

**DCHA Board of Commissioners Meeting
September 11, 2013
Testimony of Misty Thomas**

Regarding Proposed 14 D.C.M.R. § 5804 Termination of Participation and Assistance for Violent Criminal Activity and Proposed 14 D.C.M.R. § 8903 Informal Hearings

Good afternoon and thank you for the opportunity to testify about Resolution 13-13, the proposed HCVP regulations. My name is Misty Thomas and I am an attorney with the Affordable Housing Initiative at the Washington Legal Clinic for the Homeless. It is our mission to represent and advocate on behalf of people who are homeless, at-risk of homelessness, or whose affordable housing is at risk in DC.

I would like to begin by thanking the HCVP leadership and Office of General Counsel for continuing to engage with us in the advocacy community as they have sought to change and codify the HCVP Administrative Plan. We have had countless meetings over the last year and a half and do believe that this has been a collaborative and meaningful process. We are appreciative that we are invited to help craft policy at that level and at this point in the process, our remaining comments and concerns are few.

I, along with several other of my legal services colleagues, submitted formal comments to OGC as recently as July 5, regarding a handful of remaining concerns, but we wanted the opportunity to also share those last few issues with the Board, as we think they are very important – but also that they are easy fixes that would greatly benefit both the participants as well as the DCHA staff who has to implement these policies. I will try to quickly outline three of those concerns.

First, we are concerned about the proposed definition of the term “currently engaged” at 14 D.C.M.R. § 5804.3. While this may seem very minute and technical, this is actually a very important definition related to when and why DCHA can terminate someone from the HCVP program if they have engaged in the use of illegal drugs at or around their unit. This definition

should be revised to be more in line with both the common understanding of the word currently and with the definition already established in the federal HUD regulations.

The proposed § 5804.3 defines “currently engaged” to be “one or more offenses that occurred no more than *nine months* prior to the notice of recommendation for termination.” Not only do we think that this definition is in conflict with the common use and definition¹ of the word – “now”, “ongoing” or, “at the present time” – but there are both legal and policy reasons to follow the federal HUD standard which defines a household member as “currently engaged in” criminal activity if the person has “engaged in the behavior recently enough to justify a reasonable belief that the behavior is current.” *See* 24 CFR 982.553(a)(2)(C)(2).

As I read the CFR, this is not one of the situations where HUD left discretion to a Housing Authority to fill in the details of a policy to be best suited for that jurisdiction. The entirety of § 982.553 is related to denying and terminating assistance based on drug and violent crime. There are many places in that section that state clearly that DCHA should establish standards for various policies, giving leeway to DCHA, and most of them don’t have special definitions attached to the terms. However, it is unique, and therefore important, that “currently engaged” *does* have a specific definition in this section. Both in terms of legal interpretation techniques as well as common sense – the fact that they included a definition means that HUD wants it followed. And since there is a general legal principle that federal law trumps local laws that are conflict with it, we believe that the federal definition should be deferred to by DCHA.

HCVP and OGC staff explained that their rationale for 9 months is largely based on practicality in light of the time it takes to go through the termination process, but we still believe this 9-month definition is potentially unfair to participants who have since gotten clean or otherwise ended their drug use, plus it is legally risky and could expose DCHA to unnecessary litigation. Because of this conflict in definitions, it is possible that a participant would have grounds for a lawsuit if, for example, she had used drugs around January, but decided to get help in February, completed rehabilitation in April, stayed clean and attended NA meetings through

¹ In drug haven cases, the D.C. Court of Appeals has interpreted “current” and “currently” to mean at the present time, *not* in prior months. *Crescent Properties v. Inabinet*, 897 A.2d 782, 789 (D.C. 2006) (in order to prevail, the landlord must prove that the “property currently a drug haven at the time of the hearing”); *Ball v. Arthur Winn General Partnership/Southern Hills Apts.*, 905 A.2d 147 (D.C. 2006). In both cases, the D.C. Court of Appeals used the word “currently” interchangeably with “at the present time.” The D.C. Court of Appeals rejected the argument that activity from several months earlier constituted current drug activity.

the summer, and then unexpectedly gets a termination notice in August claiming she is “currently engaged” in drug activity because of evidence of her last use in January. That participant could well claim that her legal rights are those under the CFR, cannot be narrowed by DCHA, and could bring a lawsuit.

Clearly I agree that a policy of not allowing active drug users to live in subsidized housing is an appropriate one. But there are other, more effective provisions in our rules that allow for terminations based on historical behavior – DCHA can terminate for *felonious* drug behavior from the last two years (a longer reach than 9 months), violent criminal behavior, or other lease violations that might be associated with drug use. This particular provision is really designed to address the problem of a truly chronic, ongoing, *current* drug abuser who cannot control their behavior and is bringing havoc on their neighborhood and, therefore, cannot successfully participate in HCVP. It is not meant to sweep in people who have moved beyond their addiction or who may have made a one-time bad decision to use drugs in the last 9 months. Rather, DCHA, like the other jurisdictions who rely on the HUD definition, will still have full ability to terminate individuals who are currently engaged in drug use with no signs that they have addressed their addiction or will not otherwise curb their drug behavior.

To be consistent with 24 CFR 982.553(a)(2)(C)(2) and the common definition of the word, we recommend that § 5804.3 be removed from the proposed regulations. There is no need to replace it with another provision, as the CFR definition is in place and can be cited by DCHA in seeking terminations for individuals who truly are currently engaged in drug use. Alternatively, however, DCHA can replace §5804.3 with the CFR definition for clarity.

Second, the definition of “violent criminal activity” in Chapter 59 should be updated to reflect the definition agreed upon with OGC and HCVP staff - that “violent criminal activity” means “crimes of violence” as defined in D.C. Code. DCHA staff repeatedly confirmed that they had accepted “crime of violence” as defined by D.C. Code § 23-1331(4) as the definition for “violent criminal activity.” However, this definition is not set forth in either the proposed 14 D.C.M.R. § 5804 or in § 5999. In fact, the proposed § 5804 does not define violent criminal activity at all. The only definition for “violent criminal activity” is in Chapter 59, and that is now inconsistent. To avoid confusion, we recommend that DCHA update the definition in § 5999 *now*. However, if DCHA insists on immediately publishing proposed 14 D.C.M.R. § 5804

as final today instead of fixing the regulations first, the housing advocate community would like some assurance that DCHA will still use the D.C. Code definition in practice for now and make the legal fix as quickly as possible.

Third and finally, under the proposed regulations, a head of household is prohibited from presenting mitigating circumstances to HCVP staff in advance of an informal hearing if the alleged activity was committed by that head of household herself. DCHA's position is that the head of household will have an opportunity to present mitigating circumstances later to the hearing officer at the informal hearing stage, not before. If that is DCHA's position, we can understand and accept it, but this policy should then be stated in the regulations governing informal hearings in Chapter 89.

Previously OGC said that it would send a memo to its staff to not object at the presentation of mitigation at hearings, and said that DCHA would consider adding language in the hearing regulations. We encourage DCHA to update the regulations now, as an internal memo does not have the same effect as law. The importance of formalizing such policy is that it gives *all* of the hearing officers, participants, and lawyers fair notice of what they can present.

Without specific language in the law, someone may reasonably infer that no mitigating circumstances are permitted at the informal hearing. Why? First, because the rule *prohibiting* offering mitigating circumstances for head of household activity is specifically stated in Chapter 58. If there is no regulation expressly *allowing* the opportunity to present mitigating circumstances at the informal hearing, then someone logically may extrapolate that the prohibition also extends also to hearings. Second, this is actually a change in DCHA policy. In the past, it has been our experiences that the Office of Fair Hearings has prohibited a family from presenting mitigating circumstances at the informal hearing. The easiest and most effective way to notify the public of such a positive change is through the law governing informal hearings. We recommend that Chapter 89 include a provision such as: "At the informal hearing, regardless of who allegedly violated the family obligation, the head of household may present mitigating circumstances to the hearing officer."

In conclusion, I do believe that the Administrative Plan in aggregate reflects great effort on the part of DCHA to establish fair and thoughtful policies that will help some of our city's most

vulnerable families stay housed. I appreciate the efforts to balance their needs to enforce rules, avoid audits, and yet still be humane. Thank you.