

WHAT TO DO WHEN THE HEAT GOES OFF

As winter approaches and the heating season begins again, tenants once again face the problem of getting adequate heat in their apartments.

Chapter II of the State Sanitary Code requires that every landlord provide and maintain facilities to heat every habitable room and bathroom in a dwelling unit. From 16 September through 14 June, each room must be heated to a temperature of at least 68 degrees between 7 a.m. and 11 p.m. At night, the minimum temperature is 64 degrees. Excessive heat, hotter than 78 degrees, is also a violation. Unless you have agreed in a written lease to pay for the fuel, it is the landlord's responsibility to do so.

If the heat goes off, the first thing to do is call the landlord. Mechanical equipment does break down, and a landlord with the best of intentions cannot repair it until s/he knows it is broken. If you cannot reach the landlord, or you reach them and the heat isn't restored, the next step is to call the local code enforcement agency and ask for an inspection. In most Massachusetts communities, it is called the Board of Health. In some cities and larger towns, it may be called the Inspectional Services Department or the Health Department. Usually, the agency is open only during normal working hours, and an inspector will come during those hours only. When you call try to find out when the inspector will come. If you cannot be home, try to arrange for a neighbor to let the inspector in. For a heat problem the code requires an inspection within 24 hours.

When the inspector comes, s/he will take a temperature reading and leave you a copy of the inspection report. If a violation is found, a written order will be sent to your landlord, and you will receive a copy in the mail. In some communities, the police will take a temperature reading at night and on weekends, when the code enforcement agency is closed.

So far we have been talking about the isolated heat outage. What of the chronic problem – the heating system in poor repair or the landlord whose zeal to save money on fuel has become excessive? Such cases demand persistent action leading to the more serious remedy of rent withholding.

Call the code enforcement agency whenever the heat goes out, as often as is reasonable without annoying the agency staff. Build up an official record of heat complaints. But supplement the official record by keeping your own log of temperature measurements. Record the date, time, and location of each measurement, as well as the temperature. Take temperature measurements at least five feet up from the floor and five feet in from any outside wall. Placing a thermometer permanently in an appropriate location is the best way. If you can't do that, remember to wait long enough for the thermometer to reach the correct temperature. And keep track of how long you waited, so that, if necessary, you can testify about it accurately in court.

With the ubiquity of cell phone cameras, some tenants keep a temperature log by taking a picture of the thermometer or, sometimes, the thermostat, where there is an electrical thermostat which shows temperature. If your camera will do a date stamp on the picture, showing the time and date the picture was taken, that is the most preferable. Otherwise, keep your own log. Make sure you copy all pictures to a computer and back them up. We've seen pictures get corrupted in the camera because of low batteries or other issues, and the pictures are then lost as a record of your temperature measurements.

Failure to provide adequate heat is a "breach of warranty of habitability." This means that the law allows you to take deductions from your rent. You cannot be evicted for doing so provided that you follow the rules:

- First, you cannot be in arrears in your rent. Be careful about this, If the official due date of your rent is the first of the month, you are technically in arrears on the second if you haven't paid yet.
- Second, you must be able to show the nature and extent of the lack of heat. That is the reason for building an official record of complaints and keeping your own temperature log.
- Third, you must be able to show that, before the due date of your rent, and while you were not in arrears, the landlord knew of the situation. Do not rely on oral communications for this. The landlord can always deny an oral conversation. Show this through orders from the code agency and your own written correspondence with your landlord. Write the landlord a letter or email about the chronic heat problem, stating that you will withhold rent if it isn't corrected. Send it well before the due date of your rent payment (you can deliver a letter in person if you wish). Make sure you date the letter and keep a copy for yourself. Keep these copies, and the notices from the code enforcement agency, in a safe place. Archive and back up all emails and make sure they have an accurate date on them. You will need to prove that when the landlord got the letter or email, he or she knew about the condition.

The law presumes that a letter placed in the U.S. Mail was received within a short time. So far, there is no such presumption for email. So keep copies of emails back from the landlord which reply to your email. This will prove that the landlord received it.

When you withhold rent, be sure that you put the money aside so that you won't be tempted to spend it. If you have a court battle with your landlord, you will seem much more credible if you have all the money set aside. Many lawyers (this office included) insist on holding the withheld rent in an escrow account as a condition of representation.

When the heating condition has been corrected, it is time to resume paying rent and to settle with the landlord for the back rent that you withheld. You are entitled to a reduction of rent (called an "abatement") for the time that you were without adequate heat. You may need to negotiate this abatement with your landlord.

How much of an abatement should you claim? There is no exact rule, The regular rent for your apartment represents the value of the apartment in proper condition with adequate heat. An apartment is rarely worth zero rent, unless it is in really poor condition. We generally feel that an apartment without heat is worth one-fourth to one-half its normal value. In other words, for each day of inadequate heat, you take off one-half to three-quarters of a day's rent, depending on the

severity of the cold (figure a day's rent as your normal monthly rent divided by thirty days – no matter how many days that month actually happens to have).

If the landlord has deliberately failed to provide heat, you may be entitled to minimum damages of three months' rent plus your attorneys fees, which the law allows you to deduct from rent due.

The landlord may respond by bringing eviction proceedings against you. If you have followed these procedures properly, you should be protected against eviction. In some cases, the court may even order the landlord to pay for your attorney's fees. If you have a good claim against your landlord, many lawyers will represent you on a "contingent fee" basis. This means that the lawyer's fee will come out of the money that you get (including the withheld rent that you don't have to pay) and the lawyer will not be paid if you aren't awarded some money from the landlord.

Some landlords try other retaliatory tactics. If your landlord tries to evict you, raise your rent, or otherwise retaliate against you within six months after you have reported code violations to the code enforcement agency or *in writing* to the landlord, not only can the landlord not evict you, but you can recover damages from him or her, plus attorneys' fees. If your landlord yells at you, you can hang up the phone or order him or her out of your apartment, and you can call the police. It is illegal for the landlord to shut off utilities or lock you out of the apartment.

If you have inadequate heat, others in the building may also. There is strength in numbers. Landlords like to claim that you are the only tenant complaining. Tenants can often help themselves by organizing to deal with inadequate heat, rent increases, and the other problems of rental living. So stand your ground and stick up for your rights. Only then will your landlord learn that it doesn't pay to skimp on the heat.

This is a revision of an article which originally appeared in the *Brookline Tab* on 29 October 1980. Copyright © 1980, 2010, 2016 A. Joseph Ross