



U.S. Department of Housing
and Urban Development

Boston Regional Office, Region I
Thomas P. O'Neill Jr. Federal Building
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Boston, MA 02222-1092

JAN 23 1992

BY FAX NO. 617-695-2942 AND U.S. MAIL

James M. McCreight
Greater Boston Legal Services
Housing Unit
68 Essex Street
Boston, Massachusetts 02111

Dear Mr. McCreight:

SUBJECT: Deborah Barboza

We are in receipt of your request for a legal opinion regarding retroactive adjustment of the rent of Deborah Barboza, a tenant in the Wilder Gardens development in Boston ("Tenant"). We understand from your letter that Wilder Gardens ("Landlord" or "Owner") receives Section 8 project-based subsidy under the Section 8 property disposition program. Wilder Gardens is managed by Bonita Management.

For the reasons stated below, we are unable to provide a legal opinion on this matter. We believe, after review of the below listed documents, that the question at hand is whether Ms. Barboza's rent should be retroactively decreased to May 1, 1986, because she was disabled in an accident in April 1986. We must add that it is not clear from the submitted documents what the question is which the Landlord and you wish to have answered. After careful review of all the documents listed below, we conclude that there is an outstanding issue of a material fact to which the parties have not agreed.

BACKGROUND

We are in receipt of the following documents which were sent to this office in conjunction with your request.

1. Letter from James M. McCreight, attorney for Ms. Barboza, to MaryLou Muirhead, attorney for Wilder Gardens, dated January 17, 1991 ("1/17/91 McCreight Letter"). (Copy attached.) This letter makes reference to the following documents:
 - a. Letter from John Hancock to Ms. Barboza dated July 3, 1986 ("7/3/86 Hancock Letter"). (Copy

- attached.)
- b. Letter from John Hancock to Dr. Abraham Swartz dated November 12, 1986 ("11/12/86 Hancock Letter"). (Copy attached.)
 - c. Letter from Attorney James Robbins to John Hancock dated November 25, 1986 ("11/25/86 Robbins Letter"). (Copy attached.)
 - d. Letter from North Dartmouth to Ms. Barboza dated May 28, 1987. (Copy attached.)
 - e. Letter from John Hancock to Whom It May Concern dated September 3, 1987. (Copy attached.)
 - f. Letter from John Hancock to Ms. Barboza dated February 21, 1989. (Copy attached.)
 - g. Letter from John Hancock to To Whom It May Concern dated June 13, 1989. (Copy attached.)
2. Letter from MaryLou Muirhead, attorney for Wilder Gardens, to James McCreight, attorney for Ms. Barboza, dated January 18, 1991. (Copy attached.)
 3. Letter from MaryLou Muirhead, attorney for Wilder Gardens, to James McCreight, attorney for Ms. Barboza, dated February 5, 1991. (Copy attached.)
 4. Letter from James McCreight, attorney for Ms. Barboza, to Marvin Lerman, Boston Regional Counsel for HUD, dated February 19, 1991 ("2/19/91 McCreight Letter"). (Copy attached.)
 5. Letter from MaryLou Muirhead, attorney for Wilder Gardens, to Marvin Lerman, Boston Regional Counsel for HUD, dated February 22, 1991 ("2/22/91 Muirhead Letter"). (Copy attached.)

Tenant's position

The 1/17/91 McCreight Letter states,

"From the above documentation, it appears that Ms. Barboza became eligible for long-term disability payments as of April 10, 1986, that such payments were first received as of July, 1986 (presumably retroactive to the date of eligibility), and that such payments came to \$437.67/month. Based on this

information, it is GBLS' position that the landlord should, in accordance with HUD guidelines, adjust Ms. Barboza's rent retroactive to May 1, 1986 to \$119/month. This would result in an adjustment of \$38/month for the eight-month period from May, 1986 through December 1986, or a total adjustment of \$304."

The 1/17/91 McCreight Letter also states at page two (2), "Ms. Barboza previously provided these letters [7/3/86 Hancock Letter, 11/12/86 Hancock Letter, and 11/25/86 Robbins Letter] to her landlord at the time she received them, and she recently took them to Ms. Daniels again. Ms. Barboza said that Ms. Daniels acknowledged that these letters had been previously received, but that they were not sufficient to process a rent adjustment." [We assume from the context of this statement that Ms. Daniels is an employee of Bonita Management.]

The 1/17/91 McCreight Letter also suggests that the Landlord delayed processing Ms. Barboza's request for a downward adjustment in rent based on her loss of income because the Landlord was waiting until it obtained verification on what the long-term disability payments were and when they took effect. (See, page 3.) [None of the documents provided by Wilder Gardens suggests that this is or was its position.]

The 2/19/91 McCreight Letter recites the Tenant's version of the facts in this case, and requests an opinion on the issue of retroactive adjustment of rent. In the recitation of the facts, this letter states that Wilder Gardens brought a non-payment eviction against Ms. Barboza which was dismissed on technical grounds. In addition, attached to the 2/19/91 McCreight Letter is a settlement agreement between Wilder Gardens and Ms. Barboza regarding rent arrearage dated December 17, 1990. (Copy attached.) Paragraph 3 of the settlement agreement states "it is agreed that [Ms. Barboza's] rent arrearage shall be adjusted if Ms. Barboza produces substantiation for her claim that prior management was notified in 1986 of a decrease of her income but failed to make an appropriate adjustment in rent."

Landlord's position

The 2/22/91 Muirhead Letter states: "At the time Ms. Barboza advised Wilder Gardens of her disability, documentation was requested. The only documentation provided to Wilder Gardens substantiated a disability occurring in 1987."

Further, the 2/22/91 Muirhead Letter suggests that Wilder Gardens did not receive notification of Ms. Barboza's 1986 disability until 1987 or later.

HUD's Review of Documents

Careful review of all the above-noted documents indicates that the parties have never agreed as to when Ms. Barboza reported her decrease in income to Wilder Gardens.

The documents also indicate that one of the positions taken by Wilder Gardens on this matter is that the documents provided by Ms. Barboza do not substantiate a decrease in income in 1986. This is irrelevant; as explained below, once the tenant has reported a decrease in income to the landlord, the burden is on the landlord to verify this information. The landlord does not have to decrease the rent until it has verified the decrease in income, but it must make this decrease retroactive to the first day of the month commencing after the tenant reported the decrease to the landlord.

DISCUSSION

Regulations

The applicable regulations for the Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects are found at 24 C.F.R. 886.301 et. seq. Section 886.318 sets forth the responsibilities of the owner. It reads in pertinent part:

- (a) Management and maintenance. The owner shall be responsible for the management and maintenance of the project in accordance with requirements established by HUD. These responsibilities shall include but not be limited to:

...

- (3) ... verification of income and other pertinent requirements; and determination of eligibility and amount of tenant rent in accordance with part 813 of this chapter; [Part 813 sets forth the definition of income, income limits, rent and reexamination of family income for the section 8 housing assistance payments programs and related programs]

...

- (6) Reexamination of family income, composition, and extent of exceptional medical or other unusual expenses; redeterminations, as appropriate, of the amount of Tenant Rent and amount of housing assistance payments in accordance with part 813 ...

Section 886.324 addresses the reexamination of family income and composition. Section 886.324(b) states:

- (b) Interim recertifications. The family must comply with provisions on its lease regarding interim reporting of changes in income. If the owner receives information concerning change in the family's income or other circumstances between regularly scheduled reexaminations, the owner must consult with the family and make any adjustments determined to be appropriate. ...

HUD Handbook 4350.3 and Model Lease

HUD Handbook 4350.3 (last amended 2/5/91), Occupancy Requirements of Subsidized MultiFamily Housing Programs, applies to all assisted tenants living in multifamily housing projects which are subsidized under the Section 8, Property Disposition Set-Aside Program which is the program in the case at hand. Chapter 4, Leasing, Deposits, and Termination of Tenancy, of the Handbook requires that the owners of such projects either use the model lease provided in Appendix 19a of the Handbook ("Model Lease"), or obtain HUD Field Office approval of any changes to the Model Lease. We assume because of the positions put forth by both parties that the Model Lease has been used in this case.

Paragraph 16(b) of the Model Lease reads:

The Tenant may report any decrease in income or any change in other factors considered in calculating the Tenant's rent. Unless the Landlord has confirmation that the decrease in income or change in other factors will last less than one month, the Landlord will verify the information and make the appropriate rent reduction. However, if the Tenant's income will be partially or fully restored within two months, the Landlord may delay the certification process until the new income is known, but the rent reduction will be retroactive and the Landlord may not evict the Tenant for nonpayment of rent due during the period of the reported decrease and the completion of the certification process. The Tenant has thirty days after receiving written notice of any rent due for the above described time period to pay or the Landlord can evict for nonpayment of rent. (Revised 3/22/89)

HUD Handbook 4350.3, Section 5-11, Owner Responsibility for Processing Interim Recertifications, provides direction on the implementation of this paragraph:

- a. The owner must process an interim recertification if the

tenant reports a:

...

(4) decrease in income

b. Owner must:

(1) Complete recertification steps 2 through 6 of Figure 5-1.

(2) Verify only those factors (income, allowance, etc.) that have changed since the last certification/recertification or weren't previously verified.

Figure 5-1 is included in Section 5-4, Overview of Annual Recertification Procedures. Steps 2-6 are:

2. Interview tenant to obtain information on income, assets, family composition and allowance.
3. Verify tenant's income, assets and allowances.
4. Complete Form HUD-50059 and applicable HUD-50059 worksheet.
5. Have tenant sign the HUD-50059.
6. Notify tenants of any rent increase resulting from the recertification.

The language in Steps 2-6 quoted here, places the burden on the landlord to complete the steps necessary for recertification once the tenant has reported the decrease in income.

Section 5-12, Effective Date of Interim Adjustments, states:

The Owner must notify the Tenant of any change in rent or assistance payment resulting from the interim adjustment. ... Rent increases and decreases should be implemented according to the following schedule.

...

- b. Rent Decrease. If the Tenant's rent decreases because of an interim adjustment, the Owner must make the decrease effective the first day of the month commencing after the date of the action which caused the decrease. The Owner does not have to give the Tenant 30 days notice of any

rent decrease.

You have argued in your letter to Ms. Muirhead dated January 17, 1991, listed above, that "In Ms. Barboza's case, the 'date of action which caused the decrease' was the automobile accident on April 10, 1986." (Page 3).

We disagree. For the reasons set out below, it is the opinion of this office, with the concurrence of the HUD Office of General Counsel, that the "date of action" is the day the tenant reported the decrease in income to the landlord. A tenant's right to a decrease in rent does not begin to accrue until the tenant reports to the landlord the decrease in income. A landlord cannot be expected to make an interim recertification if it does not have notice of the tenant's decrease in income, and the burden is on the tenant to provide this information to the landlord. Further, a landlord cannot be charged with knowledge of the tenant's decrease in income if the tenant has not given notice of the decrease, in some form, to the landlord.

The Regulations, Handbook and Model Lease place the not insignificant responsibility on the landlord of verifying the tenant's decrease in income and making the appropriate rent reduction. The tenant's sole responsibility is to report the decrease in income to the landlord.

Any decrease in rent should be effective the first day of the month commencing after the date the decrease in income was reported to the landlord. To require otherwise would put the landlord in the position of never being able to close his books or records for any preceding year. HUD would be put in a similar position with respect to the amount of subsidies paid to a landlord pursuant to a Section 8 Housing Assistance Payments Contract. Again, the tenant's sole responsibility is to report, in some form, the decrease in income.

Betts v. Kemp

You have argued that Betts v. Kemp, no. TY-82-618-CA (E.D. Tex, February 21, 1989) is applicable to the instant case. Betts v. Kemp was a class action lawsuit which was filed on behalf of certain Section 8 tenants against of the Secretary of HUD, the Region VI Administrator, and the owner of a particular project. The plaintiff class consisted of all persons nationwide residing in Section 8 projects to which HUD Handbook 4350.3 is applicable. The lawsuit concerned Section 5-11 of the handbook which governs whether a Section 8 tenant is entitled to an interim recertification of rent due to a decrease in the tenant's income. The

plaintiffs challenged the then-existing bar to interim rent decreases unless it could be shown that the decrease would exist for more than three months. HUD specifically agreed to the following changes:

- A. To clarify Section 5-11(d)(2) to advise that the authority to refuse to process an interim certification is discretionary;
- B. To clarify Section 5-11(e) to ensure that if an owner chooses to delay processing an interim recertification, any rent reduction is to be retroactive;
- C. To clarify Paragraph 16(b) of Model Lease accordingly; and
- D. To inform owners/managers not to enforce the second sentence of the unrevised version of paragraph 16(b) in existing leases, to attach a copy of the new paragraph 16(b) at the tenant's next recertification so that it supercedes the prior version, and to make appropriate changes in the new leases.

It is the opinion of this office that Betts v. Kemp is not relevant to the matter at hand. In Betts v. Kemp the court held that (1) a Landlord could only deny a interim recertification of a Section 8 Tenant's income in the event the Tenant's decrease in income was less than one month, and (2) a Landlord may delay, but not refuse, processing an interim recertification if the owner has confirmation that the tenant's income will be partially or fully restored within two months, and processing may be delayed only until the new income is known.

We can not see how these holdings have any bearing to the question in the case at hand as presented by the materials submitted by you and Wilder Gardens. The Handbook and Model Lease were both revised in 1989 to incorporate the changes agreed to by HUD in connection with Betts. The sections of the Handbook and Model Lease discussed above include these changes. The question then is whether the requirements of the Handbook and Model Lease have been met.

CONCLUSION

As is clear from the discussion above, a tenant may report a decrease in income anytime during the lease period. Unless the landlord has confirmation that the decrease in income will last less than one month, the landlord must make an interim recertification of the tenant's income and decrease the rent accordingly. The

decrease in rent is effective the first day of the month commencing after the date the decrease in income was reported to the landlord. A tenant's right to a decrease in rent does not begin to accrue until the tenant reports to the landlord the decrease in income.


In closing we must state that it is impossible to determine from the documents submitted when Ms. Barboza reported her decrease in income to Wilder Gardens or its management agent. Further, this is a question of fact which can not be answered by this office.

If you have any questions regarding this matter, please contact Attorney-Advisor JoAnna Barnes of my staff.

Sincerely yours,

Marvin H. Lerman
Regional Counsel

By:



Nadine T. Price
Associate Regional Counsel

cc: MaryLou Muirhead, Esquire