

Legal Opinion: GME-0011

Index: 9.207

Subject: Eligibility of Chronically Mentally Ill Complainant

August 18, 1992

MEMORANDUM FOR: Roy J. Rodriguez, Acting Director
Office of Investigations

FROM: Harry L. Carey, Assistant General Counsel
for Fair Housing

SUBJECT: Quinlan v. Congregational Retirement Homes,
Inc., et al., Complaint No. 01-91-0329-1

By January 9, 1992 memorandum, the former Director requested a legal opinion regarding the above-referenced complainant's eligibility for the housing at issue. The complainant, who apparently is chronically mentally ill, applied for and was denied a place on the waiting list for an apartment at the Gould House, owned by Congregational Retirement Homes, Inc. (CRH).

The Gould House, funded under Section 202 of the Housing Act of 1959, 12 U.S.C. 1701q, is limited to elderly (age 62 and over) and handicapped tenants. Under Section 202, a housing provider may house three categories of handicapped persons, i.e., those who: (1) have impairments which (a) are expected to be of long-continued and indefinite duration, (b) substantially impede their ability to live independently, and (c) are of such a nature that that ability could be improved by more suitable housing conditions; (2) are developmentally disabled; and (3) are chronically mentally ill. 12 U.S.C. 1701q(d)(4); 24 C.F.R.

885.5. HUD policy permits Section 202 housing providers to limit their handicapped tenants to one of the three categories. March 30, 1984 Memorandum of Maurice Barksdale, Assistant Secretary for Housing, entitled "Supplemental Policy Clarification on Section 202 Admission Criteria" (Exhibit C2 of investigation file). This policy has been upheld by federal courts. *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343, 1349 (10th Cir. 1987); *Brecker v. Queens B'nai B'rith Housing Development*, 798 F.2d 52, 56 (2d Cir. 1986); *Almonte v. Pierce*, 666 F. Supp. 517, 531 (S.D.N.Y. 1987).

The evidence indicates that CRH may limit admission to the first category of Section 202 handicapped persons. CRH defines these tenants as mobility impaired. HUD's definition, which is slightly broader, states that these tenants are those with "a physical impairment, including impaired sensory, manual, or speaking abilities, which results in a functional limitation in access to and use of a building." November 1, 1989 Memorandum of Frank Keating, General Counsel, entitled "Section 202 Projects for the Elderly and Handicapped -- Persons With Aids" (attached hereto). Thus, under this first category, a handicapped individual is eligible for Section 202 housing only if he or she

has an impairment that limits his or her access to and use of a building.

The complainant does not claim, and the evidence does not indicate at this time, that, at the time she applied for the Gould House, she had an impairment that would limit her access to and use of the housing. She apparently did not require a handicap accessible unit. Therefore, she was not qualified for an apartment at the Gould House. Accordingly, CRH's refusal to place complainant's name on the waiting list would not violate subsections 804(f)(1) or (2) of the Act.

However, our preliminary review of the file indicates that CRH may have violated subsections 804(c) and (f)(2) of the Act by use of CRH's tenant application form. We are particularly concerned with the portion of the application which asks whether an applicant has a history of alcohol abuse, overmedication, drug abuse and attempted suicide. We are also concerned with several of CRH's tenaning practices, e.g., requiring a medical examination for admission.

In light of these possible violations, we believe that further investigation is required to ascertain whether CRH's use of its application form is a statement or notice made, printed, or published with respect to the rental of a dwelling, that indicates a preference, limitation, or discrimination based on handicap, and whether through that use, CRH discriminated in the terms, conditions, or privileges of rental of a dwelling. We also believe that further investigation would assist us in determining whether reasonable cause exists to believe that, while CRH refused to rent to the complainant, it may have rented to other handicapped persons who were not mobility impaired, i.e., not limited to the first handicap category, and, consequently, may have discriminated against complainant based on the nature of her handicap. Thus, further investigation is necessary in the following areas:

- 1) Complainant's precise handicap(s) at the time of application and denial must be identified, as well as supporting information indicating why she is handicapped within the meaning of the Fair Housing Act.
- 2) Ascertain when, why, and by whom the words "or handicapped" were typed onto page 2 of CRH's tenant selection policy statement at Exhibit B2. Those words appear to have been added sometime after CRH began employing a 62 or older policy.
- 3) Obtain or prepare tenant lists for the Gould House and CRH's other two buildings. These lists should specify: a) tenants' names and addresses; b) tenants' ages; c) whether tenants reside in handicap accessible units; d) tenants' disability/ies and whether they use a wheelchair; e) tenants' move-in dates; f) supportive services provided to each tenant and reasons therefore; and g) whether CRH describes each tenant as capable of independent living, and if not, why not.
- 4) Determine when CRH began to use question 17 (or any

similar question by a different number) on its tenant application. Ascertain both CRH's purpose in asking this question and what CRH does with the information once acquired. A sampling of applicant files should be made to see how applicants' answers to this question influence CRH's decision whether or not to accept an applicant for tenancy or the waiting list. Copies of relevant applicant and tenant files should be obtained.

5) Both the complainant and her case worker from the Massachusetts Department of Mental Health should be interviewed about how, if at all, the complainant was affected by having to respond to CRH's application question 17.

6) It appears that something may be missing from complainant's application because it skips from question 13 to question 17. In addition, why is page 4 dated August 22, 1990 and page 5 dated August 20, 1990? Why does the latter have Rosaleen Boylan's business card attached to it? Did the complainant complete the application herself, or did a CRH representative or complainant's case worker do so? Was any screening process by the case worker involved in the application process?

7) Determine the ages of Mr. and Mrs. Hayes at the time they applied for housing. Additionally, identify Mr. Hayes' handicap. Ascertain whether any other applicants ever been accepted by CRH who are under the age of 62 years and who are not mobility impaired. If so, obtain copies of their tenant files.

8) Determine what CRH means when it reserves the right to require applicants to submit to a medical examination and whether this right has ever been invoked and against whom. If so, obtain copies of the tenant files for these applicants. Also ascertain CRH's purpose for such a policy.

9) Discern what CRH's "capable of independent living" requirement means, and how CRH ascertains whether applicants are or are not so capable. Have any applicants been denied a unit or a place on the waiting list because they were incapable of independent living? If so, obtain copies of these applicant files.

10) Confirm that, from its beginning, Gould House was intended for elderly and mobility impaired persons.

In addition, we suggest that consideration be given to amending the complaint be amended to allege a violation of section 804(c) of the Act and to name the members of CRH's Board of Directors and its August 1990 Executive Director Rose-Virginia Smith. Any such amendment should, of course, be properly served on both current and newly added respondents. Any additional respondents should then be interviewed. We note also that Exhibit C17 is missing from and should be added to the file. Finally, CRH's application for Section 202 funding for the Gould House should be obtained.

Once the additional investigation has been completed, the

case file should be referred to this office for a determination as to whether reasonable cause exists or does not exist. Any questions should be directed to Kathleen Pennington of my staff at FTS 458-0340.

Attachment (case file)