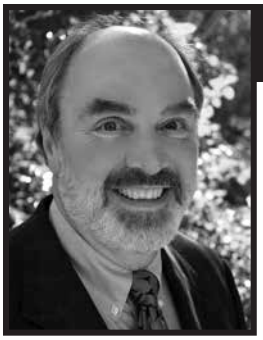

LAW IN ORDER: THE WARREN REPORT

DONE THE CRIME. DONE THE TIME. NOW WHAT?

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When considering an application from a prospective tenant, most landlords utilize tenant selection criteria. An integral part of those criteria involves criminal history. On April 4, 2016, the General Counsel for the U.S. Department of Housing and Urban Development (HUD), Helen R. Kanovsky, changed the rules about how a landlord might utilize one's criminal history to deny housing.

Ms. Kanovsky detailed her findings in a 10-page paper entitled *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records*. This HUD guidance is not law. It is, however, HUD's interpretation of the way the Fair Housing Act (FHA) is to be applied in cases where criminal history records are used to evaluate rental applicants. The conclusion of Ms. Kanovsky's paper is revealing. She states that "a discriminatory effect, resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction, cannot be justified, and therefore such a practice would violate the Fair Housing Act."

She goes on to state that "policies that exclude persons based on criminal history must be tailored to serve the housing provider's substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of the crime and the length of the time since conviction."

The HUD guidance from April 2016 is one of the first attempts to use the "disparate impact standard" since the United States Supreme Court decided, in 2015, that HUD and other government agencies may use disparate impact as a legal argument, to contest a facially neutral policy which has a discriminatory effect, and therefore violates the FHA.

"A discriminatory effect, resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction, cannot be justified, and therefore such a practice would violate the Fair Housing Act."

Factual background for the HUD guidance

According to HUD, as many as 100 million U.S. adults, or nearly one-third of the population, have a criminal record of some sort. HUD points out that, as of 2012, the United States accounted for only about five percent of the world's population, yet almost one-quarter of the world's prisoners were held in American prisons.

One statistic of note to the housing industry, (as provided by HUD), is that since 2004, an average of over 650,000 individuals have been released annually from federal and state prisons. HUD points out that when individuals are released from prisons and jails, their ability to access safe, secure and affordable housing is critical to their successful re-entry to society.

HUD's General Counsel made it a point to emphasize the connection between its data and the disparate impact standard. She states that across the United States, African-Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population. Consequently, Ms. Kanovsky notes, criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers.

There are two ways in which criminal history-based restrictions on housing opportunities may violate the FHA. First, if without justification, barriers and burdens fall more often on renters of one race or national origin over another, the result is *discriminatory effects liability.* Second, intentional discrimination in violation of the FHA occurs if a housing provider treats individuals with comparable criminal history differently because of their race, national origin or other protected characteristic. This is called *disparate treatment liability.*

All landlords should have tenant selection criteria. If the criteria you use enables you to deny an applicant simply because of arrests (and does not require convictions), you will have a problem. If your criteria have a blanket prohibition against renting to anyone with a conviction, no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then, you had better beware. Application of such "anyone-with-a-conviction" criteria will very likely now result in a violation of fair housing law.

To avoid a violation, landlords must always be able to show that there is a substantial, legitimate, nondiscriminatory interest supporting any policy which denies housing to an individual based upon the use of criminal history.

The HUD guidance from April 2016 sets forth three steps to follow when analyzing whether a proposed or existing policy, utilizing criminal history, violates the FHA. First, someone must file a complaint, and then prove that the criminal history policy in question has a discriminatory effect. If this is successfully done, there is a second step. It requires the housing provider to demonstrate that its policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest which that housing provider actually has. This interest, moreover, may not be hypothetical or speculative. The necessity of the policy must be proven by statistics and evidence.

Third, once the housing provider has convinced HUD or a court that the policy or practice is necessary, the party who filed the complaint will have the opportunity to suggest another viable practice, or provision to be included within your tenant selection criteria, which the landlord may follow that is less harmful or discriminatory.

It is foreseeable that something like the following might occur. You provide your tenant selection criteria to an applicant wanting to lease at your community. They submit a rental application. Once their criminal history is disclosed and looked into, their application is rejected. Grounds you provide for rejection are that the criminal history of the applicant did not meet your criteria. That rejected applicant then files a fair housing complaint.

Since "being a criminal" or "having a criminal history" is not a protected class under the FHA, the complaint would have to allege another basis for discrimination. Due to the disparate impact standard, the complaint would probably be based upon race or national origin. The complainant would allege that you used their criminal history as a pretext for unlawful discrimination. The complainant will contend that their criminal record was not the true reason for your adverse housing decision. They will allege that you denied them housing because of their race or national origin, both of which are protected classes.

Those are not the only two protected classes to which the disparate impact theory applies. It could just as likely be a protected class such as disability, sex or familial status. Since the allegation must be supported by facts and data, however, the protected classes of race and national origin have the most data available to support the theory that criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers.

This new HUD guidance will likely require you to revise your tenant selection criteria and its provisions on criminal history. When you do, focus on convictions. HUD states that "the mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." HUD's General Counsel specifically

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According to the U.S. Department of Housing and Urban Development, as many as 100 million U.S. adults, or nearly one-third of the population, have a criminal record of some sort.

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advises landlords that "the fact of an arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual."

Next, require specifics for prior convictions

A blanket prohibition against renting *to any person with any conviction record* will not suffice. The housing provider must consider when the conviction occurred, and what the underlying crime entailed. The prospective landlord must also take into account what the convicted person has done since the date of the conviction. Has the person been rehabilitated?

In addition, your tenant selection criteria concerning criminal history must accurately distinguish between criminal conduct that indicates a demonstrable risk to resident safety and/or property, and criminal conduct that does not. Stated another way, you will be required to analyze an applicant's past history to determine whether that person poses an unacceptable level of risk, and distinguish that type of applicant from those that do not.

In addition, your policy or practice relating to criminal history must take into account the nature and severity of an individual's conviction. The TAA Redbook, in its article entitled *Factors for Owners to Consider When Rental Applicants Have Committed Felonies*, identifies certain crimes that fit within a *more severe crimes* category. These include rape, murder, molestation, robbery, arson, and terrorism. They also include drug-related activity, although such activity involving controlled substances is restricted to sale or manufacture, rather than mere possession.

The HUD guidance also states that your policy or practice must consider the amount of time that has passed since the criminal conduct occurred. This is occasionally referred to as "the look back period."

In footnote 34 of the HUD guidance, there is reference to a 2006 report from Criminology and Public Policy which concludes "that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record."

A difficult question, then, is what length of look back period is appropriate? Stated another way, what is a reasonable period of time within which to evaluate one's criminal history? There is no fixed answer.

HUD points out that when individuals are released from prisons and jails, their ability to access safe, secure and affordable housing is critical to their successful re-entry to society.

In various HUD publications one will see reference to look back periods of seven years, five years, four years and three years before the admission decision. The length of any look back period will likely be evaluated at the same time the particular crime is evaluated. Crimes like murder, for example, arguably merit a longer look back period than crimes like robbery.

There are, in addition, certain crimes which HUD seems to suggest will always result in denial of admission to the applicant who has committed such a crime. On February 4, 2010, Thomas J. Coleman, HUD's Regional Counsel for Region VII, wrote a memorandum in response to a request for guidance in connection with criminal background screening used at a HUD-assisted project. In that paper, Mr. Coleman admitted that criminal history must be considered when the landlord decides whether to accept an application for residency. In fact, he noted that under certain circumstances, landlords at HUD-assisted projects are actually required to deny admission to applicants who have certain crimes in their criminal history.

The denial of an application is required, (at HUD-assisted housing projects), where the applicant, or any member of the applicant's household, has been evicted from federally assisted housing for drug-related criminal activity. This prohibition, moreover, remained in place for three years from the date of conviction, with two exceptions. The first exception would be for recovering addicts who have completed rehabilitation, and the second exception would be for families in which the criminal member no longer resides in the household.

Regional Counsel Coleman also pointed out that a landlord in a HUD-assisted project is prohibited from admitting a person who has a pattern of illegal drug use or is subject to a lifetime registration requirement under a state sex offender registration program.

Note that these standards apply only at HUD-assisted properties. It is unclear, moreover, whether these automatic prohibitions will be affected by the HUD guidance from April 2016. Even with this uncertainty, Mr. Coleman's comments are certainly helpful.

Regional Counsel Coleman also addressed situations in which landlords have discretion to deny admission based on criminal history. In his 2010 paper, he pointed out how landlords in HUD-assisted projects may deny admission 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 behavior; [or] (3) other criminal activity that would threaten other residents or the owner.

Mr. Coleman included in his memorandum a partial analysis of a particular property's tenant selection criteria. One criterion provided as follows: "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."

Mr. Coleman found the criteria he was asked to examine to be unacceptable.

He noted one major flaw was that it was not restricted to a reasonable time before the admission decision. He went on to suggest that the criteria be revised to read 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." HUD Regional Counsel Coleman, therefore, has given us some useful insight into how we must draft tenant selection criteria dealing with criminal histories.

The HUD guidance is clearly driven by the disparate impact theory. That theory was upheld by the United States Supreme Court in 2015. In the Supreme Court's opinion, the phrase "facially neutral policy" was used. Under the disparate impact theory, a policy which avoids reference to a protected class (e.g. race, national origin, disability, etc.), and is therefore facially neutral, many still fail under the FHA.

HUD is encouraging all landlords to use discretion, and *avoid absolute prohibitions*. As you do this, ask yourself various questions. What is the nature of the crime which makes us want to keep this applicant out of our community? How long ago did this crime occur? What was the age of the person who committed the crime at the time of the act? Was this a one-time incident, or has the applicant been convicted of other crimes since then?

Remember, simply being arrested or charged will rarely serve as a basis for excluding one from a housing opportunity. Convictions have become a necessity.

Even with convictions, however, onsite leasing professionals are faced with an applicant who has served the time and h now back in society. So consider current factors. Does the applicant have steady employment at this time? What references can the applicant provide you, and what do those references have to say about the person?

The HUD guidance does not require the landlord to ignore concerns such as the protection of other residents and their property. These are, notes HUD General Counsel Kanovsky, often considered to be among the fundamental responsibilities of a housing provider. Courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy or practice. As explained in HUD's 2013 Discriminatory Effects Final Rule, a "substantial" interest is a core interest of the organization that has a direct relationship to the function of that organization. The requirement that an interest be "legitimate" means that a housing provider's justification must be genuine and neither false nor fabricated.

By taking into account factors such as the type of crime and the length of time since conviction, HUD believes that people who are released from prisons and jails will be better able to access safe, secure and affordable housing. There appears to be no disagreement that this is critical to the successful reentry of such persons to society.

Absolute prohibitions have generally been abolished. Discretion has rushed in to fill the void. Let us hope that *discretion is the better part of valor.*

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