



TACOMA HOUSING AUTHORITY

RESOLUTION 2017-06-28 (6)

Date: June 28, 2017
To: THA Board of Commissioners
From: Michael Mirra
Executive Director
Re: Approving Litigation Against HUD re Proration of 2012 Operating Subsidy

This resolution would authorize THA to join litigation against HUD challenging its proration of 2012 operating subsidies.

Background

NAHRO (National Association of Housing and Redevelopment Officials) and PHADA (Public Housing Authority Directors Association) invite THA to join litigation against HUD that they will manage on behalf of up to 1,300 housing authorities. I attach a letter from NAHRO and PHADA explaining the basis for the litigation. I also attach an email exchange between the lead counsel to Ken Shalik. Those emails provide some further details. Joining the litigation would cost THA \$3,000 as our contribution to the filing fee and attorney's fees. We have until August 15, 2017 to join the litigation.

The Claim:

In 2012, Congress did not appropriate enough money to cover what HUD's formula would have provided to operate the public housing program. Instead, it "prorated" the amount down to 81.04%. We should have received that percentage of our formula amount in a straight proration. Instead, we and many other housing authorities received less than that. The reason we received less is that instead of a straight proration HUD, with Congressional approval, also considered our "excess reserves" and further reduced our funding below the proration level. The litigation will claim that HUD violated the Annual Contribution Contract (ACC) when it did that.

THA's Potential Recovery

THA's claim would be for \$225,522. That is the amount our 2012 funding for public housing operations fell short of the straight 81.04% proration.

The Chances of Success

NAHRO and PHADA judge the chances of success to be very good because a first round of litigation on this exact issue was successful. On January 18, 2017, the United States Court of

Federal Claims ruled in favor of 309 plaintiff housing authorities bringing the claim, including 10 from Washington State. The court awarded them an aggregate of \$135 million. The main uncertainty for a second round of litigation arises because HUD may appeal that first judgment and it may prevail on appeal. HUD has until August 8, 2017 to file its appeal.

The Risks

The plaintiff's attorney advises us that THA risks only its \$3,000 contribution to the fee.

Other risks may arise if HUD retaliates in some way against the plaintiff housing authorities. The attorney advises that he knows of no such retaliation against the first round of plaintiffs or against other public housing authorities who have sued HUD.

Who will Manage the Litigation

NAHRO and PHADA will manage the litigation, as they did the first round of litigation.

Recommendation

I recommend that the Board authorize THA's participation in this litigation and commit \$3,000 for THA's share of the filing fee and attorney's fees.



May 17, 2017

Tacoma Housing Authority
902 South L Street, #2A 98405
Tacoma, WA

RECEIVED

MAY 25 2017
Tacoma Housing Authority
902 South L Street
Tacoma, WA 98405
www.tacomahousing.org

RE: Money Damages Owed to Your Housing Authority

Dear Executive Director:

As you may have heard, we achieved a successful outcome in a lawsuit challenging the operating reserve offset that Congress and HUD imposed on your 2012 operating subsidies. In a decision handed down on January 18, 2017, the United States Court of Federal Claims (Claims Court) held that the operating reserve offset was a breach of the Annual Contributions Contract between HUD and Public Housing Agencies.

The Claims Court found that the 2012 appropriation for operating subsidies should have been prorated for all housing authorities. The Claims Court agreed with us that any HA that received operating subsidies that were less than 81.04 percent of its eligibility amount was entitled to money damages equal to the difference. **In this lawsuit, 309 housing authority plaintiffs were awarded a total of over \$135 million.**

You are among a large number of HAs who would have been entitled to money damages if you had joined the lawsuit. **The total amount of money damages for you and the other HAs that did not participate in the lawsuit is over \$230 million.** All this money will be lost if a second lawsuit is not filed before November 18, 2017, which is the end of the six-year statute of limitations period for the filing of a breach of contract lawsuit against the United States. To avoid this, we are advising you of your legal option to participate in a second lawsuit against HUD. The estimated amount of money damages you are eligible to receive, based on the Claims Court's January 18 decision, is \$225,522.

As we did for the first lawsuit, PHADA and NAHRO will administer a second lawsuit in order for HAs, like yours, to have the opportunity to obtain the money damages to which you are entitled. As with the first lawsuit, the Washington, D.C. law firm of Coan and Lyons will manage the litigation and provide necessary legal services. That law firm developed the strategy, and represented the HAs that were the plaintiffs, in the first lawsuit that we won. PHADA and NAHRO will not be parties to the second lawsuit. We will not benefit in any way from the result of the second lawsuit, as we similarly will not benefit from the result of the first lawsuit. PHADA and NAHRO's role in this second lawsuit is solely advisory and administrative. Additionally we cannot guarantee you will receive money damages since there is a possibility that HUD might appeal the Claims Court decision and win that appeal.



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Recommendation

I recommend that the Board authorize THA's participation in this litigation and commit \$3,000 for THA's share of the filing fee and attorney's fees.



TACOMA HOUSING AUTHORITY

RESOLUTION 2017-06-28 (6) **(Authorizing THA's Participation in Litigation Against HUD re 2012 Shortfall of Operating Subsidy)**

A **RESOLUTION** of the Board of Commissioners of the Housing Authority of the City of Tacoma

WHEREAS, On January 18, 2017, the United State Court of Federal Claims ruled that HUD, in 2012, underfunded public housing operations for 309 plaintiff public housing authorities in violation of their Annual Contribution Contract (ACC); and

WHEREAS, NAHRO (National Association of Housing and Redevelopment Officials) and PHADA (Public Housing Authority Directors Association) managed that litigation for the plaintiff housing authorities; and

WHEREAS, NAHRO and PHADA now plan on managing a second round of litigation on the same issue on behalf of housing authorities who did not participate in the first round; and

WHEREAS, NAHRO and PHADA invite THA to join the second litigation; and

WHEREAS, THA's share of recovery from a successful ruling would be \$225,522; and

WHEREAS, Participating in the litigation would cost THA \$3,000, which is its share of the filing fee and the attorney's fees; now, therefore, be it

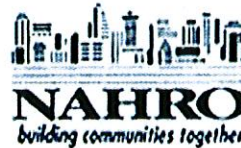
Resolved by the Board of Commissioners of the Housing Authority of the City of Tacoma, Washington as follows:

1. THA is authorized to participate in the litigation that NAHRO and PHADA will manage against HUD seeking recovery for underfunding in 2012 of public housing operations.
2. THA may commit \$3,000 of its non-federal funding for its share of the filing fee and attorney's fees.
3. The executive director is authorized to manage THA's participation in the litigation, including approving any compromise of its claims.

Approved: June 28, 2017

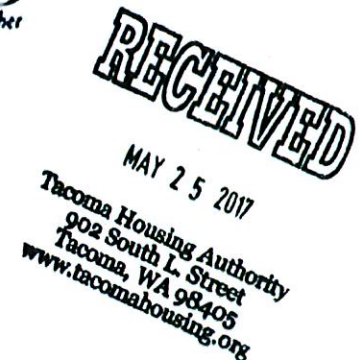


Dr. Arthur C. Banks, Chair



May 17, 2017

Tacoma Housing Authority
902 South L Street, #2A 98405
Tacoma, WA



RE: Money Damages Owed to Your Housing Authority

Dear Executive Director:

As you may have heard, we achieved a successful outcome in a lawsuit challenging the operating reserve offset that Congress and HUD imposed on your 2012 operating subsidies. In a decision handed down on January 18, 2017, the United States Court of Federal Claims (Claims Court) held that the operating reserve offset was a breach of the Annual Contributions Contract between HUD and Public Housing Agencies.

The Claims Court found that the 2012 appropriation for operating subsidies should have been prorated for all housing authorities. The Claims Court agreed with us that any HA that received operating subsidies that were less than 81.04 percent of its eligibility amount was entitled to money damages equal to the difference. **In this lawsuit, 309 housing authority plaintiffs were awarded a total of over \$135 million.**

You are among a large number of HAs who would have been entitled to money damages if you had joined the lawsuit. **The total amount of money damages for you and the other HAs that did not participate in the lawsuit is over \$230 million.** All this money will be lost if a second lawsuit is not filed before November 18, 2017, which is the end of the six-year statute of limitations period for the filing of a breach of contract lawsuit against the United States. To avoid this, we are advising you of your legal option to participate in a second lawsuit against HUD. The estimated amount of money damages you are eligible to receive, based on the Claims Court's January 18 decision, is \$225522

As we did for the first lawsuit, PHADA and NAHRO will administer a second lawsuit in order for HAs, like yours, to have the opportunity to obtain the money damages to which you are entitled. As with the first lawsuit, the Washington, D.C. law firm of Coan and Lyons will manage the litigation and provide necessary legal services. That law firm developed the strategy, and represented the HAs that were the plaintiffs, in the first lawsuit that we won. PHADA and NAHRO will not be parties to the second lawsuit. We will not benefit in any way from the result of the second lawsuit, as we similarly will not benefit from the result of the first lawsuit. PHADA and NAHRO's role in this second lawsuit is solely advisory and administrative. Additionally we cannot guarantee you will receive money damages since there is a possibility that HUD might appeal the Claims Court decision and win that appeal.

We do not know yet whether HUD will appeal the January 18 decision to the United States Court of Appeals for the Federal Circuit, the court to which appeals from the Claims Court are made. We will let you know as soon as we know. Meanwhile, time is short. If you want to file suit to receive money damages, you should obtain board approval to participate in the second lawsuit and identify the **non-federal funds** you can use to pay legal fees as soon as possible. Even if HUD appeals the decision, you will still need to participate in a lawsuit filed before November 18, 2017, to receive the money damages to which you are entitled for HUD's breach of your ACC.

The fee for small HAs (less than 250 units) is \$1,000. The fee for HAs with 250 or more units is \$3,000. These amounts include a \$400 filing fee the Claims Court is expected to charge each plaintiff. These fees were determined, in part, by the costs incurred in the first lawsuit. Again, **the money used to pay for the legal fees must come from non-federal funds.**

If you wish to participate in this lawsuit, please so indicate in a **signed letter, showing the full formal name of your agency, the name of a contact person with that person's email address and phone number**, and include a check made out to "Operating Reserves Litigation" for the requisite amount. Send the payment to: PHADA 511 Capitol Court NE Washington DC 20002. **The submission deadline is August 15, 2017.**

If you have questions, please email them to ccoan@coanlyons.com and raykjames@comcast.net. Thank you.

Sincerely,



Timothy G. Kaiser
PHADA Executive Director



John Bohm
NAHRO Acting CEO

Michael Mirra

From: RAYMOND James <raykames@comcast.net>
Sent: Tuesday, June 20, 2017 1:21 PM
To: Ken Shalik; ccoan@coanlyons.com
Subject: Re: Money Damages owed Housing Authorities

Follow Up Flag: Follow up
Flag Status: Flagged

In the first lawsuit, 355 HAs, including 10 in Washington State, signed up to be plaintiffs. This was the first ever lawsuit in the Federal Claims Court asking for money damages for a breach of the ACC. You can talk to John Harmon, who represented two Washington agencies in the suit. (jharmon@bwcha.org).

Your only risk is that you would lose the \$3000 fee if the suit was not successful. The fee for the second suit is substantially less than the fee for the first suit: 50% lower for small agencies and 25% lower for larger agencies.

In the Claims Court decision in our favor our plaintiffs were awarded over \$136 million in damages. HUD has until about Aug. 8 to decide whether to appeal this decision.

Your potential damages of \$225,522 were calculated as follows: 81.04% of your eligibility amount minus the operating subsidy you received in 2012. The basis of our claim is that the ACC incorporated the HUD operating subsidy regulations, that those regulations require that insufficient operating subsidy appropriations be prorated, that the 2012 HUD appropriations Act instead allocated operating subsidies based on an HA's excess reserves that resulted in prorations ranging from zero to just less than 95%, and that if the 2012 operating subsidy appropriations were prorated as required by the ACC the proration would be 81.04%.

We have sued HUD multiple times on behalf of both public housing agencies and private owners of assisted housing and we are not aware of any retaliation against our plaintiffs by HUD. Given that we won the first suit, we expect that most HAs with potential damages will want to participate in a second suit before the statute of limitations bars further litigation on these claims. The only limitation on the second suit being of enormous size (there are over 1300 potential plaintiffs) is that many small agencies have trouble finding non-federal funds for the fee. In our first suit many small agency plaintiffs were assisted by state associations and the same assistance appears to be available in the second suit. I have no doubt you would be joined by hundreds of fellow plaintiffs in a second suit.

On June 20, 2017 at 3:28 PM Ken Shalik <kshalik@tacomahousing.org> wrote:

Good afternoon:

We are in receipt of the letter from PHADA regarding the Operating Reserves Litigation for the 2012 Operating Subsidy.

We are interested in investigating further what this might mean for the Tacoma Housing Authority.

Is there a way you can let us know who received funds in the current settlement so we can find out about the process and what occurred. Also, it would be helpful to obtain a little more context, what to expect, and also what the risk is to the Housing Authority.

You also provided a figure to what we would be eligible to receive. Could you let us know what that was based upon.

Also, could you let us know how many HA's have signed up for the second round of litigation. As this is a lawsuit against HUD, it comes with it's own set of risks, and we want to ensure we are thoughtful in making a decision to move forward on this. It is important we have significant enough information to present to our board in order for them to sign off on us joining the second lawsuit.

Thank you for your consideration.

Ken

Kenneth Shalik

Director of Finance

Tacoma Housing Authority

902 South L Street

Tacoma, WA 98405

253-207-4425

kshalik@tacomahousing.org

www.tacomahousing.org

