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THE COUNSELLOR

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Calendar of Events:

HDLI's 2006 Spring CLE Conference
May 4-5, 2006
Washington Marriott
Washington, D.C.

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CHARITABLE CONTRIBUTIONS TO PUBLIC HOUSING AUTHORITIES

By Steven J. Riekes, Esq.
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On occasion, a public housing authority may receive an inquiry from a potential donor wanting to know if a charitable donation can be made to the authority. The inquisitive donor, who most likely wishes to take a charitable deduction from his or her taxes, or a private foundation concerned about the status of its potential beneficiaries, may inquire as to the authority's status as a "501(c)(3)" organization. This reference is made to Section 501 of the Internal Revenue Code exempting "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . ." The usual charitable donee, such as a church, school, museum, or the like, is classified under this section of the Code. Charitable donors are accustomed to this form of procedure, and if they want proof of the status of the donee, they usually ask for a copy of the donee's letter from the I.R.S. showing that the donee is so classified.

However, a public housing authority is not a "501(c)(3)" organization. Many people assume that they are, but, in fact, they are not. That does not mean, however, that the donor may not be able to take a charitable deduction in making a gift to a housing authority. But, to achieve that result, a somewhat different legal course must be followed. The purpose of this paper is to explain how that might be accomplished.

> Section 170 of the Internal Revenue Code provides:
>
> 170(a) Allowance of deduc tion. --
>
> (1) General rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. . .

In the definition section referred to above, appears the following:

> A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.

§ 170(c)(1).

The first issue is whether a public housing authority can qualify as a "political subdivision." This issue involves both federal law and state law. With few exceptions, public housing authorities are products of state law. For purposes of this discussion, however, instead of examining the public housing authority statutes of all 50 states, I will refer to Nebraska law. I do so for a number of reasons. First, Nebraska public housing authority law was rewritten in light of the Model Housing

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President's Message

A NEW YEAR OF OPPORTUNITIES!

Dear Members:

Going into the second year of my term as HDLI President, 2006 promises to be a very challenging and equally rewarding year for our organization. We have a major marketing effort underway, and we are trying more earnestly than ever to spread the good news about HDLI's unsurpassed networking, educational, and advocacy services. No where else can the housing bar receive high level training and exposure to the myriad of legal issues that we face on a daily basis. In reaching out to new members, we not only want to focus on our traditional market of housing agencies and their lawyers, but we want to recruit other stakeholders in the industry who can both add another dimension to the discussions at our conferences and also benefit by our unique services. These prospects would include landlords, managers, developers, financial institutions, and even individuals, working in the public and affordable housing industry. I hope that we can count on your help in promoting the value of membership in HDLI to all of your colleagues, affiliates, contractors, financiers, and lawyers who do business for your agency. If you know of any prospects in these areas, please take a minute to send our staff an e-mail or note with their contact information. Your active assistance will make all the difference in ensuring that we can continue to provide a high level of service for the housing bar.

I am so excited about HDLI's newest member service: the *General Counsel Forum*. Like HDLI's other conferences and trainings, we are looking for ways to provide additional forums for thoughtful discussion and strategy, and the General Counsel Forum held January in Tampa was just that for PHA in-house general counsel and outside lawyers functioning in that capacity. We were honored to have current and former HUD General Counsel Keith Gottfried and Nelson Diaz participate and give key note addresses at the Forum luncheon. HDLI is working now to formulate a position paper to submit to HUD suggesting ways that HUD can provide better guidance and workable regulations on issues such as the Bond Amendment and eminent domain, the Violence Against Women Act, procurement of legal counsel, and ways in which HUD can be more transparent to *US* - the housing bar. In the third quarter of this year, we plan to convene *another General Counsel Forum* to follow-up on the topics addressed in January and to discuss and strategize on other pressing issues that surface during the year. So, whether or not you were able to make the January Forum, please plan to participate later this year. We would like to receive your input. We also urge you to alert colleagues in private corporate organizations of the benefits of membership as we expand member categories. We trust you will join the directors of the Board in communicating this opportunity. We believe the housing industry will be enriched by the association.

I am really looking forward to seeing you May 4-5, 2006 in Washington for HDLI's annual Spring Conference entitled "*Navigating The New World of Affordable and Public Housing: Legal Strategies for Conquering New Financing, Management, and Operational Rules."* In her *Executive Director's Letter*, Lisa Walker Scott lays out the many important panel discussions that we are putting together surrounding this theme. With the timeliness of the issues and the incorporation of the panel of HUD officials, this will be one of our best conferences yet!

Many of the membership enjoy a collegial and personal camaraderie with fellow HDLI members, thus the members of HDLI welcome your participation and ideas to bring you continued excellent programming and member services. If there is anything that the board or staff of HDLI can do to assist you, please do not hesitate to call upon us.

Lisa Walker Scott, Esq.

A Letter from the Executive Director and General Counsel

HDLI's SPRING CONFERENCE is MAY 4 AND 5, 2006! This year's Spring Conference will be on of our best ones yet! Entitled "*NAVIGATING THE NEW WORLD OF AFFORDABLE AND PUBLIC HOUSING: Legal Strategies for Conquering New Financing, Management, and Operational Rules,*" the conference will be held May 4 and 5, 2006 at our usual locale, the Washington, D.C. Marriott. *Believe me, you really won't want to miss this conference.* Given the depth of information that we learned from HUD's new General Counsel, Keith Gottfried, at our General Counsel Forum in January, we wanted our broader membership to benefit from his vision and learn of the latest initiatives of his office. *Mr. Gottfried has graciously agreed to be our keynote luncheon speaker*. We have even better news! Mr. Gottfried is bringing along key members of his staff and other HUD officials to participate on a *"Who's Who at HUD"* panel to kick off the conference. Come hear from the key officials in HUD's PIH, Section 8, FHEO, IG and General Counsel's offices that you always wanted to meet.

We have a host of important and timely legal topics to address this year, including:

* *WHO'S WHO AT HUD?* Hear From Key Officials in PIH, Section 8, IG, and the General Counsel's Office.

* *New Public Housing Operating Subsidy Rules and Asset Based Management* – central v. front-line expenses, the transformability of FHA models, property grouping, "excess cash" and reserves, stop gaps, best practices, hopes and challenges, and more.

* *HUD's Proposed Extension of the Property Management Fee Structure to the Section 8 and Capital Fund Programs* - property management fees, front-line fees, strengths and weaknesses.

* *The Effect of the "Violence Against Women and Department of Justice Reauthorization Act of 2005" on Public Housing Evictions and Other Operations*;

* *Project-Based Vouchering* – Getting the Most Out of HUD's Final Rule.

* *Emergency and Disaster Response: It's Not Just For The Gulf States*– Getting Prepared and Legal Implications of Being Caught Off Guard.

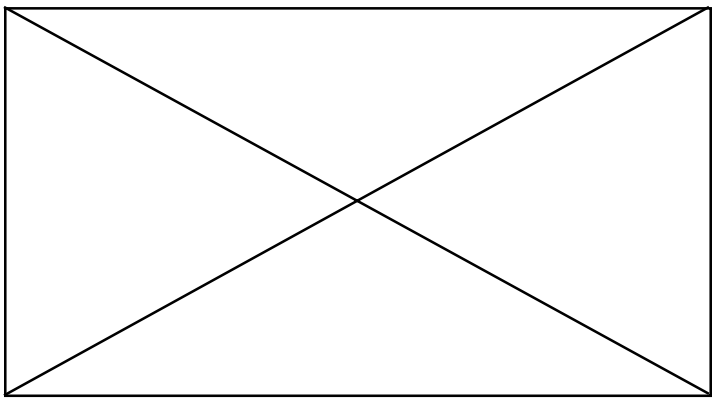
* *Hot Legal Ethics Issues in 2006*.

GENERAL COUNSEL FORUM UPDATE! As HDLI President Mattye Jones described in her message, HDLI offered a new service in 2006: the General Counsel Forum. Please plan to join us the third quarter of this year as we convene *another General Counsel Forum* to follow-up on the topics addressed in January and to discuss and strategize on other pressing issues that surface during the year. We will provide more details later this year.

IN THIS ISSUE: I would like to highlight that the featured article in this issue was written by long-time HDLI board member, Steven Riekes of Marks Clare & Richards, L.L.C. in Omaha, Nebraska. Many of you have interacted with Steve over the years at our conferences, during the drafting of HDLI/NAHRO's Model Public Housing Agency statute, and other activities. Steve and I were tackling the issue of charitable contributions to PHAs and tax-exemption issues, when we decided that all of you would benefit by better understanding the issue. Steve agreed to write an excellent article for this issue of the *Counsellor*. Be sure to read Steve's careful analysis so that you will be able to thoughtfully respond to your client's questions about charitable contributions. If you have a good idea for a feature article, already have written one, or are willing to write one on an interesting issue that you encountered, please contact me.

Finally, this issue describes a host of new PIH and other HUD notices, NOFAs, and Rules that were published over the past several weeks. Be sure to check them out.

Continue to Soar!



From Left to Right: Nelson Diaz, Mattye Gouldsby Jones, Lisa Walker Scott, and Keith Gottfried at HDLI's General Counsel Forum in Tampa, FL on January 20, 2006

CHARITABLE CONTRIBUTIONS TO PUBLIC HOUSING AUTHORITIES *Continued*

Agency Act prepared by the Housing and Development Law Institute and commissioned by NAHRO in 1997. Second, on this subject, Nebraska law is very typical of most state public housing legislation.

Pursuant to the Nebraska Housing Agency Act, §§ 71-1572 to 71-15,168, a public housing agency is defined as a political subdivision of the State. Neb. Rev. Stat. § 71-1575(16) provides in part: " . . . A local housing agency shall be a political subdivision of this state. . . ."

However, that does not completely answer the question. A housing authority must also be a "political subdivision" according to federal law dealing with taxation. In this regard, it is stated:

> A state includes an Indian tribal government and any of its subdivisions IRS recognizes as performing substantial government functions. A political subdivision must possess 'recognized sovereign power,' e.g., the power to tax.

Am.Jur.2d, Federal Taxation, ¶ 18960 at p. 242.

In other words, the phrase or term "political subdivision" has a special meaning for issues involving federal revenue that may not precisely correspond with the general understanding of that term as it may be used in state law. In the Internal Revenue Code, the term "political subdivision" is not defined. There is a Treasury regulation, § 1.103-1(b), dealing with whether interest on bonds issued by a state, territory, "or any political subdivision thereof" is exempt from taxation. That regulation gives a little more definition to the term. The regulation provides, in part:

> The term 'political subdivision,' for purposes of this section denotes any division of any State or local governmental unit which is a municipal corporation or which has been delegated the right to exercise part of a sovereign power of the unit. As thus defined, a political subdivision of any State or local governmental unit may or may not, for purposes of this section, include special assessment districts so created, such as road, water, sewer, gas, light, reclamation, drainage, irrigation, levee, school, harbor, port improvement, and similar districts and divisions of any such unit.

To understand what is meant by the phrase "which has been delegated the right to exercise part of a sovereign power of the unit", one must resort to case law and the analysis by the courts. In Texas Learning Technology Group v. Commissioner of Internal Revenue, 958 F.2d 122 (5th Cir. 1992), the following was stated:

> The term 'political subdivision' is not defined in § 170 or in the Treasury Regulations accompanying § 170. Treasury Regulation 1.103-1(b), however, provides that any division of the government that is a municipal corporation or has been delegated the right to exercise part of the sovereign power of the government, is a political subdivision. 26 C.F.R. § 1.103-1(b). Case law both before and after the promulgation of Regulation 1.103-1(b) has required an entity to be authorized to exercise some sovereign powers in order to be considered a political subdivision. The power to tax, the power of eminent domain, and the police power are the generally acknowledged sovereign powers. 1 MERTENS, LAW OF FEDERAL INCOME TAXATION, § 8.09 at 27. As discussed below, all of the cases addressing the meaning of the term 'political subdivision' under the Internal Revenue Code have required the entity to possess at least one of the three generally recognized sovereign powers in order to be classified as a 'political subdivision.'

Supra, at p. 124.

The Fifth Circuit Court went on to state that it was not necessary that the political subdivision exercise all of the governmental powers of the state: "'[I]t is sufficient if it be authorized to exercise a portion of them.'" Supra, at p. 125.

The Court discussed the case of Commissioner of Internal Revenue v. Shamberg's Estate, 144 F.2d 998 (2d Cir. 1944), cert. denied 323 U.S. 792 (1945). In that case, the New York Port Authority exercised several sovereign powers, namely, the power to subpoena, the power to enforce orders against persons within its jurisdiction, and the power to maintain a uniform police force. It also had the power of eminent domain. On the other hand, it did not have the power to tax. The Second Circuit Court held that the New York Port Authority was a political subdivision for Internal Revenue purposes.

Like the New York Port Authority, Nebraska housing authorities do not have the power to tax. (Indeed, very few public housing authorities in the entire country have the power to tax.) However, they usually do possess other significant powers delegated by the sovereign. Neb. Rev. Stat. § 71-15,113(12) gives a local housing agency's board of commissioners the power ". . . to subpoena and compel the attendance of

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CHARITABLE CONTRIBUTIONS TO PUBLIC HOUSING AUTHORITIES *Continued*

witnesses and the production of documents, books, records, papers, electronic and other data, and things . . . ."

Further, the same statute, § 71-15,113(39), provides that the housing agency has the power "To acquire real property through the exercise of the power of eminent domain in accordance with Chapter 76, article 7. . . ."

The Sixth Circuit, in State of Michigan v. United States, 40 F.3d 817 (Sixth Circuit 1994), put a similar gloss on this subject with emphasis, however, upon whether the activities of a political subdivision are for a public purpose. Also referring to the Shamberg opinion written by Judge Augustus Hand, the majority of the Sixth Circuit Court stated:

> The pertinent treasury department regulations, as quoted in Shamberg, . . . said that "[t]he term 'political subdivision' . . . denotes any division of the State or territory which is a municipal corporation, or to which has been delegated the right to exercise part of the sovereign powers of the State or Territory." The Port of New York Authority—"a body politic and corporate" through which the states of New York and New Jersey built and operated the George Washington Bridge, the Holland and Lincoln Tunnels, and other projects "operated in the interest of the public without profit to private persons," *id.* at 1000--was held to fit this definition notwithstanding that the authority lacked the power to impose taxes, had no power to pledge the credit of either state, and was not subject to the debt limiting provisions of the state constitution.
>
> Judge Hand found support for this holding in the test laid down in an opinion given by Attorney General McReynolds soon after § 103 was first adopted:
>
> > The term 'political subdivision' is broad and comprehensive and denotes any division of the State made by the proper authorities thereof, acting within their constitutional powers, for the purpose of carrying out a portion of those functions of the State which by long usage and inherent necessities of government have always been regarded as public. 30 Op.Atty.Gen. 252 (1914), as quoted at 144 F.2d at 1004.

"[T]he real criterion adopted by the Attorney General," Judge Hand observed, "seems to have been whether the activities of the subdivision were for a public purpose." Shamberg, 144 F.2d at 1004; State of Michigan, supra, 40 F.3d at 824.

In a Private Letter Ruling dated December 22, 1989, IRS PLR 8951057, 189 WL 597333, one of the issues was whether a charitable contribution could be made to "X Development Corp", a wholly owned subsidiary of the "State Development Corp", and which was specially created through the enactment of that state's Development Act. No private interests were involved. X Development Corp was to formulate a program to assist a particular city within the state. Among other things, "X Development Corp has completed 17 low- and moderate-income and elderly residential projects containing 3,904 dwelling units." The ruling concluded:

> Based on the information submitted, we conclude that X Development Corp is an instrumentality of a state. We also conclude that X Development Corp is serving an exclusively public purpose by exercising the essential governmental function of providing low-income housing and community development for Y Community. Therefore, contributions and gifts to X Development Corp are deductible under section 170(c)(1) of the Code.

Public housing authorities are recognized as being involved in serving a public purpose. This was determined by the Nebraska Supreme Court in Lennox v. Housing Authority of City of Omaha, 290 N.W. 451 (1940). This opinion upheld the constitutionality of the original Nebraska public housing authority laws. The Court stated:

> It is obvious that the legislation was passed in the exercise of the police power of the state to protect the health, safety, morals and general welfare of its people. We think that these objectives subserve a public purpose and as such are proper subjects for legislative action. Many states have enacted similar laws and we are impressed with the unanimity with which they have been upheld as being for a public purpose.

Supra, 290 N.W. at 457.

Likewise, it is said: "It is uniformly held that slum clearance and the construction of low-rent housing projects and urban renewal or redevelopment are for public and governmental purposes . . . ." 40A Am.Jur.2d Housing Laws, Etc. § 3 at pp. 629-30.

Thus, a public housing authority, based on the foregoing, should be regarded as a "political subdivision" for purposes of the deductibility of a charitable contribution as set forth in § 170 of the Internal Revenue

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CHARITABLE CONTRIBUTIONS TO PUBLIC HOUSING AUTHORITIES *Continued*

Code.

There have been some Private Letter Rulings which assume that public housing authorities are political subdivisions. For example, PLR 9320043, 1993 WL 168907, of May 21, 1993, discusses an employee retirement plan for "E", an unincorporated association formed by agreement by public housing authorities in states W, X, Y, and Z. Apparently, the function of the association was some kind of insurance pool. The ruling concludes "that E is an instrumentality of the political subdivisions of States W, X, Y, and Z."

Another Private Letter Ruling, PLR 200112028, 2001 WL 283693, dealt with a nonprofit corporation which was formed by a particular housing authority under the corporation laws of a particular state. The corporation was to assist the authority in providing public housing. It did not apply for 501(c)(3) status, although its articles permitted it to do so. The housing authority had complete control over the nonprofit corporation. According to this Private Letter Ruling, its conclusions were as follows:

> (1) Corporation is an integral part of Authority (a political subdivision of the State) and not subject to federal income taxation.
>
> (2) As a state or local governmental unit, Corporation is not required to file federal income tax returns.

Nevertheless, despite this seemingly obvious conclusion, there has been no definitive ruling on this subject, as far as I have been able to determine.

There are some items which should be distinguished or discussed. There is a Technical Advice Memorandum 9036004, 1990 WL 700298, issued September 7, 1990. This deals with a corporation created under the nonprofit corporation act of a particular state for the purpose of providing tax exempt financing for a specific public housing project. The non-profit corporation was completely controlled by the housing authority and had the approval of HUD. After payment of the indebtedness of this particular project, all of its assets would vest in the housing authority. Nevertheless, the memorandum concluded that this corporation was not eligible for a charitable deduction which would qualify for the 50% limitation under § 170(b)(1)(A) of the Code, and would include a deduction to a political subdivision under § 170(c)(1). The rationale for this conclusion was that the entity was not a municipal corporation and had not been delegated the right to exercise any sovereign power, namely, the power of eminent domain, the power to tax, or the police power. Therefore, the memorandum concluded that "the Corporation is not a political subdivision of the state in which it operates."

Thus, this Technical Advice Memorandum should be distinguishable from a situation where the taxpayer wishes to make a contribution directly to the housing authority and not to any affiliate of a housing authority. As stated above, housing authorities in Nebraska do exercise sovereign governmental powers delegated to them by the State.

This Technical Advice Memorandum seems to be at odds with the Private Letter Ruling 200112028, 2001 WL 283693. However, I have been told on more than one occasion that this is a messy and arcane area of the law. The Private Letter Ruling deals with the question of exemption from taxation and the filing of a tax return, whereas, the Technical Advice Memorandum deals with the limitations on deductions that may be taken for a charitable contribution to an entity that was determined to be a 501(c)(3) corporation and not a political subdivision.

Next, there is a Revenue Ruling, 74-14, 1974 WL 34623, holding that a public housing authority does not qualify for exemption under section 501 (c) (3) of the Code. That, however, is not the issue here.

Finally, there is a General Counsel Memorandum, 38921, 1982 WL 204158, which also discusses Rev. Rul. 74-14 and concludes that the housing authority in question also does not qualify for 501 (c) (3) purposes, even though its subpoena and investigatory powers differed in some detail from the ones discussed in the previous Revenue Ruling. It should be noted that in the course of this opinion, the writer states:

> It is our opinion that Housing Authority is not a political subdivision within the meaning of section 1.103-1(b) and is therefore not per se precluded from exemption as an organization described in section 501 (c) (3).

And, the footnote attached to that comment, states:

> FN3. We conclude that Housing Authority is not a political subdivision within the meaning of section 1.103-1(b) despite significant precedent treating housing authorities as political subdivisions under its state's law. See, e.g., *** The fact that a housing authority is treated as a political subdivision of the state under state law is not dispositive of the issue whether it is a political subdivision within the meaning of

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CHARITABLE CONTRIBUTIONS TO PUBLIC HOUSING AUTHORITIES *Continued*

> section 1.103-1(c). Cf. Ohio County and Independent Agriculture Societies v. Commissioner, 43 T.C.M. 1126 (1982) (whether an organization is a state instrumentality is a matter of Federal law).

I believe that the foregoing is completely erroneous. There is no precedent cited or analysis associated with the writer's comment. It pops out of nowhere and without any supportive rationale or logic. Furthermore, the Memorandum concludes by holding that Housing Authority is not the counterpart of an organization described in section 501(c)(3) precisely because of its governmental powers. Also, I note that this Memorandum states: "This document is not to be relied upon or otherwise cited as precedent by taxpayers." I would concur that this Memorandum should not be relied upon because it is fundamentally flawed. In private conversations that I have had with IRS counsel, it was acknowledged that a Memorandum such as this has little value and can probably be ignored.

Thus, I conclude, that public housing authorities in Nebraska and, generally, throughout the United States, should be regarded as proper donees sufficient for charitable contribution purposes under the I.R.S. Code. (Caveat: It is conceivable that the laws of a particular state do not delegate at least one of the three principally known sovereign powers to public housing authorities, namely, the power to tax, the subpoena power, or the power of eminent domain. I don't know of any such situation, but if one does exist, then legal counsel may have a difficult time with the I.R.S. He will need to demonstrate that some other sovereign power has been delegated to the public housing authorities of that state.)

This conclusion, however, does not entirely dispose of the matter. Regarding any specific donation, particularly a donation of real estate, the facts of the particular situation have to be examined. This is because § 170(c)(1) of the I.R.S. Code requires that the gift be "made for exclusively public purposes." This means that the gift cannot be something that is going to benefit the taxpayer more than the public. Or, to put it another way, the donation cannot be something that is given on a *quid pro quo* basis.

In Transamerica Corporation v. the United States, 902 F.2d 1540 (Fed. Cir. 1990), the donor gave films of substantial value to the Library of Congress. However, the gift was of the physical property only. While access to the film would be given to researchers engaged in serious research, the donor reserved all right, title and interest to the property for commercial purposes. The Court of Claims denied the charitable deduction. The Court of Claims stated:

> The benefits received by [taxpayer] were (1) continued access for its commercial interests to both the physical property in the nitrate negatives given and access to the Library's preservation copies, [and] (2) relief from the costs and potential liability for the storage, maintenance, and care of nitrate negatives. Benefits to [taxpayer] were substantial, and were sufficient to provide [taxpayer] with a *quid pro quo* for the transfer. These benefits to [taxpayer], accordingly, effectively destroyed the charitable nature of the transfer.

902 F.2d at 1543.

The Court of Appeals upheld the Court of Claims' ruling. The Court of Claims stated:

> Not every transfer of property to the United States or to a charitable institution which is denominated a charitable contribution or gift falls within the ambit of the section. 'A payment of money [or transfer of property] generally cannot constitute a charitable contribution if the contributor expects a substantial benefit in return.' United States v. American Bar Endowment, 477 U.S. 105, 116-17, 106 S.Ct. 2426, 2432-33, 91 L.Ed.2d 89 (1986).

902 F.2d at 1543.

The appellate court, as did the Court of Claims, denied the charitable nature of the gift because the "taxpayer received a *quid pro quo* in the form of a substantial benefit for the transfer of property to the Library, the transaction falls within the general rule that there was no gift." Supra, at pp. 1545-46.

I can conceive of a situation in which a donation might be denied. For instance, a taxpayer might own an adjoining piece of property and is willing to make a donation to the housing authority of a portion of a taxpayer's property if the housing authority, in exchange, will confer a benefit to the taxpayer's remaining property, such a paving a road or putting in a sewer line, etc. But, if the facts show that the gift is being made for proper public purposes, and not for some special benefit to the taxpayer, then the gift should qualify for charitable deduction purposes.

There is one final particular aspect to this matter which may bring us back full circle. Even though I have said that a public housing authority ought to be a proper donee for charitable donation purposes, despite not

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CHARITABLE CONTRIBUTIONS TO PUBLIC HOUSING AUTHORITIES *Continued*

qualifying as a 501(c)(3) organization, it may not wish to accept the donation directly. If the donation is a substantial one, the housing authority might consider setting up a subsidiary corporation and qualifying that affiliate as a 501(c)(3) corporation. By taking the donation in the name of an affiliate, the housing authority might be able to deal much more flexibly with the donated property than it may otherwise be able to do if it mingled the donation with its other assets. In dealing with its affiliate and its affiliate's assets, the housing authority could not avoid any requirements imposed upon it by state law (see Lycoming County nursing Home Association, Inc. v. Commonwealth of Pennsylvania, 156 Pa.Cmwlth. 280, 627 A.2d 238 (1993)), but the property ought to be free from HUD rules and regulations.

Of course, starting up such an organization and getting it qualified as exempt under § 501(c)(3), is a time-consuming effort and would involve some expense. Thus, the circumstances would have to warrant this procedure. Absent those circumstances, again, ordinarily, as stated above, a donor may take a charitable contribution for a proper gift to a public housing authority.

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RECENT HUD NOFAs, RULES AND NOTICES

Following are some of the important recent HUD Rules, Proposed Rules, and/or Notices that appear in the Federal Register, along with a brief description.

RECENT NOFAs

Notice Number	Date	Substance	Submission Deadline
E6-1054	1/18/06	Guaranteed Rural Rental Housing Program	6/16/06
FR-5030-N-01	1/11/06	Advance view of General Section to HUD's FY2006 SuperNOFA,targeted for publication in early 2006.	n/a
E5-7629 E5-7630	12/15/05	Treasury Dept's FY 2006 Funding Round and FY 2007 Funding Round of the Community Development Financial Institutions Program	2006: 5 PM on 3/1/06 2007: 5 PM on 2/14/07

RECENT HUD RULES

Published Date	Affected CFR(s)	Federal Register Citation	Substance	Effective Date
2/9/06	91;570	71 FR 6949	Changes to the consolidated plan regulations of state and local governments so that the plans are more results-oriented and useful to communities in assessing their own progress toward addressing the problems of low-income areas. Eliminates obsolete and redundant provisions and makes other changes that conform these regulations to HUD's public housing regulations that govern the PHA Plan.	3/13/06

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RECENT HUD PIH NOTICES
(Office of Public and Indian Housing)

Notice	Date Issued	Subject	Substance	Expiration Date
PIH 2006-12	2/3/06	Disaster Voucher Program (DVP)-Families Displaced by Hurricanes	Continuation of temporary rental assistance. HUD has waived all requirements related to income eligibility and tenant contribution for families participating under the DVP for the statutory maximum term of 18 months.	2/28/07
PIH 2006-11 (HA)	2/3/06	Integrated Pest Management	Voluntary Guidance on IPM. Local rules still govern.	2/28/07
PIH 2006-10 (HA)	2/3/06	Asset Management	Provides guidance on identification of projects. PHAs have until 4/21/06 to submit their project identifications.	2/28/06
PIH 2006-9 (HA)	2/3/06	Procurement of Legal Services	Continuation of prior notice (Notice 2003-24 (HA)).	2/28/06
PIH 2006-8 (HA)	1/27/06	Electronic Exigent Health and Safety (EHS) System	Extends Notice PIH 2005-4 (HA) regarding the electronic exigent health and safety (EHS) system whereby PHAs certify the correction of EHS deficiencies observed during inspections and outlines procedures for HUD field office staff to document corrective measures.	1/31/07
PIH 2006-7 (HA)	1/27/06	Employee Benefit Plans	Extends Notice PIH 2005-3 directing PHAs to follow OMB Circular A-87 regarding employee benefits plan administration, and transmits a change to the Housing Agency (HA) Guidebook: Employee Benefit Plans, 7401.7 G, paragraph 2.8, subparagraph (e), Forfeitures.	1/31/07
PIH 2006-06	2/1/06	Energy Performance Contracts	Provides guidance on Energy Performance Contracts with terms up to 20 years	2/28/07
PIH 2006-5 (HA)	1/13/06	2006 HUD Appropriations	Implements the Housing Choice Voucher (HCV) funding provisions resulting from FY2006 HUD Appropriations Act (Public Law 109-115). Continues the 2005 allocation method for calculating and distributing housing assistance payments (HAP) renewal funds, PHA admin. fees, and continues to prohibit the use of renewal funds for over-leasing.	1/31/07

RECENT HUD PIH NOTICES CONTINUED

Notice	Date Issued	Subject	Substance	Expiration Date
PIH 2006-04 (TDHEs)	1/12/06	Native American Housing Assistance and Self-Determination Act (NAHASDA) Funding	Provides instructions to tribes and tribally designated housing entities on the process for requesting an advance of IHBG funds for FY 2006 in view of funding delays.	1/31/07
PIH 2006-03 (HA)	1/11/06	Administrative Fee Reserve Recapture	Discusses rescission and recapture of FY2005 admin. Fee reserves. Provides that any unused ACC reserves remaining after December 31, 2005 will be reduced to zero and provides that any budget authority provided to PHAs in calendar year 2005 that exceeds actual program expenses for the same period must be maintained in an undesignated fund balance account.	1/31/07
PIH 2006-2 (TDHEs)	1/3/06	Indian Tribes' Federal Cash Transactions Report	Extends Notice PIH 2004-25 (TDHEs), Clarification of submission dates for the form HUD-272-I Federal Cash Transactions Report ONAP (REV)	1/31/07
reinstates Notice PIH 2005-2 (HA)	1/3/06	Designation of Public Housing Projects.	Reinstates Notice PIH 2005-2 (HA) regarding the requirement for designation of public housing projects.	1/31/07

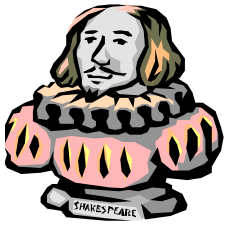
OTHER RECENT HUD NOTICES

Notice	Date Issued	Subject	Substance	Effective Date
FR-5031-C-02	2/9/06	Section 8 Contract Rent Annual Adjustment Factors, Fiscal Year 2006: Correction	Corrects contract rates published in the Federal Register on 12/1/05 (70 FR 72168) for Midwest and South regions.	12/1/05
FR-4995-N-04	2/7/06	Fair Market Rents	Confirms eligibility of 24 areas for continuing or new eligibility for 50th percentile FMRs.	3/1/06

Note: HUD has special exception procedures to adjust voucher payment standards in areas affected by Hurricanes Katrina or Rita. In areas directly affected by these hurricanes, PHAs are authorized to use voucher payment standards of up to 120 percent of published FMRs, which is significantly higher than the standards permitted for 50th percentile areas. PHAs in these areas may request higher exception payment standards if justified by local rent increases.

OTHER RECENT HUD NOTICES CONTINUED

Notice	Date Issued	Subject	Substance	Effective Date
FR-5051-N-01	2/9/06	CDBG Disaster Recovery Grantees Under the 2006 DOD Appropriations Act	Describes the common application, reporting waivers and common alternative requirements for these grants.	2/13/06
FR-5045-N-05	2/2/06	McKinney Homeless Assistance Act	State-by-state list of unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.	2/2/06
FR-06-927	1/31/06	Lead Paint	Notice of proposed consent decree in United States v. V.T. Fallon dba VTF Properties, No. 05-2830 RJL/AKB in D. Minn. Consent decree between HUD and owner and management company of 11 properties containing 124 units in Minneapolis, MN.	1/31/06



SHAKESPEARE'S REVENGE

"The first thing we do, let's kill all the lawyers."

-- William Shakespeare

Did you ever want to one-up somebody who told you a bad lawyer joke? Here's the ammunition . . .

An engineer dies and reports to hell. Pretty soon the engineer gets dissatisfied with the level of comfort in hell, and starts designing and building improvements. After a while, they've got air conditioning and flush toilets and escalators, and the engineer is a pretty popular guy.

One day God calls Satan up on the telephone and says with a sneer, "So, how's it going down there in hell?"

Satan replies, "Hey things are going great. We've got air conditioning and flush toilets and escalators, and there's no telling what this engineer is going to come up with next."

God replies, "What??? You've got an engineer? That's a mistake -- he should never have gotten down there; send him up here."

Satan says, "No way. I like having an engineer on the staff, and I'm keeping him."

God says, "Send him back up here or I'll sue."

Satan laughs uproariously and answers, "Yeah, right. And just where are you going to get a lawyer?"

An International Perspective:

In the USA, everything that is not prohibited by law is permitted.
In Germany, everything that is not permitted by law is prohibited.
In Russia, everything is prohibited, even if permitted by law.
In France, everything is permitted, even if prohibited by law.
In Switzerland, everything that is not prohibited by law is obligatory.

CASE CORNER

The following recently-reported cases are chock full of interesting issues:

DISCRIMINATION - Age

Alba v. Housing Authority of the City of Pittston, 400 F. Supp. 2d 685 (M.D. Pa. Nov. 23, 2005)

COURT: U.S. District Court for the Middle District of Pennsylvania.

FACTS: A 70-year-old former PHA mechanic sued the PHA and its officials under the Age Discrimination in Employment Act (ADEA) through Section 1983 for alleged equal protection violations, and under the state human relations act. Plaintiff contended that the PHA had an illegal mandatory retirement plan which required him, an employee of PHA for over ten years, to retire at age 70. Plaintiff subsequently was involuntarily retired and filed an EEOC complaint for age discrimination. The EEOC dismissed the claim, finding that since the PHA employed less than 20 employees, it was not covered by the statutes. The employee filed suit. Defendants' provided evidence that during the requisite periods it only had between 11 and 14 employees, three of whom worked less than twenty weeks per year. Plaintiff claimed that the PHA had between 23 and 26 employees. In support of his figures, plaintiff argued that the city police officers who patrol PHA's projects, and the PHA solicitor and financial consultant were employees of PHA. It was undisputed that the PHA contracted with the City of Pittston for off-duty police officers to patrol PHA's projects. The PHA also had a contract with the solicitor who was paid $14,000/year and received no benefits. And the PHA had a contract with a CPA as a financial consultant who was paid $3,600/ year and received insurance benefits that he paid for himself. Defendants argued that these individuals were independent contractors. Plaintiff provided evidence that the police used PHA's vehicles and patrolled only its projects and provided support services as requested by PHA. He also argued that PHA controlled the solicitor since he performed all of PHA's legal work, since the PHA Board directed him on what to do, and since he needed Board approval for his work. As to the CPA, the plaintiff argued that he received a fixed compensation from PHA, as well as dental insurance, which is only provided to employees. In the alternative, the Plaintiff claimed that the PHA and the City of Pittston should be construed as one employer, and that combined they had well over 20 employees during the requisite period.

ISSUE 1: Whether the 20 employee threshold of ADEA is a jurisdictional or substantive element of an ADEA claim.

HOLDING/RATIONALE I: Substantive. Comparing Third Circuit and countervailing state lower court precedent, the court held that the 20 employee threshold was a substantive, rather than jurisdictional, element of an ADEA claim.

ISSUE 2: Whether city police who patrolled PHA property, and the PHA solicitor and financial consultant, all of whom had contracts with the PHA, constituted "employees" within the meaning of the ADEA for purposes of computing the 20 employee threshold.

HOLDING/RATIONALE 2: Under the ADEA, "employee" is defined as "an individual employed by any employer." The state law definition under the state human relations code is "any board employing four (4) or more persons in Pennsylvania." Finding that these definitions of the term "employee" were not helpful, the court noted that U.S. Supreme Court precedent mandates that courts are to use a common-law agency test to determine employee status. Under that test, the court considers the following factors: the hiring party's right to control the manner and means by which the product is accomplished, as well as the skill required, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits, and the tax treatment of the hired party. The most weight is to be placed on the right to control by the hiring party and the manner and means that the work is accomplished. The court determined that the fact that the police officers, CPA and solicitor had employment contracts with PHA was not dispositive of the

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CASE CORNER CONT'D

employment relationship they had with PHA. Rather, the court evaluated the individual employment contracts under the foregoing factors. The court found that the police officers' agreement between PHA and the City stated that "off-duty police officers while working [*i.e.* patrolling PHA's projects] shall be in full uniform and covered by the City of Pittston." The Agreement for legal services provided that he would accept employment to provide legal services required by PHA in the operations of its projects. The financial consultant agreement provided that PHA employs him as financial consultant to monitor accounting records and complete required financial reports. Considering these agreements, the court found that it was the clear intent of the parties that these persons be independent contractors and not employees of the PHA. The court found that there simply was no evidence that these people were dependent upon the PHA for their livelihood, and that the PHA had no control over these persons' work product.

ISSUE 3: Whether the city and PHA should be considered a single employer, or joint employers, for purposes of the ADEA.

HOLDING/RATIONALE 3: The court decided this issue in favor of PHA. Plaintiff provided evidence that the Mayor of Pittston is both the Controller of the City and the PHA. The Mayor and city council also appoint and terminate all Board members. Plaintiff also argued that the security agreement between the City and PHA shows that the Mayor and PHA controlled the payment to the Police. The court found that under both the single employer standards and the joint employers test, the PHA and Pittston City were neither a single employer nor a joint employer. The court relied on the facts that the City did not have complete control over the PHA Board, the Board does not report to the City, and that the City does not provide any monies to PHA. The court further found that PHA and the City are separate entities, the PHA has its own Article of Incorporation, and the Board does not report to the City. PHA employees are paid from rents collected from PHA housing units. Board members are not paid for their duties and are appointed by the Mayor and City Council for five-year terms. The court found that, similar to the appointment of federal judges by the executive, in which both branches of government still remain separate and distinct, simply because PHA board members are appointed by the Mayor and City Council does not mean that PHA is controlled, managed and owned by the City.

The court also found that the City cannot dissolve PHA, a duly incorporated non-profit organization under the laws of Pennsylvania. The City could not control the assets of PHA, a separate legal entity. There was no evidence that any of PHA properties are under common ownership with the City. There was no evidence that the City controls any of PHA's employees, other than that it appoints PHA Board members. While PHA contracts with the City for its off-duty Police Officers to patrol its projects, showing a degree of functional integration of operations, there was not control of the Police by PHA, and there was no common management of either the Police by PHA or of PHA employees by the City. Moreover, the court found there was no evidence that the PHA and the City share office space, that the City controlled any of PHA's records, including employment records, or that the City and PHA had joint employment. There was no evidence that the two legal entities combine payroll or any other financial records.

ISSUE 4: Whether the ADEA provides the exclusive federal remedy for Plaintiff's age discrimination claim, thereby requiring dismissal of Plaintiff's Section 1983 equal protection claim.

HOLDING/RATIONALE 4: No. The court recognized that there is disparity around the country, some courts holding that Section 1983 claims asserting an independent constitutional claim of age discrimination can still be pursued in addition to an ADEA claim, with others holding the converse. There is a different standard for a constitutionally based civil rights claim of discrimination and a Title VII discrimination claim. Accordingly, the plaintiff's proposed Section 1983 claim, if alleged properly, would not merely be a restatement of his ADEA claim. The standard for a Section 1983 equal protection claim requires proof of purposeful discriminatory conduct, and the plaintiff must show disparate impact plus some additional "indicia of purposeful discrimination." The court further found that, in a constitutionally based civil rights claim of discrimination, the Plaintiff must show that the Defendants purposefully discriminated against him due to his age. In a 1983 claim, the focus is on the motivation for the defendant's action. In an ADEA claim, the focus is on the effects of the defendant's action on the plaintiff.

ISSUE 5: Whether plaintiff had a Section 1983 claim against the PHA.

HOLDING/RATIONALE 5: No. The court found that there was no dispute that the PHA's mandatory retirement age policy applied equally to all of its employees and that plaintiff was not singled out for application of the policy. Moreover, the court found that the plaintiff failed to provide an independent constitutional claim for age discrimination, finding that his Section 1983 claim was simply a reaverment of his ADEA claim. The court found that Defendants applied PHA's mandatory retirement policy to Plaintiff, that the policy applied to all of PHA's employees, and that Plaintiff was made to leave his position with PHA only because he became 70 years old. However, the court found that the plaintiff failed to offer

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CASE CORNER CONT'D

an independent constitutional claim for age discrimination. The court further found that, even if Plaintiff did assert a constitutional claim for age discrimination independent from his ADEA claim, he failed to show that he was deprived of a constitutional right by Defendants since neither state nor federal law clothed Plaintiff's employment with a right enforceable through an action under Section 1983.

Dismissing all federal claims, the court allowed the employee's state claims to proceed against the individual supervisory Defendants; however, it declined to exercise supplemental jurisdiction over those claims since the federal claims were dismissed.

DISCRIMINATION - Employment

Marra v. Philadelphia Housing Author., 404 F. Supp. 2d 839 (E.D. Pa. Dec. 9, 2005)

COURT: U.S. Dist. Court for the Eastern District of Pennsylvania.

FACTS: Two PHA employees brought Title VII (under Section 1983) and state human relations act claims against the PHA, claiming that it unlawfully retaliated against them after they testified pursuant to subpoena in a discrimination case in which the PHA was a defendant. The first plaintiff argued that he was fired in retaliation; while the PHA contended that he was terminated due to a reorganization. The second plaintiff claimed that he was demoted; while the PHA contended that he volunteered to be transferred to the new position. The trial court granted summary judgment in favor of the PHA on the Title VII claims because of plaintiffs' failure to exhaust administrative remedies. At trial, the court denied the PHA's motion for judgment as a matter of law at the close of the plaintiffs' case. The jury returned a verdict in favor of plaintiffs finding that the PHA retaliated against plaintiffs in violation of the state human relations law and section 1983. The Court, however, directed a verdict in favor of the PHA on the section 1983 claim because the jury also found that the PHA's Executive Director whom the Court determined to be the PHA's sole policymaker, did not personally order or acquiesce in any retaliation against plaintiffs. The verdict on the PHRA claim stood. The jury awarded one plaintiff back pay in the amount of $ 208,676 and compensatory damages of $102,000. The jury awarded the second plaintiff compensatory damages in the amount of $ 70,000. The PHA again moved for judgment as a matter of law or in the alternative for a new trial, arguing that there was no causal connection between the testimony and the employment actions and thus the verdict was against the weight of the evidence.

ISSUE 1: Whether a jury trial under the state human relations law is required in federal court.

HOLDING/RATIONALE 1: Yes. While it was clear that under state law the plaintiffs had no right to a jury trial in employment discrimination actions brought under the state human relations act, the court found that a jury trial is is required in federal court because, even if not made available under the state statute, a jury trial is mandated under the Seventh Amendment which preserves the right to a trial by jury in suits at common law, where the value in controversy exceeds twenty dollars. The court found that federal law, not state law, determines the right to a jury trial when pursuing a state-created right in federal court.

ISSUE 2: Whether, notwithstanding a 10 month gap between one plaintiff's testimony in the trial and his eventual firing, there was a causal connection between the testimony and the firing.

HOLDING/RATIONALE 2: Yes. To establish a causal connection, a plaintiff must prove either (1) an unusually suggestive temporal proximity between the protected employee activity and the adverse action, (2) a pattern of antagonism coupled with timing to establish a causal link, or (3) the evidence gleaned from the record as a whole infers causation. In this case, the Court agreed that the gap of time between one plaintiff's involvement in the trial and his eventual firing (approximately ten months) is not "unusually suggestive" of a retaliatory motive. However, viewing all facts in the light most favorable to the plaintiff the Court decided that it was reasonable for the jury to find a "pattern of antagonism" against him by the PHA between his pretrial and trial testimony and his eventual termination. That pattern included: 1) an involuntary change in his employee status from Assistant General Manager to Project Manager, thus losing a $ 425 stipend to cover the costs of using his private vehicle for PHA business; 2) the hard drive on his computer was vandalized at work and the PHA took no action; 3) being excluded from a meeting of supervisors to which, prior to his testimony, he would have expected to have been invited to attend; 4) a subordinate of his was demoted and transferred to another department, without his consent; and 5) at a meeting of supervisors, the PHA's Executive Director, gave him a "look of disgust" when he admitted that he had testified against the PHA, and finally 6) he was terminated because the PHA claimed it was reorganizing.

ISSUE 3: Whether the PHA's actions were retaliatory and its proferred reasons pretextual.

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HOLDING/RATIONALE 3: Yes. The court found that a reasonable jury could find that the PHA's actions following the testimony were retaliatory. The court also found that a reasonable jury could find that the proferred reasons were pretextual since, in the case of the employee fired on account of the reorganization, he was the only manager who lost his job.

ISSUE 4: Whether the jury's finding that (1) the PHA retaliated against plaintiffs in violation of the PHRA and (2) the finding that the E.D. did not personally direct or acquiesce in any retaliation against plaintiffs, are inconsistent.

HOLDING/RATIONALE 4: No. The court found that the verdicts were consistent. Distingishing the proof necessary under section 1983 and the state claim, the court found that, while under the federal law, plaintiffs had to prove that the E.D. as the sole PHA official with final and unreviewable authority was responsible for the action which deprived plaintiffs of their constitutional rights, under the state law, liability is imposed upon the PHA for the discriminatory conduct of any agent of PHA who was acting within the scope of their employment, regardless of the E.D.'s personal involvement or knowledge.

ISSUE 5: Whether delay damages were available for their compensatory damage awards.

HOLDING/RATIONALE 5: No. The court found that, under state law, delay damages are available when "seeking monetary relief for bodily injury, death or property damage." Pennsylvania courts have held that delay damages are not available where a plaintiff is seeking recovery for emotional injury, loss of reputation, humiliation, and mental anguish because such do damages do not constitute "bodily injury" under state law. Here, plaintiffs sought compensation for "past and future non-economic losses, including extreme emotional distress, loss of reputation, shame, humiliation, pain and suffering, inconvenience, mental anguish, and impairment in quality of life." Accordingly, the court found that plaintiffs were not entitled to delay damages.

DUE PROCESS

Driver v. Hous. Auth., Nos. 2005AP410 2005AP411, 2006 Wisc. App. LEXIS 124 (Feb. 8, 2006)

COURT: Court of Appeals of Wisconsin, District 2

FACTS: This case involved a consolidated appeal of two tenants to whom a PHA sent notices terminating their section 8 benefits using language that they had violated a "family obligation." In one case, a tenant had been arrested for allegedly committed a robbery and also was believed to have another individual living with her, which she denied. In the other case, members of the household fought outside of the unit and one stabbed the other. Both were arrested. After receiving their termination notices, each party requested and received an informal hearing, after which HARC issued a written decision terminating their assistance for violating their "tenant responsibility." The notices were devoid of any recitation of the particular facts giving rise to the terminations. The trial court granted summary judgment for the PHA on the ground that both plaintiffs had "actual knowledge" of the charges against them and had an opportunity to prepare for the hearing. The tenants appealed.

ISSUE 1: Given that tenants had actual notice of the facts giving rise to the termination of their Section 8 benefits, whether notices that were essentially form letters that failed to specify the particular conduct at issue provided ample due process.

HOLDING/RATIONALE 1: No. The court found that both the initial notices and the ultimate decisions, essentially form letters, fell woefully short of the level of specificity that due process requires. The court found that nowhere did these documents specify *who* had violated *what* specific obligation, *when* the violation occurred, and neither gave even a rudimentary description of the incidents giving rise to the charges. The court found that actual notice would not suffice since federal regulations mandate *written* notice, and strict compliance is imperative as a matter of law and public policy. The court stated that, by reading an "actual notice" exception into the regulatory scheme, it would invite housing authorities to dispense with proper notice whenever they determined for themselves that the tenant "must have known" the basis for the allegations against them. Tenants would have no recourse unless they could prove, based on a record that may be sparse or nonexistent, that they did not actually have such notice.