

Hearing Officer Fundamentals

Presented By Brandon M. Engblom, Esq.



Hello & Welcome!

Or Hello Again If You've Seen Me Before.

Who Am I?



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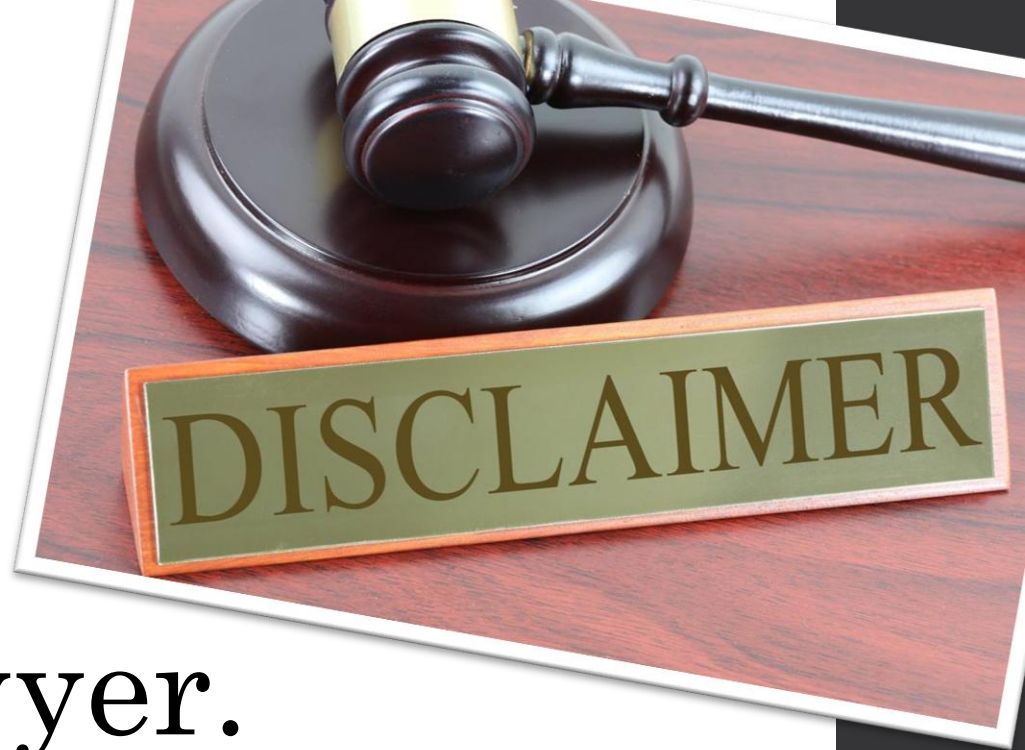
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DISCLAIMER

Disclaimer

- I am a Lawyer;
- I am not *your* Lawyer.

- Seek individualized legal advice to review your particular situation.



Disclaimer



- Opinions or points of view expressed in this discussion represent those of the speaker and do not represent the official position or policies of the Housing and Redevelopment Authority of Duluth, Minnesota or the University of Wisconsin-Superior
- These prepared remarks are for **general education purposes.**

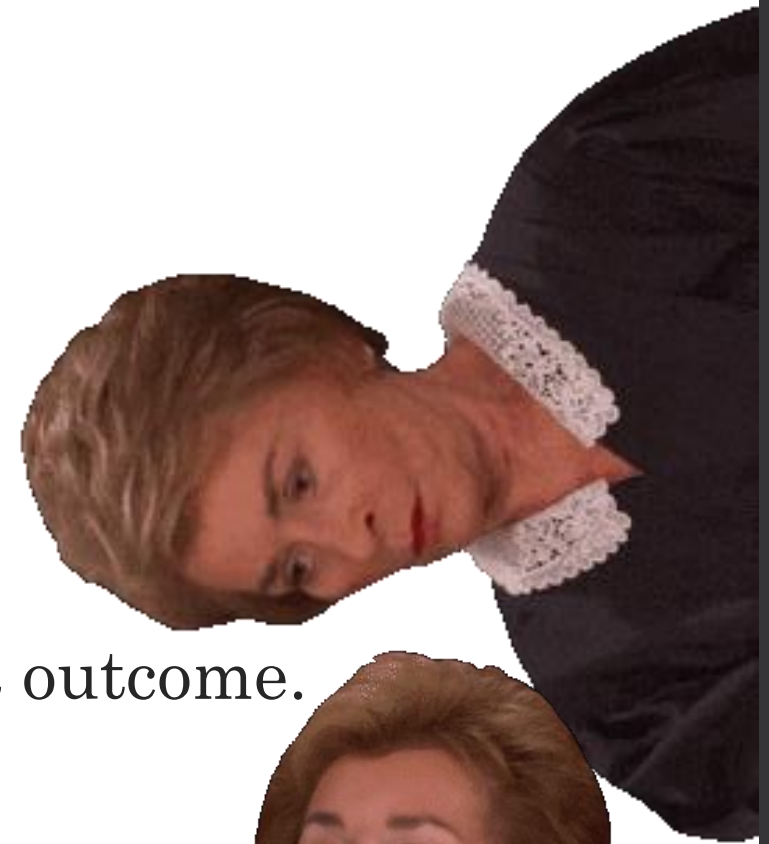
Today – Hearing Officers

- Hearing Officer requirements.
- The hearing process in detail.
- Considerations for contracting a hearing officer.

Please ask questions as we go.

Hearing Officers?

- Think Judge Judy.
 - Makes findings of fact
 - Decides an outcome
 - An agency is generally bound to that outcome.



Dreaming of being a hearing officer?

- You too could be a hearing officer after this training...
if your agency assigns such a function to you.



Hearing Officer Fundamentals

- What Is a Hearing Officer?
 - A neutral decision-maker assigned to review a disputed program decision.
 - Manages the hearing, receives information, applies governing rules, and issues a written decision.

Hearing Officers Fundamentals

- Why Do We Have Hearing Officers?
 - Required by **Due Process** (14th Amendment)
 1. Notice;
 2. An opportunity to be heard; and
 3. An impartial decision maker.

Hearing Officers Fundamentals

- Why Do We Have Hearing Officers?
 - Further required under various program rules.
 - Public Housing Grievances,
 - Application appeals,
 - Removal of subsidy appeal,
 - Reasonable accommodation appeals,
 - Etc.

An impartial decision maker...

- Who is an impartial decision maker?
 - Can't have issued the decision being appealed;
 - Can't be a subordinate of the person who issued that decision;
 - Can't have approved or reviewed that decision.

Why?

An impartial decision maker...

- Impartial does not mean they are a blank slate.
- Hearing Officers can have expertise in the subject matter they are presiding over.

An impartial decision maker...

- It can be:
 - An outside attorney/arbitrator contracted for hearing services;
 - An employee completely independent of the chain of command that issued the decision being appealed;
 - An employee senior in the chain of command to the person who issued the decision being appealed.
- **The Rule of Zero Prior Involvement**
 - No input, guidance, or control of the decision being appealed.

Best Practices

- **Fair:** each side knows the issue and has a real opportunity to respond.
 - Fair opportunity to respond does not mean a fair chance at winning their case.
- **Organized:** the officer keeps the hearing orderly, and complete.
- **Reviewable:** the written decision logically follows from what was presented at the hearing.

The Hearing Process

Prehearing

Review notice
and
receive packet

The Hearing

Open the record
and manage the
action

Post-Hearing

Close the record
and issue
written decision

Prehearing

- Receive the hearing packet;
- Audit the notice;
- Confirm the source of authority.

Receive the Hearing Packet

- This is prepared by staff ahead of the hearing.
- The hearing packet should include:
 - the notice,
 - relevant policy or lease provisions,
 - key records including exhibits or timelines;
- This packet needs to be shared with all parties before the hearing.
 - No trial by ambush.
 - Risk of delayed sharing of materials.

Receive the Hearing Packet

- Best practice:
 - The admission of the hearing packet as evidence is generally *stipulated* to, while weight and interpretation remain disputed.
 - What does it mean to “*stipulate*”?
 - Parties agree to its admission.
 - Anything not stipulated to needs to be admitted as evidence separately during the hearing.

A HEARING OFFICER MAY NOT CREATE THE PACKET

Audit the Notice

- Does the notice identify the factual basis, policy basis, and consequences?
 - Citation to Admin Plan, ACOP, HUD terms.
 - Note on vetting notices (checks / supervisory review).
- Would a reasonable person understand what is at issue and why?
- The notice sets the scope of the hearing.

Confirm Source of Authority

- **Identify the source of authority:**
 - ACOP;
 - Admin Plan;
 - Other.
- **Why?**
 - Your authority as a hearing officer may be limited.
 - A hearing officer is not a **judge**.
 - Binding power of judgments and escape hatches.

The Hearing

- Hearing Officers have discretion on how to hold their hearings.
- Best Practice:
 - Trial Like Process.
 - But it does not *need* to be exact.

General Order of Operations

- Hearing called to order
- Hearing Officer statement
- Opening Statements
 - From both parties.
- Case-in-chief
 - From both parties.
- Closing Statements
 - From both parties.

Call the Hearing to Order

1. Identify the matter, date, hearing officer, and method of appearance;
2. Identify the parties, representatives, witnesses, and interpreter;
3. Take up any preliminary matters, including accommodations, interpreter needs, hearing packet stipulation, and continuance requests.

Hearing Officer Statement

- Explain your neutral role and the issue
- Explain the outline of the hearing process;
 - It is best practice to avoid legalistic labeling here.
- Answer any final questions about the sequence of events to come before proceeding.

Agency Opening Statement

- *OPTIONAL*
- A short opening presentation that preview the evidence and requested outcome.
- A strong opening answers: what decision is requested, what facts matter, and what record support will be offered.
- **This has ZERO evidentiary value.**

Participant Opening Statement

- *OPTIONAL*
- Same as the agency opening statement.
- Openings **should not become** testimony, argument, or a substitute for exhibits.
- **This has ZERO evidentiary value.**

Agency Case-in-Chief

- The agency usually presents first because it issued the action
- Present witnesses, documents, timeline
- Tie evidence to the authority relied on in the notice

Witness Testimony

- During the Case-in-Chief:
 - Before testimony is given, the witness should be put under oath.
 - The Agency needs to call witnesses to testify.
 - We call this “Direct Examination”
 - After a Direct Examination is complete, the other side may ask questions.
 - We call this “Cross Examination”

Agency Case-in-Chief

- During this time, any non-stipulated parts of the hearing packet need to be admitted.
- Process to admit:
 - Have a witness testify that:
 1. They have personal knowledge of the item;
 2. The item appears to be a fair and accurate copy;
 - Then offer the item as an exhibit.
 - “We offer _____ as Exhibit 1”.
- When the Agency is done providing testimony, it “rests” its case-in-chief.

Participant / Applicant Case-in-Chief

- Present testimony, exhibits, defenses, and context
- Address disputed facts and policy application
- Raise mitigation or discretion if allowed by policy

Witness Testimony

- Same general rules apply.
- Ensure that the Participant / Applicant and all their witnesses are put under oath **before** testifying.
- *Raise your right hand*
- *Do you affirm that your testimony at this hearing will be the truth, the whole truth, and nothing but the truth?*

Questions by Hearing Officer

- During the case-in-chief of any party, the Hearing Officer **MAY** ask questions of the witnesses.
- Ask questions to help clarify misunderstandings or explain murky factual issues.
- Avoid questions that signal disbelief, coach a witness, or supply missing proof.

Keeping the Hearing On Track

- When **to intervene** in a case-in-chief:
 - New issues outside the notice
 - Needlessly cumulative evidence
 - Breach in decorum
- Best practice:
 - Be slow to intervene but be stern on the intervention.

Keeping the Hearing On Track

- When **not to intervene** in a case-in-chief:
 - To fix a party's missing proof
 - To suggest a better legal theory or argument

Closing Statements

- *OPTIONAL*
- Argument only.
- Recap what was presented and connect it to policy.
- **This has ZERO evidentiary value.**

Closing the Record

- State whether the record is closed.
- Identify any allowed post-hearing submissions.
- Set deadlines and response rights if anything remains open.
- Do not accept private follow-up outside the stated process.

Post-Hearing

- Burden of Proof
- Credibility Findings
- Decision Writing

Decide From the Record

- The written decision should rest only on evidence and argument received through the hearing process.
- If the evidence remains uncertain, explain how the burden of proof affected the outcome.
- What is the burden of proof?

- The Traditional Civil Standard of Proof.
 - By a Preponderance of the Evidence
 - *What is more likely?*
 - *50.0001%*
- *Preponderance of the evidence* is defined as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.



Credibility Findings

- Make credibility findings when a material fact turns on competing testimony or inconsistent records.
- Tie credibility to record-based reasons:
 - Consistency,
 - Detail,
 - Corroboration,
 - Opportunity to observe, and
 - Plausibility.

Example Decision Writing

Heading

Procedural Statement

Statement of Issue

Findings of Fact

Conclusions of Law

Order

Heading

HEARING OFFICER REPORT

Hearing Date: November 1, 2021

Hearing Officer: Shawn B. Reed

Re: [REDACTED]

Present: Brandon Engblom, General Counsel,
Greg A., HRA
[REDACTED], Tenant

Procedural Statement

PROCEDURAL STATEMENT

This matter came on for an appeal hearing before the undersigned hearing officer on November 1, 2021. This appeal hearing arose at [REDACTED] (“Tenant”) request following the HRA recommendation to terminate her lease for lease violations including repeated disturbances, property damage, and safety violations following an informal hearing dated March 2, 2021. (Correspondence dated March 2, 2021).

The Tenant appealed the decision by serving an appeal and a request for an accommodation on March 3, 2021. (Correspondence dated March 3, 2021). The Tenant also filed documents in an effort to establish that she was the victim of sexual assault. (*Id.*)

On March 29, 2021, HRA acknowledged receipt of the request for accommodation and requested further paperwork to be returned by April 12, 2021. (Correspondence dated March 29, 2021).

On April 12, 2021, the Tenant requested two week extension so as to finish her reasonable accommodation request. (Correspondence dated April 12, 2021).

Statement of Issue

STATEMENT OF ISSUE

The issue presented at this appeal hearing is whether HRA's recommendation to terminate the Tenant's housing is supported by a preponderance of the evidence.

Findings of Fact

2. On or about February 1, 2021, the Tenant was at the first floor entrance throwing papers around. (Hearing test. Greg A.). It was alleged that the Tenant also spit on or at a resident and made racial slurs to another tenant. (*Id.*)
3. The same day, the Tenant pulled the fire alarm which resulted in the building being evacuated. (*Id.*) The Tenant confirmed this in her testimony. (Hearing test. Tenant).
4. HRA staff made contact with the Tenant at her apartment. (Hearing test. Greg A.). She was agitated and explained that some of her laundry was stolen from the laundry room. (*Id.*) Tenant confirmed this during her testimony. (Hearing test. Tenant). She testified she did her laundry two days prior to the incident and left the items in the washer as she claimed the washer did not work. (*Id.*) When asked if she reported the malfunctioning machine to HRA, she responded, "I am a victim." (*Id.*)
5. During the contact with HRA following the first fire alarm, the Tenant terminated the contact by beginning to scream loudly and to swear. She then slammed her door on HRA staff. (Hearing test. Greg A.).

Conclusions of Law

CONCLUSIONS OF LAW

1. The Lease defined clear expectations of the Tenant. The Lease further made it clear that the Tenant's conduct on or about February 22, 2021 materially violated the Lease. The Tenant by pulling the fire alarm on multiple occasions on or about February 22, 2021 created a serious situation that threatened the health, safety, and peaceful enjoyment of the tenants and the staff. Further, the Tenant's own conduct apart from the fire alarms disturbed other tenants. Finally, the Tenant failed to follow the reasonable rules of HRA by damaging public housing property.
2. The Tenant did not deny pulling the fire alarms. Nor did she pull the fire alarms for the purpose of alerting the building to a hazard. The Tenant admitted doing so because she was angry.
3. The Tenant did not dispute her other conduct. Rather, she admitted that she was angry about the alleged thefts.

Order

- No example here.
- Just state what the outcome is.
 - The Termination is Upheld, Overturned, etc.

Too much of a hassle?

- You can contract for hearing officer services.

Contracting Out for Hearing Officers

- Outside officers can strengthen neutrality and capacity.
- Considerations:
 - Type of hearings needed;
 - Legal experience;
 - Pricing.
 - Flat fee vs hourly.