



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, DC 20410-0500

OFFICE OF GENERAL COUNSEL

April 8, 2015

MEMORANDUM FOR: Lourdes Castro-Ramirez, Principal Deputy Assistant Secretary for  
Public and Indian Housing  
Edward Golding, Principal Deputy Assistant Secretary for Housing

FROM: Helen R. Kanovsky, General Counsel

SUBJECT: Use of Arrest Records in Screening Program Applicants or  
Evicting or Terminating Assistance of Tenants of Public and  
Other HUD-Assisted Housing

### Introduction

The Office of Public and Indian Housing (PIH) and the Office of Housing (Housing) requested our opinion as to whether Public Housing Agencies (PHAs) and owners of HUD-assisted housing may deny admission to applicants or evict or terminate assistance to tenants on the basis of arrests that did not result in conviction. For the reasons discussed below, arrest records are not adequate evidence of criminal activity upon which to base a denial of admission to, eviction from, or termination of assistance for public housing or other HUD-assisted housing.

### Federal Standards for Screening Applicants on the Basis of Criminal Activity

Federal law does not impose a blanket ban on admission to public or other federally assisted housing for individuals with a criminal record. Under the Quality Housing and Work Responsibility Act of 1998 ("QHWRA"),<sup>1</sup> Congress imposed only two mandatory, lifetime bans on admission to certain "federally assisted housing"<sup>2</sup> on the basis of two very specific types of criminal history. The first of these bans applies only to the previously convicted individual, while the second applies to an entire household:

- PHAs must permanently bar admission to public housing, the Section 8 tenant-based and project-based voucher programs, and the Section 8 moderate rehabilitation program for

<sup>1</sup> QHWRA amended the United States Housing Act of 1937, 42 U.S.C. § 1437 et seq. Several of QHWRA's provisions, codified at 42 U.S.C. §§ 1437n, 13661, and 13663 establish admission standards for federally assisted housing.

<sup>2</sup> For purposes of applicant screening, the term "federally assisted housing" is defined under QHWRA and HUD's implementing regulations to include public housing, the Housing Choice Voucher program, project-based Section 8, Section 202, Section 811, Section 221(d)(3), Section 514, and Section 515. See 42 U.S.C. § 13664(a)(2); 24 C.F.R. § 5.100.

individuals convicted of manufacturing or producing methamphetamine on the premises of federally assisted housing;<sup>3</sup> and

- PHAs and owners of HUD-assisted housing must permanently deny admission to a household if any household member is subject to a lifetime registration requirement under a state sex-offender registration program.<sup>4</sup>

Section 576(a) of QHWRA also requires PHAs and owners of HUD-assisted housing to prohibit admission of a household for a three-year period, beginning from the date of eviction, if a household member was previously evicted from federally-assisted housing for drug-related criminal activity.<sup>5</sup> However, PHAs and owners of HUD-assisted housing retain discretion to admit such households before the three-year period has elapsed if the previously evicted household member who engaged in drug-related criminal activity has successfully completed an approved drug-rehabilitation program or the circumstances leading to eviction no longer exist.<sup>6</sup>

Beyond these limited circumstances where exclusion from federally assisted housing is either categorically or conditionally mandated by statute, federal law and HUD regulations permit, but do not require, PHAs and owners of HUD-assisted housing to deny admission to applicants on the basis of certain other types of criminal activity, which are defined by statute or regulation. Specifically, Section 576(c) of QHWRA authorizes PHAs and owners of HUD-assisted housing to reject an applicant if they “determine” that an applicant or member of the applicant’s household engaged in: (1) drug-related criminal activity, defined as “the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance;”<sup>7</sup> (2) violent criminal activity, defined as “any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage;”<sup>8</sup> or (3) other criminal activity that would adversely affect the health, safety, or peaceful enjoyment of the premises by other residents.<sup>9</sup>

Such criminal activity, however, may be grounds for denying an applicant only if it occurred within a “reasonable time,” as determined by the PHA or owner, before the individual seeks admission.<sup>10</sup> In exercising this discretionary authority to screen and evaluate applicants’ suitability for tenancy in light of past criminal activity, PHAs and owners of HUD-assisted properties must consider the time, nature, and extent of the applicants’ conduct and may also

<sup>3</sup> See 42 U.S.C. § 1437n(f)(1); see also 24 C.F.R. §§ 882.518(a)(1)(ii) (Section 8 moderate rehabilitation), 960.204(a)(3) (public housing), 982.553(a)(1)(ii)(C) (Section 8 voucher).

<sup>4</sup> See 42 U.S.C. § 13663(a); see also 24 C.F.R. §§ 5.856 (federally assisted housing in general), 882.518 (a)(2) (Section 8 moderate rehabilitation), 960.204(a)(4) (public housing), 982.553(a)(2)(i) (Section 8 voucher).

<sup>5</sup> See 42 U.S.C. § 13661(a); see also 24 C.F.R. §§ 5.854(a) (federally-assisted housing in general); 882.518(a)(1)(i) (Section 8 moderate rehabilitation); 960.204(a)(1) (public housing); 982.553(a)(1)(i) (Section 8 voucher).

<sup>6</sup> See 42 U.S.C. § 13661(a); see also 24 C.F.R. §§ 5.854(a) (federally assisted housing in general), 882.518(a)(1)(i) (Section 8 moderate rehabilitation), 960.204(a)(1) (public housing); 982.553(a)(1)(i) (Section 8 voucher).

<sup>7</sup> See 42 U.S.C. § 1437a(b)(9); see also 24 C.F.R. § 5.100.

<sup>8</sup> See 24 C.F.R. § 5.100.

<sup>9</sup> See 42 U.S.C. § 13661(c); see also 24 C.F.R. §§ 5.855 (federally assisted housing in general), 882.518(b)(1) (Section 8 moderate rehabilitation), 960.203(c)(3) (public housing); 982.553(a)(1)(ii)(B) (Section 8 voucher).

<sup>10</sup> See 24 C.F.R. §§ 5.855(b) (federally-assisted housing in general); 882.518(b)(2) (Section 8 moderate rehabilitation); 960.203(c)(3)(ii) (public housing); 982.553(a)(2)(ii)(B) (Section 8 voucher).

consider any other relevant factors that indicate a reasonable probability of favorable future conduct, such as evidence of rehabilitation or willingness to participate in appropriate counseling services.<sup>11</sup> In addition, federal law requires that PHAs and owners of HUD-assisted housing provide applicants with notification and the opportunity to dispute the accuracy and relevance of a criminal record *before* denying admission on the basis of such record.<sup>12</sup> Public housing and Section 8 applicants also must be afforded the right to request an informal hearing or review *after* an application for housing assistance is denied.<sup>13</sup>

### **Federal Standards for Evicting and Terminating Assistance on the Basis of Criminal Activity**

The circumstances in which federal law requires that a tenant or household be evicted from federally assisted housing on the basis of a criminal record are even more limited than those in which admission is prohibited. Eviction from public housing or termination of Section 8 assistance on the basis of criminal activity is required by federal law under only one circumstance. Specifically, PHAs must terminate the tenancy or assistance of public housing and Section 8 households if any member of the household has ever been convicted of manufacturing or otherwise producing methamphetamine on the premises of federally assisted housing.<sup>14</sup>

Apart from this limited circumstance, neither federal statutes nor HUD regulations mandate that PHAs or owners of HUD-assisted housing terminate assistance (PHA only) or evict a household, or even the culpable household member, on the basis of criminal activity. Instead, PHAs and owners of HUD-assisted housing have discretion to decide whether to terminate assistance or evict a household if a tenant, household member, or guest engages in: (1) drug-related criminal activity on or off the premises (in the case of public housing) or on or near the premises (in the case of Section 8 programs), defined as “the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance;”<sup>15</sup> (2) violent criminal activity on or near the premises, defined as “any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage;”<sup>16</sup> or (3) any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises or nearby residences by other tenants or persons residing in the immediate vicinity of the premises.<sup>17</sup> Thus, while PHAs and owners have discretion, HUD does

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<sup>11</sup> See, e.g., 24 C.F.R. §§ 5.852 (federally assisted housing in general); 960.203(d) (public housing), 982.552(c)(2)(i) (Section 8 voucher).

<sup>12</sup> See 42 U.S.C. § 1437d(q)(2); see also 24 C.F.R. §§ 5.903(f) (federally assisted housing in general), 960.204(c) (public housing), 982.553(d)(1) (Section 8 voucher).

<sup>13</sup> See 24 C.F.R. §§ 960.208(a) (public housing), 982.201(f)(1) (Section 8 voucher).

<sup>14</sup> See 42 U.S.C. § 1437n(f)(2); see also 24 C.F.R. §§ 882.518(c)(1)(ii) (Section 8 moderate rehabilitation), 966.4(l)(5)(i)(A) (public housing), 982.553(b)(1)(ii) (Section 8 voucher).

<sup>15</sup> See 42 U.S.C. § 1437a(b)(9) (defining “drug-related criminal activity”); see also 24 C.F.R. § 5.100 (same).

<sup>16</sup> See 24 C.F.R. § 5.100 (defining “violent criminal activity”).

<sup>17</sup> See 42 U.S.C. §§ 1437d(l)(6) (public housing), 1437f(o)(7)(D) (Section 8); see also 24 C.F.R. §§ 5.858-5.859 (federally assisted housing in general), 966.4(l)(5)(i)(B)-(ii)(A) (public housing), 982.310(c)(1)-(2) (Section 8). Although “violent criminal activity” is not specifically listed among those types of criminal activity for which PHA’s public housing leases explicitly must authorize eviction, see 42 U.S.C. § 1437d(l)(6), public housing

not require that PHAs and owners of HUD-assisted housing adopt or enforce so-called “one-strike” rules that require automatic eviction any time a household member engages in criminal activity in violation of their lease.

In deciding whether, or whom, to evict or terminate assistance based on criminal activity, PHAs and owners of HUD-assisted housing may consider any relevant factors, including but not limited to: the seriousness of the offending action; the effect that eviction of the entire household would have on family members not involved in the criminal activity; and the extent to which the leaseholder has taken all reasonable steps to prevent or mitigate the criminal activity.<sup>18</sup> Additionally, when specifically considering whether to terminate assistance or tenancy for illegal drug use by a household member, a PHA or owner may consider whether the household member is participating in or has successfully completed a drug rehabilitation program.<sup>19</sup>

As with admissions decisions, federal law requires that PHAs and owners of HUD-assisted housing provide tenants with notice and the opportunity to dispute the accuracy and relevance of a criminal record before they evict or terminate the tenant’s assistance on the basis of such record.<sup>20</sup> Moreover, PHAs and owners of HUD-assisted housing may only terminate the tenancy or assistance of a public housing or Section 8 tenant through either a judicial action in state or local court, or through an administrative grievance hearing before an impartial hearing officer appointed by the PHA.<sup>21</sup> In either case, the tenant must be afforded the basic elements of due process, including the right to be represented by counsel, to question witnesses, and to refute any evidence presented by the PHA or owner.<sup>22</sup>

### **Arrest Records Are Not Adequate Evidence of Criminal Activity to Support a Denial of Admission to, Termination of Assistance for, or Eviction from HUD-Assisted Housing**

As discussed above, PHAs and owners of HUD-assisted housing retain broad discretion to set admission, termination of assistance, and eviction policies for their programs and properties. However, any denial of admission or eviction based upon criminal activity must be supported by adequate evidence. Because some PHAs currently deny applicants, terminate assistance, or evict households on the basis of an arrest regardless of the criminal justice

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program statutes elsewhere expressly authorize eviction based on such activity. *See id.* at §§ 1437d(k), 1437d(l)(4)(A)(ii).

<sup>18</sup> *See* 24 C.F.R. §§ 966.4(l)(5)(vii)(B) (public housing); 982.310(h)(1) (Section 8 voucher).

<sup>19</sup> 42 U.S.C. § 13662(b); *see also* 24 C.F.R. §§ 966.4(l)(5)(vii)(D) (public housing); 982.310(h)(3) (Section 8 voucher).

<sup>20</sup> *See* 42 U.S.C. § 1437d(q)(2); *see also* 24 C.F.R. §§ 5.903(f) (federally assisted housing in general), 966.4(l)(5)(iv) (public housing), 982.553(d)(2) (Section 8 voucher).

<sup>21</sup> *See* 24 C.F.R. §§ 966.51 (applicability of PHA grievance hearing procedures); 982.310(f) (owner eviction of Section 8 tenants by court action only); 982.555(a)(1) (informal hearing required for PHA termination of Section 8 assistance).

<sup>22</sup> *See* 24 C.F.R. §§ 966.53(c) (required due process elements for PHA eviction by judicial action in state or local court); 966.56 (PHA grievance hearing procedures for public housing eviction); 982.555(e) (hearing procedures for PHA termination of Section 8 assistance).

outcome,<sup>23</sup> PIH and Housing have requested clarification as to whether a record of arrest(s) not resulting in conviction is adequate evidence of criminal activity to warrant a denial of admission to or termination of assistance or tenancy in public or other HUD-assisted housing. For the reasons stated below, it is not.

Before a PHA or owner of federally assisted housing denies admission to, terminates the assistance of, or evicts an individual or household on the basis of criminal activity by a household member or guest, the PHA or owner must “determine” that the relevant individual actually “engaged in” such activity.<sup>24</sup> The fact that an individual was arrested does not prove that he or she engaged in criminal activity, and thus an arrest is neither required, nor is it adequate, to make such a determination.<sup>25</sup> As the Supreme Court has stated, “[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.” *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 241 (1957); *see also United States v. Berry*, 553 F.3d 273, 282 (3d Cir. 2009) (“[A] bare arrest record – without more – does not justify an assumption that a defendant has committed other crimes and it therefore cannot support increasing his/her sentence in the absence of adequate proof of criminal activity.”); *United States v. Zapete-Garcia*, 447 F.3d 57, 60 (1<sup>st</sup> Cir. 2006) (“[A] mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct.”).

In many cases, arrests do not result in criminal charges and, even where they do, such charges can be and are often dismissed. *See, e.g., Zapete-Garcia*, 447 F.3d at 60 (1<sup>st</sup> Cir. 2006) (“[A]rrest ‘happens to the innocent as well as the guilty.’”) (quoting *Michelson v. United States*, 335 U.S. 469, 482 (1948)); *see also* Brian A. Reaves, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Felony Defendants in Large Urban Counties*, 2009, at 22, Table 21 (2013), <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf> (reporting that in the 75 largest counties in the country, approximately one-third of felony arrests did not result in conviction, with about one-quarter of all cases ending in dismissal). Moreover, arrest records are often inaccurate or incomplete (e.g., by failing to indicate whether the individual was prosecuted, convicted, or acquitted), such that reliance on arrests not resulting in conviction as the sole basis for denying applicants or terminating the assistance or tenancy of a household or household member is likely to result in unwarranted denials of admission to or eviction from federally subsidized housing. *See, e.g.,* U.S. Dep’t of Justice, *The Attorney General’s Report on Criminal History Background Checks* at 3, 17 (June 2006), [http://www.justice.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.justice.gov/olp/ag_bgchecks_report.pdf) (reporting that the FBI’s Interstate Identification Index system, which is the national system designed to provide automated criminal history record information and “the most comprehensive single source of

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<sup>23</sup> *See, e.g.,* Marah A. Curtis et al. *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 *Cityscape: J. Pol’y Dev. & Res.* 37, 37-52 (2013) (noting that several PHAs ban admission on the basis of previous arrests, regardless of whether the applicant was convicted or not).

<sup>24</sup> *See* 42 U.S.C. § 13661(c); 24 C.F.R. §§ 5.861 (federally assisted housing in general), 882.518(c)(3) (Section 8 moderate rehabilitation; termination of assistance), 966.4(l)(5)(iii) (public housing; termination of tenancy), 982.310(c)(3) (Section 8 voucher; owner termination of tenancy), 982.553(c) (Section 8 voucher; PHA termination of assistance).

<sup>25</sup> *See* 24 C.F.R. §§ 5.861 (federally assisted housing in general), 882.518(c)(3) (Section 8 moderate rehabilitation), 966.4(l)(5)(iii) (public housing), 982.310(c)(3) (Section 8 voucher; owner termination of tenancy), 982.553(c) (Section 8 voucher; PHA termination of assistance).

criminal history information in the United States,” is “still missing final disposition information for approximately 50 percent of its records”).

With respect to the Section 8 tenant-based and moderate rehabilitation programs, HUD regulations specifically provide that termination of assistance for criminal activity must be based on a “preponderance of the evidence” that the tenant or other covered person actually engaged in such activity.<sup>26</sup> For public housing as well, applicants or tenants may not be denied admission or evicted based on suspicion that they or a household member has engaged in prohibited activity. See *Nashua Hous. Auth. v. Wilson*, 33 A.3d 1163 (N.H. 2011) (holding that tenant’s arrest, criminal complaints, and trial testimony of police officer that failed to identify the tenant as the person who sold a controlled substance did not satisfy housing authority’s burden of proving that tenant engaged in drug-related criminal activity); *Landers v. Chicago Housing Authority*, 936 N.E.2d 735, 742 (Ill. App. 2010) (holding that housing authority erred by denying applicant public housing on the ground that he had a pattern of arrests for criminal activities because it had “no evidence whatsoever that [the applicant] engaged in criminal activity where the outcome of his arrests was the consistent dismissal of the charges”); cf. *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 136 (2002) (noting that “[a]ny individual factual disputes about whether [a] lease provision was actually violated [by reason of criminal activity] can be ... resolved [by the courts]”). Absent a corresponding conviction, “[a]n arrest shows nothing more than that someone probably suspected the person apprehended of an offense.” *Schware*, 353 U.S. at 241; see also *United States v. Hynes*, 467 F.3d 951, 957 (6th Cir. 2006) (upholding a preliminary jury instruction that stated that a “defendant is presumed to be innocent unless proven guilty. The indictment against the Defendant is only an accusation, nothing more. It’s not proof of guilt or anything else.”); *United States ex rel. DeNegris v. Menser*, 360 F.2d 199, 203 (2d Cir. 1966) (“At best, [a prior arrest] only implies that the police suspected them of [criminal] activity at that [earlier] time.”). Therefore, a PHA or owner of HUD-assisted housing may not base a determination that an applicant or household engaged in criminal activity warranting denial of admission, termination of assistance, or eviction on a record of arrest(s) that did not result in conviction.

## Conclusion

In sum, PHAs and owners of HUD-assisted housing may not base a denial or termination of tenancy or assistance upon an applicant’s record of arrest(s) that did not result in conviction. An arrest, by itself, is not adequate evidence that an applicant or household member engaged in drug-related criminal activity, violent criminal activity, or other criminal activity that would adversely affect the health, safety, or peaceful enjoyment of premises by other residents.

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<sup>26</sup> See 24 C.F.R. §§ 882.518(c)(3) (Section 8 moderate rehabilitation); 982.553(c) (Section 8 voucher).