

U. S. Department of Housing and Urban Development
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OFFICE OF GENERAL COUNSEL

JUN 27 1996

MEMORANDUM FOR: Deborah J. McKeone, Chief Counsel, Nebraska
State Office, 7DC

FROM: Robert S. Kenison, Associate General Counsel
Office of Assisted Housing and Community Development, CD

SUBJECT: Kearney (Nebraska) Public Housing Authority Tenant/Unit
Assignment According to Smoking Preference
Compatibility with Tenant Selection/Assignment
Regulations

This is in response to your January 18, 1996, memorandum to Michael E. Reardon, Assistant General Counsel, Assisted Housing Division, requesting legal advice as to whether or not the Kearney (Nebraska) Housing Authority's policy of assigning available public housing units based on the applicant's smoking preference is consistent with HUD's waiting list procedures. It is our understanding from the information provided that in an October 20, 1995 letter, the KHA submitted a request for approval of a modification to its Tenant Selection and Assignment Plan.

Specifically, the KHA's new plan provides that of the 22 buildings that currently make up the Kearney Manor Apartments, two buildings will be designated as smoking, 16 as smoke-free and four will be handicap accessible, exempt from any smoking designation. All new applicants would be required to designate their smoking preference on their application for housing. The applicants would then be assigned from the waiting list to units based, among other criteria, on their own preference to live in either a smoking or smoke-free unit. While both smokers and non-smokers may choose to live in the smoking buildings, only non-smokers may live in the smoke-free buildings. Violations of the smoking prohibition in a smoke-free building by a member of the household or their visitors could result in the eviction of the tenants.

Before discussing the permissibility of the specific KHA policy, this memorandum will first address the general question of whether a PHA may restrict smoking in its public housing. As you stated in your memorandum, there are no statutory prohibitions to a PHA adopting such a policy, nor are there any regulatory ones. HUD has given PHAs broad authority and guidance to develop their own Tenant Selection and Assignment Plan with

only minimal restrictions. Under 24 CFR 1.4(b)(2)(ii), the PHA may promulgate its own requirements affecting preference or priority of tenant selection as long as they are not inconsistent with the objectives of Title VI of the Civil Rights Act of 1964 and 24 CFR 1.

Also, aside from the requirements for Federal and local preferences stated at 24 CFR 960.211 - 960.213, PHAs may develop their own procedures for applicant assignment from their waiting list. Because of this grant of authority, PHAs have the ability to designate particular types of units as smoking or non-smoking, determine the suitability of the type of unit for the applicant, assign applicants based on the smoking preference, and to restrict tenants' behavior within the particular type of unit through the terms of the lease. Furthermore, because the right to smoke or not to smoke is not a right protected under the Civil Rights Act of 1964 or any of the other HUD-enforced civil rights authorities, and because neither smokers nor non-smokers are groups that receive special recognition under the Civil Rights Act of 1964, the restriction of smoking in public housing would not violate § 1.4.

Now, we turn specifically to the validity of the KHA's smoking preference policy. Based on the limited information provided to us, aside from potentially problematic issues involving the accommodation of the disabled, its smoking policy appears to be an acceptable application of the KHA's authority, granted by HUD. In your memorandum, you refer to statements contained in the Omaha Office of Public Housing's letter of

24 CFR 1.4(b)(2)(ii) states "A recipient, in operating low rent housing with Federal financial assistance under the United States Act of 1937, as amended, . . . shall assign eligible applicants to dwelling units in accordance with a plan . . . providing for the assignment on a community wide basis in sequence based upon the date and time of the application is received, the size or type of unit suitable, factors affecting preference or priority established by the recipient's regulations, which are not inconsistent with the objectives of Title VI of the Civil Rights Act of 1964, and this part 1. The plan may allow an applicant to refuse a tendered vacancy for good cause without losing his standing on the list but shall limit the number of refusals without cause as prescribed by the responsible Department official."

Section 402(d)(2) and (3) of the Balanced Budget Downpayment Act of 1996 (Public Law No. 104-99) eliminated Federal preferences for the certificate, voucher, and moderate rehabilitation programs for the fiscal year 1996 by amending Section 8(d)(1)(A) and 8(c)(3)(B) of the U.S. Housing Act of 1937.

November 6, 1995. This letter, which rejects the KHA's proposed smoking preference plan, states that the KHA waiting list "must be managed such that the next available unit be offered to the next applicant on the waiting list regardless of smoking preference."

Your memorandum also indicates that this letter suggested that the KHA, as an alternative to its plan, operate its waiting list as it does now, but classify an applicant's rejection of a unit due to a smoking preference as "good cause." Addressing both of these statements, under 51.4, the KHA has a broad discretion over both its selection and assignment procedures with few restrictions or requirements. Because none of the statutory or regulatory restrictions require adherence to the policy stated in the letter, such statements are only suggestions, and not legal obstacles to the KHA's plan.

Furthermore, the KHA smoking preference policy is in accordance with 24 CFR 960.204. In this provision, HUD gives the PHA additional guidance in developing its tenant selection policies. Section 960.204 states:

"each PHA shall adopt and implement policies and procedures . . . which take into consideration the needs of individual families for public housing and the statutory purpose in developing and operating socially and financially sound public housing projects that provide a decent home and a suitable living environment . . ."

One of HUD's purposes in granting PHAs broad authority to develop their own tenant selection and assignment plans is to provide PHAs with the flexibility to address their individual goals, as well as the concerns of the communities that they serve. In this case, the KHA smoking preference plan was developed in response to numerous complaints of health hazards and medical problems from non-smoking residents. The Kearney Manor Apartments' HVAC air system inadequately filters the air; thus, the poorly filtered air passes from smokers' units into the nonsmokers' adjacent units. Moreover, because it is difficult to remove the smoke smell and residue when preparing a unit for a new resident

3 For example, in a case where the family next on the waiting list had designated their preference for a smoking unit, but there were no available smoking units, statutory or regulatory law would not require the KHA to assign the family to a smoke-free unit, just because it was available. It is, therefore, possible that a family could remain on the waiting list for some time, and be passed over for housing until a unit of their preference is available.

once a smoker has left, the KEA has been experiencing vacancy problems. The new KEA policy is an appropriate way to address the residents' health concerns and vacancy problems, and thus, is a step towards a "decent home and a suitable living environment" and "financially sound public housing projects."

There is, however, one concern that must be conveyed to the KEA regarding its policy's treatment of the disabled.⁴ The plan for the Kearney Manor Apartments states that four of the 22 buildings will be handicap accessible and exempt from any smoking designation. There are two possible legal problems. First, segregating the disabled residents to only four of the buildings, away from the non-disabled, is potentially discriminatory. The KEA cannot provide separate accommodations for the disabled, even if those accommodations are comparable, solely on the basis of their disability.⁵ To our knowledge, the KEA has not offered any justification for distinguishing the four handicap accessible buildings from the other 18. Thus, with all else being equal among the 22 buildings, it appears that the KEA's current policy calls for the segregation of the disabled based solely on their disability.⁶ Because this aspect of the KEA policy could violate Federal law,⁶ the smoking policy's accommodation of the disabled in the Kearney Manor Apartments must be reevaluated.

The second legal problem is that because the handicap accessible buildings are exempt from the smoking designation, the disabled do not receive the same benefits of the new smoking policy as the non-disabled.⁷ For example, the disabled are not

⁴ The "disabled" meaning those individuals with disabilities as defined and protected under the Fair Housing Act, Section 504 of the 1973 Rehabilitation Act and the Americans with Disabilities Act.

⁵ 24 CFR § 8.4(b)(1)(iv) states "A recipient, in providing housing, aid, benefit, or service in a program or activity that receives Federal financial assistance from the Department . . . may not . . . solely on the basis of handicap provide different or separate housing, aid, benefit, or service to individuals with handicaps from that provided to others unless such action is necessary to provide qualified individuals with handicaps with housing, aid, benefits, or services that are as effective as those provided to other."

⁶ See footnotes 3 and 4.

⁷ 24 CFR § 8.4(b)(1)(i) states that "A recipient . . . that receives federal financial assistance . . . may not, solely on the basis of handicap deny a qualified individual with handicaps the opportunity to participate in, or benefit from, the housing, aid, benefit, or service."

afforded the opportunity to choose between living in a smoking or smoke-free building as the non-disabled are. The reason that the KHA offered for developing its new policy was to allow their residents to choose the type of smoking environment in which they would live. Again, the KHA policy appears to violate the law by denying the residents of the handicap accessible buildings the right to choose solely because of their disability. Thus, the policy must be modified to be consistent with the law.

In summary, the KHA may limit or prohibit smoking in its public housing, as long as its plan provides for the non-discriminatory treatment of the disabled and is consistent with other applicable Federal and State laws. Therefore, as long as the KHA conforms with 24 CFR 960.204, which governs the adoption and the publication of the new smoking preference plan, the provision of sufficient notification to current tenants and applicants, and the availability of the plan upon HUD request, the KHA will have fulfilled its obligations, and therefore, its smoking preference policy would be permissible.

⁹ See footnotes 3 and 6.