



Use of Criminal Records

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Use of Criminal Records

- Three recently-issued documents address use of arrest and other criminal records
 - Notice PIH 2015-19
 - Guidance document from HUD OGC
 - http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf
 - HUD FAQs for PIH 2015-19
 - http://portal.hud.gov/hudportal/documents/huddoc?id=faq_excldearrestrec33116.pdf



Supreme Court Decisions

- Rucker v. HUD
- Goldberg v. Kelly
 - Burr v. New Rochelle Municipal Housing Authority
- Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.



Use of Criminal Records

- Current regulations require denial/termination for some types of criminal activity, and allow PHAs discretion to establish policies for other types of criminal activity
 - Screening and Eviction Final Rule (2001)



Use of Criminal Records

- Mandatory denial (statutory):
 - Conviction for methamphetamine manufacture on premises of assisted housing
 - Subject to state lifetime sex offender registration requirement
- Not subject to consideration of circumstances



Use of Criminal Records

- Other "mandatory" denials (not statutory)
 - Currently engaging in illegal drug use
 - Evicted from assisted housing for drugs within 3 years
 - Pattern of drug use or alcohol abuse that threatens...
- Subject to consideration of circumstances



Use of Criminal Records

- PHAs must establish policies that enable it to screen out/terminate persons engaging in
 - Violent criminal activity
 - Drug-related criminal activity
 - Other criminal activity that threatens health, safety or peaceful enjoyment
- Subject to consideration of circumstances



Use of Criminal Records

- Consideration of circumstances was not required (but was permitted) under the S&E rule for non-statutory denials
 - Supreme Court case *Rucker v HUD*



Consideration of Circumstances



Consideration of Circumstances

- PHA's decision is subject to consideration of reasonable accommodation if family includes a person with disabilities
 - Actions must be consistent with fair housing & equal opportunity



Consideration of Circumstances

- The PHA may consider
 - Seriousness of the case
 - Extent of participation or culpability of individual family members
 - Mitigating circumstances relating to disability of a family member
 - Effects of denial on other uninvolved family members



Consideration of Circumstances

- The PHA may impose a requirement that culpable family members may not reside in the unit, and provide assistance to the remaining members



Consideration of Circumstances

- For household member no longer engaged in illegal drug use or alcohol abuse, PHA may consider whether member
 - Is participating in supervised drug or alcohol program, or
 - Has successfully completed a supervised drug or alcohol program, or
 - Has otherwise been successfully rehabilitated
 - May require member to submit evidence



What about VAWA?



What about VAWA?

- The VAWA Final Rule provides that PHAs cannot deny, terminate, or evict on the basis of *or as a direct result of* domestic violence, dating violence, sexual assault, or stalking, if the applicant or tenant otherwise qualifies for admission, assistance, participation, or occupancy



What about VAWA?

- Common “adverse factors” which may be the result of domestic violence, dating violence, sexual assault, or stalking:
 - Poor credit history
 - Poor rental history
 - Criminal record
 - Failure to pay rent



What about VAWA?

- Other disqualifiers may also stem from VAWA issues, therefore PHA must offer VAWA forms to anyone being denied or terminated and must evaluate each VAWA claim on its own merits



What about VAWA?

- With any notice of denial, at admission, and with any notice of termination, PHA must send:
 - VAWA 5382 – Certification form
 - VAWA 5380 – Notice of Occupancy Rights
- PHAs must establish an Emergency Transfer Plan
 - What is yours for HCV? PH?



OGC Memo on Nuisance Ordinances

- Office of General Counsel Guidance on Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services, issued 9/13/16



OGC Memo on Nuisance Ordinances

- Nuisance ordinances penalize landlords of high crime or “nuisance” properties
 - Often measured by number of police calls and use of emergency services
- Landlords subject to sanctions including forfeiture and incarceration
 - May be required to evict “nuisance” tenants



OGC Memo on Nuisance Ordinances

- Such nuisance and crime-free ordinances may lead to discrimination
 - May have a disparate impact on protected classes
- VAWA victims are especially vulnerable
 - Subject to eviction if they call police or ambulance



OGC Memo on Nuisance Ordinances

- Local governments are prohibited from enforcing ordinances which penalize individuals for use of emergency services or for being victims of domestic violence or other crimes



Use of Criminal Records



Use of Criminal Records

- Before any PHA notice of adverse action based on criminal records, must:
 - Provide subject and applicant with copy of record, and
 - Offer opportunity to dispute



Notice PIH 2015-19

- Published November 2, 2015
- States that an arrest, in and of itself, is not sufficient evidence of criminal activity to justify a denial or termination of housing assistance



Notice PIH 2015-19

- Notice 2015-19 clarifies that an arrest record alone is not sufficient evidence that the subject actually engaged in the illegal activity
- However, the behavior leading to the arrest may be sufficient cause for denial or termination



Notice PIH 2015-19

- Notice contains a reminder that PHAs are not REQUIRED to adopt "one-strike" style policies
- Balance between ensuring safety and providing second chances for individuals with criminal records



Notice PIH 2015-19

- PHAs may still take adverse action based on the conduct leading to an arrest
- Arrest record may trigger an inquiry into whether there is sufficient evidence to determine that a person engaged in disqualifying criminal activity



Notice PIH 2015-19

- Other evidence which may be utilized in making a determination
 - Police reports describing the arrest
 - Witness statements
 - Other relevant documentation
 - Conviction
 - But PHAs are NOT required to "wait for a conviction" before taking adverse action



OGG Guidance Memo

- Issued 4-4-16
- Focuses on PHA policies
- Prohibits blanket policies requiring denial or termination for criminal background
 - Disparate impact on protected classes
 - Hispanic, African American



OGG Guidance Memo

- Note that such “blanket” policies were encouraged under the Screening and Evictions Final Rule in 2001
- Policies for denial/termination due to arrests or convictions must be based on “demonstrable risk to safety and/or property”



What Is Disparate Impact?

- Facially neutral policy that has a discriminatory effect, even if there was no intent to discriminate
- Policies that have an unjustified disparate impact on protected classes are illegal
 - Supreme Court 2015



What Is Disparate Impact?

- Disparate impact examples
 - Siting of affordable housing
 - Exclusionary zoning
 - Residency preferences
 - Eligibility of formerly-incarcerated persons



What Is Disparate Impact?

- Policies may be justified despite having a disparate impact
 - If necessary to achieve a legitimate, substantial, nondiscriminatory interest
 - Protection of other residents



What Is Disparate Impact?

- HUD published a final rule on disparate impact in 2013
 - Implementation of the Fair Housing Act's Discriminatory Effects Standard
 - Prohibits housing practices that have a discriminatory effect, regardless of whether the practice was adopted for a discriminatory purpose



What Is Disparate Impact?

- HUD has requested comments on amending the final rule in view of the SCOTUS ruling
 - Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard
 - Advance notice of proposed rulemaking, FR 6/20/18



OGG Guidance Memo

- Arrest records are not sufficient proof of health/safety risk
- Conviction records are proof that the individual committed the crime
 - But not proof of health/safety risk



OGG Guidance Memo

- Even if PHA policies are tailored to exclude only persons with certain types of convictions, the PHA must prove that these policies accurately distinguish between criminal conduct that constitutes a risk to health/safety/property and that which does not



OGG Guidance Memo

- Policies must take into account the
 - Nature
 - Severity
 - Recency
 - Of the criminal conduct
- Determination **MUST** be made on a case-by-case basis



OGG Guidance Memo

- OGC suggestion: delay consideration of criminal history until the end of eligibility determination
 - To minimize additional costs



HUD FAQs

- Posted 4-5-16
- Supplement to PIH 2015-19
- Contains sample language for acceptable admission policy
- PHAs should review ACOP/admin plan



Sample Admissions Policy

“The fact that an applicant or tenant was arrested for a disqualifying offense shall not be treated or regarded as proof that the applicant or tenant engaged in disqualifying criminal activity. The arrest may, however, trigger an investigation to determine whether the applicant or tenant actually engaged in disqualifying criminal activity.”



Sample Admissions Policy

As part of its investigation, [the PHA or owner] may obtain the police report associated with the arrest and consider the reported circumstances of the arrest. The PHA may also consider any statements made by witnesses or the applicant or tenant not included in the police report; whether criminal charges were filed;



Sample Admissions Policy

whether, if filed, criminal charges were abandoned, dismissed, not prosecuted, or ultimately resulted in an acquittal; and any other evidence relevant to determining whether or not the applicant or tenant engaged in disqualifying activity.”



What Does All This Mean?



What Does All of This Mean?

- PHA needs to review admission and termination policies in the ACOP & administrative plan
- Determinations must now be made on an individual basis
 - Do current policies reflect only the regulatory language?
 - Look-back periods?



What Does All of This Mean?

- The individual evaluation must consider the nature, severity and recency of the crime, as well as
 - Tenancy history
 - Evidence of rehab
 - Age at time of crime



What Does All of This Mean?

- What kind of criminal background could be found to create a risk to safety/property?
 - Murder?
 - Sexual assault?
 - ?
- Even in these cases an individual evaluation must be done



What Does All of This Mean?

- How can the PHA “prove” that its policies distinguish between criminal history that creates a risk and history that does not?
- HUD’s sample admissions policy states that the PHA will perform “an investigation”



What Does All of This Mean?

- How does the concept of protecting health/safety/property of other residents apply in the HCV program?



Summary

- Questions?
- Comments?
- Thank you for attending!
- We hope to see you again soon



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