualifying behaviors." Id. § 6109.6. For applicants with a history of disqualifying criminal activity, the agency

> shall make an assessment of the applicant's (or the relevant member of the applicant's family) behavior to determine whether he/she currently demonstrates that he/she has been rehabilitated. Factors that DCHA may consider include, but are not limited to, the following: acknowledgment of culpability; adequate and suitable employment or participation in a generally recognized training program; substance abuse treatment, if necessary; successful completion of therapy directed at correcting the behavior that lead to the criminal activity; and existence of a support network or support systems.

Id. § 6109.7(c).

Finally, in crafting admissions rules for participants in the Local Rent Supplement Program, DCHA has provided an even more expansive opportunity to demonstrate eligibility for the program. For sponsor-based housing, DCHA will only consider felony convictions in reviewing criminal history. Applicants with felony convictions who cannot show the relevant mitigating factors will not be barred from admission if the applicant is willing to participate in supportive services provided by the sponsor and tailored towards preventing such behavior from reoccurring. *See* 14 D.C.M.R. § 9508.4.

In our view, both the agency and its consumers would benefit from applying the same considered, humane approach to the termination process. We acknowledge that there will always be cases in which termination is warranted; in a great many other situations, however, the only effect of terminating the voucher is to render an already struggling family homeless. In many of those cases, preservation of the voucher would make the difference in keeping the family on a path toward stability and security.[3]

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[3] Numerous studies have shown that unstable housing is the greatest predictor that an individual will reoffend. *See* National Alliance to End Homelessness presentation, http://www.endhomelessness.org/content/general/detail/2125, http://www.endhomelessness.org/content/article/detail/2033. For instance, in Georgia, "the likelihood of re-arrest increased by 25% each time a parolee moved" (Meredith, Speir, Johnson, & Hull, 2003); released prisoners living in shelters in New York "were more likely to use drugs and alcohol, to be unemployed, and to abscond from probation or parole" (Nelson, Deess, & Allen, 1999); and "[a]n unstable living arrangement was the strongest predictor of parole absconding in a sample of over 4,000 parolees in California" (Williams, McShane, & Dolny, 2000). *Id.*

Furthermore, it makes little sense for DCHA to apply such different rules to the admissions and termination processes. This is particularly so given that – in light of the District's severe shortage of affordable housing – families terminated from the voucher program will only end up back on the waiting list, usually with a homeless preference, and within a few years will be facing admission to the program once again.

We suggest that the agency adopt regulations for the termination process that mirror those included in Chapter 61. Such regulations would give participants facing termination the opportunity – before a termination notice is issued and the case sent to an informal hearing – to present mitigating information to the agency. The agency would then weigh that information in deciding whether the drastic remedy of termination is appropriate.

We also suggest that the agency create a category of cases in which participants will automatically be diverted to a remedy short of termination from the program. For instance, in cases in which Pretrial Services has made a decision to divert the client from jail and into Drug Court or Mental Health Court, a third party has already determined that both the offense is relatively minor and that the defendant has either an addiction or a mental health disorder. The specialty court then develops and monitors compliance with a diversion plan with supportive services tailored to the individual's needs and aimed at reducing recidivism. If the individual complies with the plan, his criminal case is dismissed. DCHA should not use these cases to refuse admission to applicant, nor should these cases form the basis for a voucher termination. Instead, in the termination context, we suggest that DCHA stay the termination proceeding until the court process is complete, and withdraw the proposed termination if the person complies with the plan of the specialty court.

5) <u>The regulations should include a section on reasonable accommodation for persons with disabilities.</u>

We strongly suggest that these regulations make reference to a participant's right to reasonable accommodation in the termination process. While DCHA does have separate regulations governing reasonable accommodation, we believe cross-referencing those rules here, at the very least, would help both participants and DCHA staff to understand the law and appropriately accommodate persons with disabilities.

The regulations should also make clear that DCHA has an affirmative obligation to assist persons with disabilities in the termination process. DCHA's obligation to reasonably accommodate tenants is not solely spurred by a tenant request for reasonable accommodation. "[D]iscrimination can be found even in a landlord's failure to offer a tenant assistance, not merely in affirmative acts of rejection." <u>Douglas v. Kriegsfeld Corp.</u>, 849 A.2d 951, 957 (D.C. 2004).

Additionally, to ensure that applicants and participants are aware of and can fully exercise their rights, each notice of denial or termination should include notification of the right to request a reasonable accommodation and an explanation for the process for doing so. The agency should also assess reasonable accommodation requests in the context of considering

mitigating measures, and through the same process of notification, as there may be some overlap in mitigation and accommodation factors.

Finally, the regulations should include examples of reasonable accommodations are likely to be granted in this context. Including this material would not only help inform participants of their rights, but would facilitate recognition by HCVP staff of reasonable accommodation requests and help avoid unnecessary denials. Examples could include the following:

- A person with an addiction disorder who is denied eligibility based on a conviction for illegal drug possession should be deemed eligible as long as he can show that the conviction was related to his addiction and that he is not currently using;
- A participant who receives a termination notice for the criminal acts of her live-in aide should not be terminated if she is able to show that she could not control the live-in aide due to a disability and that the live-in aide has been fired;
- A participant who receives a termination notice for failing to cooperate with the inspection process should not be terminated if she is able to show that she was hospitalized during the scheduled inspections or otherwise unable to let the inspector into the apartment due to disability;
- A participant who receives a termination notice for lack of cooperation with housing quality standards should not be terminated if she is able to show she has clinical hoarding disorder and is willing to cooperate with treatment.

6) <u>The regulations should include provisions required by the Violence Against Women Act.</u>

DCHA's draft regulations include two sentences concerning domestic violence. Both of these sentences are problematic for the reasons outlined below.

Among other things, the Violence Against Women Act (VAWA) provides that:

> Criminal activity directly relating to domestic violence, dating violence, or stalking shall not be considered cause for termination of assistance for any participant or immediate member of a participant's family who is a victim of the domestic violence, dating violence, or stalking. [42 U.S.C. § 1437f(o)(20)(C).]

The first sentence of Section 9003 mirrors the above statute, with one exception. DCHA's draft regulations purport to restrict VAWA's protections by requiring that, in order to qualify for the VAWA exception, the criminal activity at issue must be perpetrated by someone who is a member of the household or any guest or person under the control of a household member. VAWA does not include this requirement, and DCHA's regulations cannot be inconsistent with the federal law. Thus, we suggest that DCHA remove the clause requiring that the criminal activity at issue be perpetrated by someone who is a member of the household or any guest or person under the control of a household member.

The second sentence of Section 9003 is also problematic. The second sentence provides that "If the perpetrator of the domestic violence, dating violence or stalking is a member of the household composition they shall be removed there from." Nothing in VAWA *requires* that a perpetrator of domestic violence, dating violence or stalking be removed from the household composition. Moreover, this provision may be problematic in circumstances where there are cross-certifications of domestic violence, dating violence or stalking. For example, there may be cases in which two parties in a relationship both assert that they are the victims of domestic violence, dating violence or stalking. Unfortunately, it is not uncommon for a perpetrator of domestic violence to retaliate against the victim by filing a cross-petition for a civil protection order with the Court.

Requiring the Housing Authority to remove the perpetrator, when two parties are each alleging that the other party is the perpetrator, may place the Housing Authority in a position of having to remove both individuals from the household composition – even though one individual is clearly the victim. This is neither prudent nor fair.

In place of the language DCHA has proposed in the second sentence of Section 9003, we suggest that that DCHA incorporate VAWA's bifurcation of rental assistance provision. This section provides that:

> The Housing Authority may terminate assistance to a household member who engages in criminal acts of physical violence against family members or others, without terminating assistance to, or otherwise penalizing, the victim of such violence who is also a household member. [42 U.S.C. §§ 1437f(o)(7)(D)(ii) and (o)(20)(D)(i).]

Thus, VAWA provides that the Housing Authority *may* terminate assistance for a perpetrator of criminal acts of physical violence against family members or others, but it does not *require* that the Housing Authority do so. This gives DCHA the flexibility to make fair decisions, particularly, when cross certifications have been submitted.

In addition, consistent with VAWA's requirements and with the approach in the public housing program, the regulations should include a provision indicating that if there is alleged criminal activity, fraud or any other cause for termination from the Section 8 program, the Housing Authority shall consider whether domestic violence, dating violence, or stalking played a role in such activity prior to deciding whether to terminate the family from the program.

Finally, the regulations should include a provision requiring that all termination notices notify participants of VAWA's protections and notify participants that they may seek an informal hearing if they believe that the termination is based on acts of domestic violence, dating violence, or stalking committed against the participant or immediate member of a participant's family who is a victim of the domestic violence, dating violence, or stalking.

* * *

We thank you again for the opportunity to provide comments on these rules, and we look forward to discussing them further with you. If you have any questions, please do not hesitate to contact Julie Becker of the Legal Aid Society, or any of the other signatories listed below.

Sincerely,

Julie Becker
Rosanne Avilés
Shirley Horng
Legal Aid Society of D.C.

Amber Harding
Andy Silver
Washington Legal Clinic for the Homeless

Gwendolyn Washington
D.C. Public Defender Service

Jennifer Berger
AARP Legal Counsel for the Elderly

Vytas Vergeer
Rebecca Lindhurst
Bread for the City Legal Clinic

cc: Karen Moone
Members of the DCHA Board of Commissioners

Attachment A

Suggested provisions describing the type of criminal activity warranting termination

Section 9000.2(a)

Drug related criminal activity means any felony violation of D.C. Official Code §48-904.01 which includes offenses with the following elements:

1) Possession with Intent to Distribute

The essential elements of possession of a controlled substance with intent to distribute are:

1. that a household member possessed a controlled substance;
2. that said household member did so knowingly and intentionally. This means consciously, voluntarily and on purpose, not mistakenly, accidentally or inadvertently;
3. that when said household member possessed the controlled substance s/he had the specific intent to distribute it. Distribute means to transfer or attempt to transfer to another person.

2) Distribution of a Controlled Substance

The essential elements of distribution of a controlled substance are:

1. that a household member distributed a controlled substance. Distribute means to transfer or attempt to transfer to another person;
2. that said household member distributed the controlled substance knowingly and intentionally. This means consciously, voluntarily and on purpose, not mistakenly, accidentally or inadvertently;
3. that when said household member distributed the controlled substance, s/he was at least 18 years of age and not a minor;
4. that said household member need not have received money or something of value in exchange for the distribution of the controlled substance."

Section 9001.1

Definitions:

The term "violent criminal activity" means--

(a) An offense that has as an element the use, attempted use, or threatened use of physical force against the person, or
(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person may be used in the course of committing the offense.

Section 9001.3(a)

Conviction or arrest for any of the following criminal offenses, set forth in D.C. Code § 23-1331(4):

a. Aggravated assault;
b. Act of terrorism;
c. Arson;
d. Assault on a police officer (felony);
e. Assault with a dangerous weapon;
f. Assault with intent to kill,
g. Assault with intent to commit first degree sexual abuse,
h. Assault with intent to commit second degree sexual abuse, or
i. Assault with intent to commit child sexual abuse;
j. Assault with intent to commit any other offense;
k. Burglary;
l. Carjacking;
m. Armed Carjacking;
n. Child Sexual Abuse;
o. Cruelty to Children in the First Degree;
p. Extortion or Blackmail accompanied by threats of violence;
q. Gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation;
r. Kidnapping;
s. Malicious Disfigurement;
t. Manslaughter;
u. Manufacture or Possession of a weapon of mass destruction;
v. Mayhem;
w. Murder;
x. Robbery;
y. Sexual Abuse in the First, Second, or Third Degrees;
z. Use, Dissemination, or Detonation of a weapon of mass destruction; or an attempt or conspiracy to commit any of the foregoing offenses.

Sections 9000.5 and 9001.3 (Evidence)

Evidence of [drug related activity / violent criminal activity] that may be relevant to demonstrating that a participant has violated his or her family obligations includes:

(a) [see above]
(b) Any testimony from law enforcement and/or DCHA Compliance Investigators who have personal knowledge and/or were involved in the investigation of the alleged criminal activity;
(c) any reports involving relevant hearsay evidence regarding the alleged criminal activity by household members or at the household's premises, provided that the evidence meets the following criteria:

a. the out-of-court declarant was not biased and had no interest in the outcome of the case;
b. the participant could have obtained the information contained in the hearsay before the hearing;
c. the information contained was not inconsistent on its face;
d. the information has been recognized by courts as inherently reliable.

(d) [omit]
(e) [omit]