

Voice of The Ex-Offender

3301 Chartres Street, New Orleans, LA 70117

David Gilmore, Administrative Receiver
Housing Authority of New Orleans
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RE: HANO's Draft Criminal Background Policy

January 18, 2013

Dear Mr. Gilmore,

VOTE is a grassroots, membership based organization founded and run by Formerly Incarcerated Persons in partnership with allies dedicated to ending the disenfranchisement and discrimination against FIPs. We believe that FIPs, their loved ones, allies and communities can use their experiences and expertise to improve public safety in New Orleans. It is with that sentiment we represent families that are suffering under HANO's policies, and we also endeavor to help craft policies that create a safe and healthy New Orleans.

The drafted policy ("HANO Draft," Jan. 5, 2013) is a welcome step in acknowledging a systemic problem in our community. The Preamble, in particular, is a very honest assessment of HANO's role in perpetuating the problem we all face. More importantly, HANO recognizes the importance of taking a proactive approach to ending the discrimination and supporting all families with a need for affordable housing.

Although the Policy Statement is vague, and we presume the public hearing is designed to help guide specific language, there are several troubling aspects that need to be addressed.

Employment and HANO Draft:

The Draft states all who do business with HANO, including contractors, consultants, or landlords, shall adopt this policy. Such a policy, as the language appears, may subject HANO to a Title VII discrimination lawsuit by the EEOC and/or private litigants. The community is not aided by any part of the HANO/HUD budget going to attorneys, settlements, or jury awards.

In 2012, the Equal Employment Opportunity Commission revised their official standards regarding criminal convictions and employment practices.ⁱ After an extensive investigation and hearing process, they ruled that blanket bans against hiring all who have been convicted of crimes will likely violate Title VII in the Civil Rights Act of 1964.ⁱⁱ This is because evidence is clear that Black and Latino Americans are disparately impacted by the criminal justice system.ⁱⁱⁱ The EEOC has provided strict, yet flexible, contours for employers to remain in compliance with Title VII. Namely:

- The EEOC acknowledges that national data proves exclusions based on criminal records will have a disparate impact based on race and national origin.
- Employers are likely to meet “job related” and “business necessity” standards where they have developed a target screen considering at least:
 1. Nature of the crime;
 2. Time elapsed;
 3. Nature of the job;^{iv}
 4. Individualized assessment.^v

Although compliance with federal laws and/or regulations conflicting with Title VII are a defense to a discrimination charge, HANO policies that exceed federal employment restrictions are preempted by Title VII if they require or permit any unlawful employment practice under Title VII.^{vi} This Title VII enforcement structure, where naturally extended to public housing practices, allows HANO a defense where adhering to HUD residency requirements, yet a liability where policies either “require” or “permit” unlawfully excessive discrimination by use of a criminal record.

After the Supreme Court acknowledged in 1971 that Title VII permits disparate impact claims, Congress ultimately amended the FHA.^{vii} The new law requires a respondent facing an established disparate impact claim to demonstrate that the practice is job related for the position in question and consistent with job necessity.^{viii} This further shows the interrelatedness of housing and employment standards of the Civil Rights Act. Currently, the HANO Draft might, for example, bar a landscaping company employing someone with a 10-year old domestic violence conviction.

Suggestions:

The HANO Draft would reasonably bar many people from working for, or with, HANO that have nothing to do with “job related” or “business necessity.” Therefore, HANO should:

- Establish a targeted screen for employment;
- Provide clear guidance for subcontractors who employ people with criminal convictions;
- Establish which jobs pertain to resident safety or fiduciary responsibility (e.g. having supervisory control over funds or vulnerable populations);
- Establish a procedure whereas a background check is not conducted until there is an offer of employment, so as not to be discriminatory in the hiring process;
- Make no permanent bars to employment for *any* crime, except where federally mandated.

Housing and HANO Draft:

Similar to employment, HANO should adopt a specific policy that both furthers its mission and keeps it immune to discrimination litigation. To this end, HANO’s restrictions clearly exceed the HUD standards (see attached Table). Whether the Policy Statement can survive in any capacity will depend upon:

- (1) How “clear and present danger” is defined;

- (2) How broadly they determine the scope of sex crimes;¹
- (3) What is meant by “history of domestic violence;”
- (4) The composition of the review panel, and
- (5) What guidance is used to analyze the factors.

HANO may ultimately bar people who were convicted of misdemeanors or who merely had the police respond to an alleged domestic violence scenario. It should not be overlooked that anyone applying for public housing is not incarcerated. Whether it is someone on probation, or recently coming home from prison, homelessness should not be a part of their punishment.

Suggestions:

- Eliminate permanent bans in category 2 and 3, except where HUD mandates a ban on those who are on the lifetime sex offender registry;
- Develop a targeted screen, with factors including mitigation (see: Stand With Dignity’s Model ACOP);
- Ensure that the Admissions/Eviction panel represents the community, including those with criminal records;
- Not apply any standards to entire Households (target any exclusions to the offending person);
- Clearly state how far back HANO intends to consider criminal convictions (3 years is ample time);
- Address mental health and substance abuse problems by developing programming rather than eviction, and/or arrest, that contributes to prison overcrowding and the homelessness in New Orleans.

People in our community will never be able to work through their struggles if they are rendered homeless. It is well established that there is not enough affordable housing options for every eligible family, and waiting lists can be lengthy. This added burden, which has served to thin the applicant pool, has not been beneficial as a whole. The War on Drugs has been a war on our own people and, four decades into it, we are feeling those intergenerational affects.

Every year thousands of people return home from prison, most of them are from families that are economically eligible for subsidized housing. Practically all would be eligible in their own right, as heads of households. Hundreds could be absorbed into households already living in HANO housing, except for the myriad barriers. As HANO knows, the

¹ Currently, all people on the Sex Registry (regardless of level) are barred- including their families. This is similar to Chicago. See, e.g., CHICAGO HOUSING AUTHORITY, FY2010 ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 14 (approved Sept. 21, 2010) (denying admission to applicants who have —ever been convicted of a crime that requires them to be registered under a state sex offender registration program including the ten-year Illinois State Sex Offender Registration Act[|]).

community it serves is not the individual residential properties it administers, but the entire low-income people of New Orleans. The city is not safer because a parent tells their child to go live under I-10 rather than jeopardize her own housing. Those parents and other loved ones are the key support network for anyone's reentry.

It is easy to focus on the formerly incarcerated and overlook the fact that most people with criminal records never went to prison. They were placed on probation, as they did not pose a danger to the community. Considering the readiness for prosecutors to seek (and judges to order) incarceration, it should be acknowledged that many people barred from HANO were never considered a "clear and present danger." Furthermore, the parole boards who release a prisoner also does not consider them such a threat to the community. There is no compelling reason for HANO to have a stricter standard of threat assessment than those who make such decisions on a daily basis.

People who struggle with mental health and substance abuse make up the bulk of people arrested by the police. At times they are committing crimes, while others they may be simply unable to effectively comply with a police officer's commands. HANO should not presume anyone guilty in their admission or eviction policy, as this violates the Constitution. Arrests are not proof of a danger to other residents at all. The NOPD has its own challenges to work through before they should be recognized as judge and jury for an entire family's housing.

We would like to see HANO be part of directing people to treatment, and if they find substance abuse is epidemic to low income HANO residents, it would be more effective to develop rehabilitative programs through HUD's financial and political structure than to evict them all and pass the problem along to someone else. The one program that accepts everyone is prison. We reject this as a solution to systemic problems and we seek to ally ourselves with those who want to unify, not dissect, our community.

Conclusion

VOTE appreciates this opportunity to address a longstanding problem, and look forward to working with HANO. The opportunity should not be lost, however, due to well-intentioned yet half-hearted measures. Ultimately, we need to develop a system where people can work through their problems and, for those who are sent to prison, a chance to unite our families. Katrina did enough to split us up into isolated and struggling individuals. Our low income people thoroughly felt every failure of FEMA. We cannot afford to have HUD and HANO operate contrary to our interests any longer.

Sincerely,

Norris Henderson
Executive Director
Voice of the Ex-Offender (VOTE)

ⁱ Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (April 25, 2012). http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

ⁱⁱ Id. At I. Summary: · A violation may occur when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability).

An employer's neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity (disparate impact liability).

ⁱⁱⁱ Id. At Part II, Introduction.

^{iv} EEOC Guidelines, at 5, *citing* Green v. Missouri Pacific, 549 F.2d 1158 (8th Cir. 1977).

^v Id. Although not required, those screens lacking an individualized assessment are more likely to violate Title VII.

^{vi} Id. Citing 42 U.S.C. § 2000e-7.

^{vii} *Griggs v. Duke Power*, 401 U.S. 424, 431-32 (1971).

^{viii} 42 U.S.C. § 2000e-2(k)(1)(A)(i). The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105; *see also* *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010) (reaffirming disparate impact analysis); *Ricci v. DeStefano*, 557 U.S. 557 (2009).