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Opinion No. 10-105

Preemption of HUD regulations by the Administrative Procedures Act

QUESTION

Do the United States Department of Housing and Urban Development (HUD) regulations set out in 24 C.F.R. §§ 982 *et seq.* impliedly preempt the requirements of the Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301 *et seq.*?

OPINION

No. The HUD regulations do not preempt the Administrative Procedures Act under any of the theories of implied preemption.

ANALYSIS

Section 8 of the United States Housing Act of 1937 authorizes a Federal Housing Choice Voucher program to provide low income families with decent, safe, and sanitary housing at affordable rents. The Tennessee Housing Development Agency (THDA) contracts with HUD to administer the Federal Housing Choice Voucher program and receives allocations of Section 8 Rental Assistance funding to do so. THDA administers the Section 8 Housing Choice Voucher Program (the Program) statewide consistent with federal requirements as provided in an administrative plan and local policies. THDA, the administrative plan, and local policies must comply with all federal HUD regulations as well as state and federal law regarding administration of the Program. *See, e.g.,* 24 C.F.R. §§ 982.52; 982.53; 982.155; and 982.308.

When THDA seeks to terminate a participant from the Program, it must give the participant notice and an opportunity to be heard. Such proceedings are governed by both state and federal law. *See* Tenn. Code Ann. §§ 4-5-301 *et seq.*; 24 C.F.R. §§ 982 *et seq.* Federal regulations require THDA to notify the participant and have a single hearing. 24 C.F.R. § 982.555(c)-(e). Under the federal regulations, there is no provision for appeal by either the participant or THDA; however, THDA is not bound by the decision if the hearing officer attempts to decide issues that are not subject to review or the decision is contrary to HUD regulations, federal, state, or local law. 24 C.F.R. § 982.555(f). The regulation governing discovery provides only for review and copying of documents. 24 C.F.R. § 982.555(e)(2). Both

parties must be able to present proof and question witnesses, but admissibility of evidence is not governed by the rules of evidence. 24 C.F.R. § 982.555(e)(5). THDA must proceed in a "reasonably expeditious manner" once a family requests a hearing. 24 C.F.R. § 982.555(d).

In addition to its obligations under federal law, THDA is a state agency to which the Administrative Procedures Act (APA) applies.[1] Tenn. Code Ann. § 4-5-102(2). Therefore, the APA's requirements also apply when THDA seeks to terminate an individual's voucher. Under the APA, THDA must comply with discovery, and the administrative decision may be appealed to Chancery Court, and thereafter to the Court of Appeals. *See* Tenn. Code Ann. §§ 4-5-311, 322, 323. Thus, the APA provides a Program participant due process protection that is at least equal to, and in some respects greater than, that provided by HUD.

You have asked whether these differences between the HUD regulations and the APA requirements impliedly preempt the APA with regard to Program hearings. As explained below, we do not believe that the HUD regulations preempt state law under any theory of implied preemption.

The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. 6, cl. 2. Congressional intent determines whether a federal statute preempts state law. *Wadlington v. Miles, Inc.*, 922 S.W.2d 520, 522 (Tenn. Ct. App. 1996). "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Thus, courts should work from the presumption that powers generally reserved to the states are not displaced by federal enactment unless that was Congress' clear intent. *California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 325 (1997).

Preemption may result from legislation by Congress itself or from the action of a federal agency acting within the scope of its authority. *City of New York v. F.C.C.*, 486 U.S. 57, 63-64 (1988). When a federal agency acts to preempt state law, it must do so specifically:

> As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. . . . Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and

[1] A participant in the Program has a protected property interest in his or her housing voucher, *Davis v. Mansfield Metropolitan Housing Authority*, 751 F.2d 180, 184 (6th Cir. 1984), and therefore, a constitutional right to a contested case hearing under the APA. Tenn. Code Ann. § 4-5-102(3).

> complexity of its regulations indicate that the agency did in fact intend to pre-empt.

Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 717-718 (1985). Thus, implied preemption by federal regulation is even more difficult to demonstrate than when Congress legislates directly.

The Supremacy Clause results in federal preemption of state law when: (1) Congress expressly preempts state law; (2) Congress has completely supplanted state law in that field; (3) adherence to both federal and state law is impossible; or (4) the state law impedes the achievement of the objectives of Congress. *Wadlington*, 922 S.W.2d at 522.

As there is no express preemption in the HUD regulations, any preemption must be implied. In *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287 (1995), the Supreme Court summarized the principles of implied preemption:

> We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. We have found implied conflict preemption where it is "impossible for a private party to comply with both state and federal requirements," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 287 (citations omitted).

There are three kinds of implied preemption. The first is "field preemption," which occurs when Congress intends federal law to occupy a field exclusively. *Wadlington*, 922 S.W.2d at 522. If the context and substance of the congressional enactments "indicate an intent to occupy a given field to the exclusion of state law," state law is preempted. *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 300 (1988). There are no "precise guidelines" for determining whether or how broadly field preemption has occurred, because "each case turns on the peculiarities and special features of the federal regulatory scheme in question."*City of Burbank v. Lockheed Air Terminal Inc.,* 312 U.S. 52, 67 (1941).

Here, the HUD regulations clearly anticipate state regulation of a Section 8 Public Housing Authority (PHA) and its discretionary policies. For example, HUD regulations require THDA to review leases entered into under the Program for compliance with state and local law. 24 C.F.R. § 982.308. The rent charged to a Program participant may be subject to rent control under state or local law. 24 C.F.R. § 982.509. A PHA may disregard a hearing decision that is contrary to state law or HUD regulations. 24 C.F.R. § 982.555(f). This regulatory language provides unambiguous evidence that the HUD regulations do not completely preempt state laws by occupying the entire field of regulation. *See Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

The second category of implied preemption is direct conflict preemption. *Wadlington*, 922 S.W.2d at 522. Direct conflict preemption occurs when "there is an inescapable contradiction between state and federal law – for example, „where it is impossible for a private party to comply with both state and federal law."' *Leggett v. Duke Energy Corp*., 308 S.W.3d 843, 853 (Tenn. 2010) (quoting *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 372-73 (2000)). While the APA regulations provide more due process than the HUD requirements, an APA hearing would not violate the HUD standards.

Further, although the APA regulations differ from their HUD counterparts in the increased due process protections provided to a Program participant, "[a]bsent congressional intent to the contrary, a state is free to promulgate standards that are more stringent than federal standards." *Schoolcraft Memorial Hosp. v. Michigan Dept. of Community Health*, 570 F.Supp.2d 949 (W.D. Mich., 2008) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)). Unless Congress makes a contrary intent clear, it is presumed that federal law establishes a floor, not a ceiling. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 146. Here, the HUD regulations provide a floor for due process. The APA regulations, which provide additional due process protections, are not invalid merely because they build upon that floor.

The final kind of implied preemption occurs when state law impedes the achievement of the objectives of Congress. *Wadlington*, 922 S.W.2d at 522. Federal regulations require an "expeditious hearing process" for Program participants whose assistance is being terminated. 24 C.F.R. § 982.555(d). The background facts provided with your opinion request indicate that an appeal process under the HUD regulations would take approximately 75 days, whereas the appeal process under the APA takes approximately 120-150 days. Therefore, there is some tension between the enhanced due process protections provided by the APA and the HUD requirement for an expeditious hearing process. However, reading 24 C.F.R. § 982.555 in its entirety, the purpose of the regulation is clearly to protect participants from unfair or improper termination from the Program. In balancing the requirement for an expeditious hearing with the added due process protections afforded by the APA, we believe that the APA's more generous protections enhance rather than frustrate the due process protections that Congress intended.

Federal law does not preempt Tennessee's provision in the APA of more generous due process than is found in the relevant HUD regulations under any of the three recognized categories of implied preemption. Accordingly, the APA procedures apply when THDA seeks to terminate a participant from the Housing Choice Voucher Program.

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