

# Public Housing Authorities

## Slow to Implement Earned Income Disregard\* See Attached Note (last page)

By Fred Fuchs

Envision this scenario: You interview Jane Doe who has come to Legal Aid because she has been served with an eviction lawsuit for nonpayment of three months' rent to the local public housing authority (PHA). Ms. Doe tells you that prior to starting a new full-time job seven months ago, she had not worked for about fifteen months, subsisting only on child support and income of \$5.00 an hour from babysitting her sister's baby eight hours a week on Saturdays. The PHA increased her rent by \$300 per month after she reported her new employment income. Ms. Doe explains that because she had worked only sporadically the past year, she accumulated a good deal of debt.

Ms. Doe managed to pay the increased rent for three months. However, she tells you that she then chose to pay other bills, because she thought the PHA would work with her more than other creditors who were harassing her. She admits that she does not have the \$1,200 the PHA claims she owes in back rent. She is desperate to keep her apartment. Is she beyond help?

This scenario should immediately trigger further factual inquiry to determine whether Ms. Doe qualifies for the public housing earned income disregard. If she qualifies, then she will not only defeat the eviction, but she will also be entitled to a rent reduction and a rent refund of \$900 (the additional rent she paid for three months due to her increase in income from her full-time job).

With the passage of the Quality Housing and Work Responsibility Act of 1998,<sup>1</sup> Congress enacted a major change in the method of calculating the rent amount paid by three classes of public housing tenants: (1) tenants previously on welfare; (2) tenants previously unemployed; and (3) tenants participating in a family self-sufficiency or other job training program.<sup>2</sup>

The statute provides that the rent paid by a tenant in public housing may not be increased for a one year period as a result of increased income from employment if the family's earned income increases (a) as a result of employment of a member of the family who was previously unemployed for one or more years; or (b) as a result of participation of a family member in any family self-sufficiency or other job training program; or (c) as a result of employment of a family member who has received

Temporary Aid for Needy Families (TANF) within the past six months.<sup>3</sup>

Congress further stipulated that during the second year following the increase in earned income, fifty percent of the family's earned income must be disregarded in determining the family's rent.<sup>4</sup> This is a dramatic change from the previous rule requiring PHAs to include all earned income in determining a family's rent.

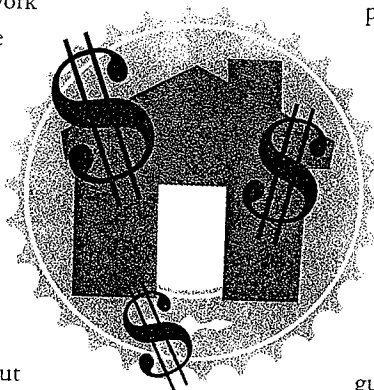
The earned income disregard was effective October 1, 1999.<sup>5</sup> The United States Department of Housing and Urban Development (HUD) published notice in February 1999 that it would give PHAs implementation instructions on the earned income disregard at a later date.<sup>6</sup> In April 1999, HUD

published proposed regulations on the earned income disregard.<sup>7</sup> HUD was unable to publish final regulations as quickly as needed.

Since Congress had set an effective date of October 1, 1999, HUD published a guidance notice in the Federal Register in August 1999, stating that "PHAs must take all necessary steps to ensure that families eligible for new mandatory deductions receive those deductions."<sup>8</sup> As part of the guidance, HUD stated that PHAs that followed the guidance would not be penalized for any changes made by HUD in the final regulations.<sup>9</sup>

HUD subsequently published another notice in the Federal Register in December 1999 giving further guidance on implementation of various provisions of the Quality Housing and Work Responsibility Act of 1998, including the earned income disregard.<sup>10</sup> With respect to the earned income disregard for public housing tenants, HUD noted that its previous notice on August 6, 1999, "made clear that the . . . mandatory disregard of increased earned income provisions were to be implemented by PHAs on October 1, 1999."<sup>11</sup> HUD finally published the final rule on the earned income disregard provisions in March 2000.<sup>12</sup>

With the published final rule, HUD clarified some of the questions raised by the statute. For example, the regulations define the term "previously unemployed" as including a person who has earned in the twelve months prior to employment no



more than would be received for ten hours of work per week for fifty weeks at the minimum wage.<sup>13</sup> In other words, any public housing tenant who obtains employment and has worked fewer than 500 hours at the minimum wage during the previous twelve months qualifies for the earned income disregard. Thus, in the example given at the beginning of this article, Ms. Doe will qualify for the earned income disregard because she worked only 400 hours (8 x 50) during the year prior to the date she obtained full-time employment.

Therefore, the PHA illegally increased Ms. Doe's public housing rent, and it has no grounds to evict her for nonpayment of the increased rent amount. In addition, Ms. Doe is entitled to a refund of the additional \$300 in rent she has paid for three months and is entitled to have her rent adjusted. The PHA must exclude her entire earned income for a one-year period dating from the date of her employment. During the second year, she will be entitled to have fifty percent of her income excluded by the PHA when it calculates her rent.

As noted earlier, the earned income disregard also applies to families who obtain employment within six months after receiving TANF assistance.<sup>14</sup> If any member of the family obtains employment within six months of the receipt by another member of the family of TANF assistance, the new earned income must be disregarded.<sup>15</sup>

Further, HUD fleshed out the statute by defining the TANF program as including not only the monthly TANF payments but also such benefits and services as one-time payments, wage subsidies and transportation assistance, so long as the total amount of such payments equals at least \$500 over six months.<sup>16</sup> Thus, a family receiving such benefits equal to at

least \$500 will qualify for the earned income disregard.

PHAs have been slow to enact the earned income disregard (and to give it effect retroactive to October 1, 1999), because of the delay in the publication of final regulations.<sup>17</sup> This presents an opportunity for community education of public housing residents. In addition, in any case in which a public housing tenant who is sued for eviction may qualify for the earned income disregard, you should plead the failure to give the tenant the earned income disregard as an affirmative defense to the eviction.<sup>18</sup> In those cases in which a PHA has not implemented the statute retroactive to October 1, 1999, affirmative litigation may be necessary.

Many questions about implementation are not clear from the regulations. HUD has posted on its web site its answers to frequently answered questions.<sup>19</sup> HUD's answers on its web site show that it is liberally interpreting the statute to sweep as broadly as possible.

**Endnotes**

1. Pub. L. No. 105-276, 112 Stat. 2518 (October 21, 1998) (codified in scattered sections of 42 U.S.C.).
2. See Pub. L. No. 105-276, at '508 (codified at 42 U.S.C.A. '1437a(d) (West Supp. 2000)). Congress also included under the definition of "eligible families" those families receiving Section 8 assistance. See *id.* at '508(d)(3)(A)(ii); 42 U.S.C.A. '1437a(d)(3)(A)(ii) (West Supp. 2000). However, Congress then limited the earned income disregard for Section 8 families by conditioning it upon advance appropriations by Congress. See *id.* at '508(d)(4); 42 U.S.C.A. '1437a(d)(4) (West Supp. 2000). To date, Congress has not appropriated additional funds. Thus, the earned income disregard is available only to public housing tenants and not Section 8 tenants. However, HUD published a final rule in January 2001 which

extends the earned income disregard to persons with disabilities participating in the following HUD programs: Section 8 Housing Choice Voucher Program, HOME Investment Partnerships, Housing Opportunities for Persons with AIDS and Supportive Housing. See 66 Fed. Reg. 6219 (Jan. 19, 2001). The original effective date of these regulations was February 20, 2001. See *id.* However, by notice published in the Federal Register on January 30, 2001, HUD delayed the effective date of this regulation until April 20, 2001. See 66 Fed. Reg. 8175 (Jan. 30, 2001).

3. Pub. L. No. 105-276, at '508(d)(1)(codified at 42 U.S.C.A. '1437a(d)(1) (West Supp. 2000)).
4. *Id.* at '508(d)(2) (codified at 42 U.S.C.A. '1437a(d)(2) (West Supp. 2000)).
5. See *id.* at '508(d)(4); 42 U.S.C.A. '1437a(d)(4) (West Supp. 2000) ("This subsection . . . shall apply beginning upon October 1, 1999...").
6. See 64 Fed. Reg. 8192 (Feb. 18, 1999) (Quality Housing and Work Responsibility Act of 1998; Initial Guidance).
7. See 64 Fed. Reg. 23460, 23473, at '5.612 (April 30, 1999)(proposed rule).
8. See 64 Fed. Reg. 42955 (August 6, 1999) (Public Housing Rent Policies; Guidance Pending Publication of Final Rule on Admissions and Occupancy Requirements).
9. See *id.*
10. See 64 Fed. Reg. 71799 (Dec. 22, 1999).
11. See *id.* at 71807.
12. See 65 Fed. Reg. 16692,16727-28, at '960.255 (March 29, 2000) (codified at 24 C.F.R. '960.255 (2000)).
13. See 24 C.F.R. '960.255(a) (2000).
14. See *id.*
15. *Id.*
16. See *id.*
17. This observation is based on personal experience and communications with housing advocates throughout the United States.
18. See TEX. R. CIV. P. 94 (affirmative defenses must be pleaded).
19. See: [http://www.hud.gov/pih/legis/ao\\_faq.pdf](http://www.hud.gov/pih/legis/ao_faq.pdf)

*Fred Fuchs is the Housing Team Leader for Legal Aid of Central Texas. ♦*

**Note**

HUD expanded the earned income disregard (“EID”) effective March 20, 2001 to families with a family member who is a person with disabilities to the following housing programs:

Section 8 Housing Choice Voucher Program;

Home Investment Partnerships Program

Housing Opportunities for Persons with AIDS

Supportive Housing Program

See 24 C.F.R. § 5.617 (2006).