



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
REGION VII

Gateway Tower II, Room 200
400 State Avenue
Kansas City, KS 66101-2406
HUD Home Page: www.hud.gov

February 4, 2010

MEMORANDUM FOR: [REDACTED]

for Thomas J. Coleman
FROM: Thomas J. Coleman, Regional Counsel, 7AC

SUBJECT: [REDACTED]

This memorandum responds to your request for guidance in connection with the criminal background screening used at the above-referenced Section 8 New Construction/Substantial Rehabilitation project. Based on discussions with your office, Counsel understands that the project management, [REDACTED] recently hired a new vendor to conduct criminal background checks. The new vendor's criminal background checks are apparently more extensive and go further back in time than those of the previous vendor, revealing criminal activities that may have gone unnoticed under the previous vendor's background checks. Additionally, [REDACTED] recently revised its resident selection criteria such that the vendor conducts criminal background checks not only on applicants, but also on all current residents in connection with their annual recertification interviews. As a result of the new vendor's background checks, [REDACTED] threatened to evict some residents based on: 1) criminal activities that occurred prior to their admission to the project; and 2) the submission of false information to management concerning criminal history. You inquired whether such evictions would conflict with HUD's rules and regulations.

Conclusions

In response to your inquiry, Counsel researched the applicable statutes, HUD regulations, and Housing Handbook 4350.3 ("the Handbook"), and reviewed the documents attached to your memorandum. As detailed below, Counsel determined that:

- In general, an eviction at a HUD-assisted project based on the criminal activity of a resident must be related to a crime that occurs during the course of the resident's tenancy.
- Landlords at HUD-assisted projects must deny admission to applicants who have committed certain crimes. Landlords may deny admission to applicants based on

other criminal activities if those criminal activities occurred during a reasonable time before the time of application.

- If the criminal activity of a resident that occurred prior to admission ("pre-admission criminal activity") was not revealed at the application stage due to a failure of the criminal background check (such as error, oversight, or inadequate technology) and the activity should have resulted in a mandatory denial of admission, the resident must be evicted.
- If the pre-admission criminal activity of a resident was not revealed upon admission due to failure of the background check and the activity should have resulted in a denial of admission under the landlord's tenant selection plan (as it existed at the time of admission), the landlord may evict the tenant.
- If the criminal activity of a resident was not revealed due to the resident's submission of false information, the resident may be evicted.
- Based on these conclusions, [REDACTED]'s resident selection criteria must be revised.

Analysis

Lease Termination Based on Crime

The Quality Housing and Work Responsibility Act of 1998 ("QHWRA"), codified, in part, at Section 1437f of Title 42 of the United States Code ("42 U.S.C."), created new legal requirements regarding the leasing of units at HUD-assisted projects. With regard to lease requirements related to lease termination based on crimes, many of QHWRA's provisions are restated in Sections 5.858 and 5.859 of Title 24 of the Code of Federal Regulations ("24 CFR"). Under 24 CFR Section 5.858, the landlord of a HUD-assisted project may terminate a lease if a drug-related crime was "engaged in on or near the premises, by any tenant, household member, or guest, and any such activity engaged in on the premises by any other person under the tenant's control." Landlords may also terminate a lease based on other types of criminal activity under 24 CFR Section 5.859 if that activity "threatens the health, safety, or right to peaceful enjoyment of the premises by other residents" or "persons residing in the immediate vicinity of the premises." These statutory and regulatory requirements are further restated in the Model Lease for Subsidized Programs ("the Model Lease"), which Section 8 projects such as [REDACTED] are required to use under figure 6-2 of the Handbook.

In connection with evictions for criminal activity, the regulations do not explicitly address the timing of the criminal activity. However, 42 U.S.C. Section 1437f(d)(1)(iii) provides, in part:

[D]uring the term of the lease, any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other tenants . . . or . . . by persons residing in the immediate vicinity of the premises, or any drug-related criminal activity . . . shall be cause for termination of tenancy.

(Emphasis added). Accordingly, QHWRA authorizes landlords of HUD-assisted projects to evict residents for criminal activity if that activity occurs during the course of their

leases. Neither QWHRA nor the regulations address evictions based on pre-admission criminal activity.

Denying Admission to a Project

As detailed below, criminal history must be considered when a landlord decides whether to accept an application for residency. In fact, under certain circumstances, landlords are required to deny admission to their projects based on the applicant's criminal history. For example, under 24 CFR Section 5.854(a), landlords are prohibited from admitting an applicant if the applicant, or any member of the applicant's household, "has been evicted from federally assisted housing for drug-related criminal activity." This prohibition remains in place for three years from the date of eviction (with two exceptions: recovering addicts who have completed rehabilitation; and families in which the criminal member no longer resides in the household). Landlords are also prohibited from admitting persons who have a pattern of illegal drug use (24 CFR Section 5.854(b)(2)) or are "subject to a lifetime registration requirement under a State sex offender registration program" (24 CFR Section 5.856).

In addition to the conditions under which landlords are prohibited from admitting persons with criminal histories, HUD regulations detail situations in which landlords have discretion to deny admission based on criminal history. Under 24 CFR Section 5.855(a), landlords may deny admission to their projects if the applicant "is currently engaging in, or has engaged in during a reasonable time before the admission decision: (1) drug-related criminal activity; (2) violent criminal activity; [or] (3) other criminal activity" that would threaten other residents or the owner. While "reasonable time before the admission decision" is not defined in QWHRA or the regulations, section 4-7(C)(4)(c) of the Handbook requires owners denying admission under 24 CFR Section 5.855(a) to define "reasonable time" in their tenant selection plans.¹ Thus, if a landlord determines that an applicant committed assault three years ago, and, for assault, the landlord's tenant selection plan defines the "reasonable time" as four years before the admission decision, the landlord would be authorized to deny the applicant admission to the project.

Additionally, Counsel determined that, while landlords are free to revise the definition of "reasonable time" under their tenant selection plans, landlords cannot apply those revised definitions to existing residents. For example, assume a resident committed a violent crime in 2005 and is admitted to a HUD-assisted project in 2009. At the time of admission, the landlord's definition of "reasonable time" is three years before the admission decision. In 2010, if the landlord redefines that term to mean five years before the admission decision, the landlord cannot use that new definition to evict the resident admitted in 2009. In other words, once a resident is properly admitted to a project, the landlord cannot change the definition of "reasonable time" and apply that new definition retroactively to evict the resident.

¹ Counsel notes that owners can implement different reasonable time standards (for both admission and termination decisions) based on the nature of the crime. Thus, an owner may use a longer time period for violent crimes than for less serious crimes.

Lease Termination Based on Pre-admission Criminal Activity

While HUD's regulations set parameters for lease termination resulting from events occurring during tenancy and denial of admission, the regulations do not squarely address whether landlords at HUD-assisted projects can terminate leases based on pre-admission crimes that were not discovered during the application process. The following example illustrates the issue: in 2000, the landlord of a HUD-assisted project located in Missouri approved the application of John Doe. The vendor performing the criminal background check failed to discover that John committed a crime in Indiana in 1998. John has not engaged in any subsequent criminal activity. If the vendor discovers the crime from 1998 during John's annual recertification in 2010, can the landlord terminate John's lease? As detailed below, the answer to this question depends on the nature of the crime and the landlord's tenant selection plan as it existed in 2000.

As discussed above, landlords at HUD-assisted projects are required to deny the applications of persons who have committed certain crimes. For example, if an applicant's crime results in the applicant's placement on a lifetime sex offender list, the landlord must reject the application, regardless of when the crime occurred. Thus, continuing the example above, if John Doe's crime in 1998 resulted in John's registration as a lifetime sex offender in Indiana, the landlord was required to reject his application in 2000. Since the landlord violated 24 CFR Section 5.856 by admitting John, the landlord must cure the violation by terminating his lease upon discovery of the crime in 2010. Accordingly, if a landlord violates HUD's requirements by accepting an applicant who committed a crime that should have resulted in a mandatory denial of the application, the landlord must terminate the applicant's lease upon learning of the crime.

In contrast, landlords are allowed (but not required) to deny admission to applicants who have committed crimes that fall under certain categories, so long as those crimes were committed "during a reasonable time before the admission decision" (see 24 CFR Section 5.855 and the discussion above under "Denying Admission to a Project"). For example, a landlord can exercise this discretion by stating in its tenant selection plan that it will not accept applicants who have committed a violent crime at any time during the three years prior to the application. If the landlord at John Doe's project had such a policy on violent criminals in its 2000 tenant selection plan, and John Doe's crime in 1998 was armed robbery, then that crime should have disqualified him from being admitted in 2000. Since John was not properly admitted to the project, the landlord is authorized to terminate John's lease upon discovering the crime in 2010. On the other hand, if John's 1998 crime was a non-violent crime, such as tax evasion, then John was properly admitted under the project's 2000 tenant selection plan and the landlord could only evict him based on: violating the lease; and/or HUD's eviction regulations. In other words, the landlord could not use that crime as the basis for an eviction. In sum, if a resident's pre-admission criminal activity should have led to a discretionary denial of admission based on noncompliance with the landlord's tenant selection plan, a landlord may terminate the resident's lease.

Counsel emphasizes, however, that unless a resident's pre-admission crime should have resulted in a mandatory rejection of the application, termination of tenancy based on pre-admission crimes is a discretionary matter for the landlord. Thus, if John's 1998 crime was armed robbery, but he has not engaged in criminal activity since that time and has otherwise been a good resident, the landlord could reasonably decide to allow John to continue living at the project.

Lease Termination Based on Submission of False Information

Figure 6-2 of the Handbook provides that owners of Section 8 New Construction/Substantial Rehabilitation projects must use HUD's Model Lease for Subsidized Programs ("the Model Lease"). Under paragraph 25 of the Model Lease, "knowingly giving the Landlord false information regarding income or other factors considered in determining Tenant's eligibility and rent is a material noncompliance with the lease subject to termination of tenancy." Accordingly, while pre-admission crimes can only serve as the basis for lease termination in the limited circumstances discussed above, landlords may terminate leases based on the submission of false information about those crimes.

Attached to your inquiry was a Notice of Termination of Tenancy ("the Notice") addressed to a resident of the project and dated April 24, 2009. (Counsel understands the management company later decided not to pursue this termination of tenancy). In the fourth paragraph, the Notice states that the landlord is terminating the resident's lease based in part on "knowledge gained after move-in of criminal activity" The Notice does not specify whether the crime occurred before or after admission. However, the crime is not the sole basis of the landlord's decision to terminate the resident's lease. The landlord also cites the resident for violating paragraph 25 of the lease by submitting false information. Specifically, the resident, in responding to a question during the annual recertification interview, stated that he had not been convicted or pled guilty or no contest to a felony, although the criminal background screening showed otherwise. Since the resident submitted false information to the landlord by lying about his criminal history, and criminal history is a factor used to determine the resident's eligibility, it was within the landlord's discretion to terminate the lease based on a violation of paragraph 25 of the Model Lease, regardless of whether the crime in question occurred prior to admission.

Resident Selection Criteria

Counsel reviewed the most recent version of the Resident Selection Criteria ("the Criteria") used at [REDACTED]. In accordance with the requirements detailed above, Counsel determined that the Criteria must be revised as follows:

1. On page 16 of the Criteria, paragraph (ii) under the section "Applicant Households" provides: "Management will reject the application if any person listed on the application is currently or has ever been determined guilty of a violent crime by due process of law; or if there is clear documentation to support a pattern of criminal activity." Paragraph (iii) on page 17 contains the same language. As noted above, under 24 CFR Section 5.855, landlords of HUD-assisted projects are only allowed to deny

admission to a project based on violent criminal activity if the applicant engaged in that activity "during a reasonable time before the admission decision." Accordingly, the above-quoted language from pages 16 and 17 must be revised such that "ever" is deleted and a specific "reasonable time" standard is defined. For example, the language could be revised as follows: "Management will reject the application if any person listed on the application is currently or has been determined guilty of a violent crime by due process of law within three years prior to the submission of the application"

2. Counsel notes that the landlord must not apply the reasonable time standard discussed in comment 1 above to the crimes listed in paragraphs (iii)(5) and (iii)(9) on pages 17 and 18 of the Criteria. In other words, the landlord must continue to reject applicants who: have ever committed a crime that requires lifetime registration as a sex offender; or have been evicted from federally assisted housing for drug-related criminal activity within the last three years. However, paragraph (iii)(5) on page 17 must be amended to conform to paragraph (i) on page 16 under the section "Applicant Households," which provides the two exceptions to the prohibition relating to applicants who have been evicted from federally assisted housing for drug-related criminal activity. To conform to paragraph (i) on page 16, the following language could be added to the end of paragraph (iii)(5) on page 17: "There are two exceptions to this provision: the evicted household member has successfully completed an approved supervised drug rehabilitation program; or the circumstances leading to the eviction no longer exist (e.g., the household member no longer resides with the applicant household)."

3. On page 18 of the Criteria, paragraph (v) provides: "Knowledge gained after move-in of any criminal activity resulting in arrest or conviction of a household member for any of the above stated activities, may result in termination of the Lease Agreement." This language does not specify when the criminal activity must occur; thus, the landlord could terminate a resident's lease based on criminal activity that occurred 20 years before the resident began living at the project. While terminations based on criminal activity during the course of tenancy are permissible, terminations based on pre-admission criminal activity must be limited by the requirements detailed above in the section labeled "Lease Termination Based on Pre-Admission Criminal Activity." Accordingly, paragraph (v) on page 18 must be revised such that the landlord can terminate a lease based on pre-admission crimes only if those crimes: should have resulted in a mandatory denial of admission under HUD guidelines; or should have resulted in a denial of admission based on the landlord's tenant selection plan, as it existed at the time of admission.

Please contact Jim Provenzale, Attorney-Advisor, at extension 5439 if you have any further questions regarding this matter.