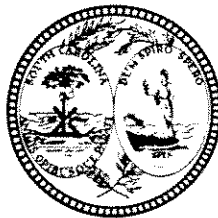


Reg 4865



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 6, 1995

Ronald L. Poston, Executive Director
Housing Authority of the City of Lake City
P. O. Box 1017
Lake City, South Carolina 29560

Re: Informal Opinion

Dear Mr. Poston:

You have asked our opinion as to whether procedures in South Carolina's magistrate courts for eviction of tenants meet the Department of Housing and Urban Development's (HUD's) definition of "due process". As I understand it, there are occasions where tenants need to be evicted for drug activity. It is my opinion that South Carolina's eviction procedures fully comport with due process.

Pursuant to 42 U.S.C. 1437 d(k), HUD is required to issue a rule which establishes the "basic elements of due process", and to determine whether eviction procedures under the law of the relevant jurisdiction meet HUD's due process definition. 24 C.F.R. Section 966.53(c) provides as follows:

Elements of due process shall mean an eviction action or a termination of tenancy in a State or local court in which the following procedural safeguards are required:

- (1) Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction;
- (2) Right of tenant to be represented by counsel;

Mr. Poston
Page 2
April 6, 1995

(3) Opportunity for the tenant to refute the evidence presented by the PHA [Public Housing Authority] including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense which the tenant may have;

(4) A decision on the merits.

S.C. Code Ann. Section 27-37-10 et seq. provides a landlord with the right to seek ejectment of a tenant. The tenant, pursuant to Section 23-37-10,

may be ejected upon application of the landlord or his agent when (a) such tenant fails or refuses to pay the rent when due or when demanded, (b) the term of tenancy or occupancy has ended or (c) the terms or conditions of the lease have been violated.

Section 27-37-20 provides that an ejectment action shall be initiated upon the magistrate's issuance of a written rule requiring the tenant to vacate the premises forthwith or "to show cause why he should not be ejected within ten days after service of a copy of the rule upon the tenant."¹ Service of the rule to show cause is made pursuant to Section 27-37-30, in the same manner as service is made in the court of common pleas.

If the tenant decides not to contest the ejectment, the magistrate then issues a warrant of ejectment. Section 27-37-40. However, pursuant to Section 27-37-60,

[i]f the tenant appear and contest ejectment the magistrate shall forthwith hear and determine the case as any other civil case, allowing trial by jury if demanded by either party.

Should a jury trial be demanded, "a jury shall be summoned and a jury trial had as in any other civil case." Section 27-37-80. The magistrate is also given authority to grant a new trial, "as in any other civil case", pursuant to Section 27-37-90, and either party possesses

¹ As the Court of Appeals recently stated in Billips v. Hawkins, 290 S.C. 435, 381 S.E.2d 210 (1989), the Legislature, in the Landlord-Tenant Act, Section 27-40-10 et seq., specifically provided protection for tenants holding residential leases by requiring notice be given by the landlord before he may terminate the rental agreement. See Sections 27-40-710 and -720 [14 days written notice].

Mr. Poston
Page 3
April 6, 1995

a right of appeal. Section 27-37-120. If the jury renders a verdict for the tenant, then the tenant must remain in possession until termination of the tenancy, until failure or neglect to pay rent, or until ejected in another ejectment proceeding or by the judgment of a court of competent jurisdiction. Section 27-37-110.

In Johnson v. Tamsberg, 430 F.2d 1125 (4th Cir. 1990), the Fourth Circuit Court of Appeals reviewed the South Carolina statutory scheme for ejectment of a tenant, described above. The Court distinguished the South Carolina statutes from procedures in New York where the Second Circuit had recently ordered the New York City Housing Authority to upgrade its administrative procedures in Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970). However the Fourth Circuit found South Carolina's statutory ejectment scheme fully complied with due process:

Plaintiff asks that we order similar relief in this case. We decline to do so because we think Escalera inapposite.

The sharp distinction between the two cases is that under the New York eviction procedure, administrative decisions to evict, reached in Escalera without observing due process safeguards, were enforceable without any judicial review of the factual basis of the administrative action. In the South Carolina scheme, on the other hand, in order to obtain an eviction order the Housing Authority must prove its allegations. There is a full trial in which the tenant may demand a jury. Thus, in Charleston, unlike New York in Escalera, public housing tenants are not actually ejected until basic due process requites are satisfied. That is precisely what happened in this case. [emphasis added].

430 F.2d at 1126-1127.

Likewise, in Wimberly v. Shorter, 204 S.C. 558, 30 S.E.2d 593 (1943), the South Carolina Supreme Court noted that this eviction procedure "... is not summary in the sense, however, that it deprives the tenant or the landlord of full opportunity to be heard." 204 S.C. at 562.

Applying the criteria set forth in 24 C.F.R. 966.53(c), the South Carolina statutory scheme for ejectment provides adequate notice to the tenant of the grounds for terminating

Mr. Poston
Page 4
April 6, 1995

the tenancy and for eviction; provides the tenant the right to be represented by counsel;² provides the opportunity for the tenant to refute the evidence presented by the Public Housing Authority, including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense which the tenant may have; and provides a decision on the merits. Accordingly, it is my opinion that South Carolina's procedure for ejection or eviction fully meets the HUD definition of "due process".

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Robert D. Cook
Assistant Attorney General

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² Obviously, a tenant has the right to be represented by counsel in magistrate's court in any eviction action. HUD's regulation rejected the idea that in a civil eviction proceeding, there is any "due process or other Federal Constitutional right to representation by publicly paid counsel." See Federal Register, Vol 56, No. 198 October 11, 1991. Reference is also made to Administrative and Procedural Rules for Magistrates Courts, Rule 11(c), which provides:

In the trial of a civil action, in which one or both parties are unrepresented by legal counsel, the court shall question the parties and witnesses in order to assure that all claims and defenses are fully presented.

See also, Rule 17.