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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2022-001353

Jeffery Rush,…….....Appellant,

v.

Shady Moss Apartments……..Respondent.

FINAL RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

(A) Cases

(B) Statute

(C) Regulations

(D) Other Materials

STATEMENT OF THE ISSUE ON APPEAL

Did the Circuit Court properly affirm the Magistrate's decision to grant the Respondent's request for an eviction, where the applicable federal regulations permit termination of a lease without a right to cure in situations involving criminal activity?

STATEMENT OF THE CASE

This case arises from an eviction due to criminal activity in an apartment being leased by Appellant Jefferey Rush. As a result of that incident, Respondent Shady Moss Apartments filed a Rule to Vacate in the Horry County Magistrate's Court on March 12, 2021. [R. p. 12] Following a non-jury trial in April 2021, the Magistrate found in favor of Shady Moss Apartments. [R. p. 11] The Magistrate subsequently denied Rush's motion to alter or amend.

Rush appealed to the Circuit Court, which held a hearing and then remanded the case to the Magistrate's Court for further proceedings. [R. pp. 8, 16] The presiding Magistrate determined that a re-trial was necessary, but recused himself because he had conducted the original trial. [R. p. 7] Thus, the case was transferred to a different judge for the re-trial. [R. p. 7] The second bench trial took place on April 18, 2022, and it again resulted in a finding in favor of Shady Moss. Specifically, the Magistrate concluded that the applicable federal regulations entitled Shady Moss to terminate the Lease Agreement under these circumstances. [R. pp. 4-6]

Rush filed a second appeal in the Circuit Court, which led to a hearing on September 21, 2022. [R. pp. 18, 55-65] At the conclusion of that hearing, the Honorable Michael Nettles announced his decision to affirm the result in the Magistrate's Court. [R. p. 64] Judge Nettles signed a written Order to that effect on September 23, 2022. [R. pp. 2-3] In

that Order, Judge Nettles gave Rush until September 26, 2022, to vacate the premises or a Writ of Ejectment would be issued. [R. p. 2] However, on September 26, 2022, Rush filed and served a Notice of Appeal in this Court. [R. p. 54]

STATEMENT OF THE FACTS

Appellant Jefferey Rush ("Rush") entered into a Lease Agreement for an apartment unit at Shady Moss Apartments ("Shady Moss") in Conway, SC, on or about September 16, 2020. [R. pp. 172-186] As noted in the lease, Shady Moss is a community that receives subsidies and/or funds from the United States Department of Agriculture ("USDA") through its Rural Housing Service program. [R. pp. 172, 177-178] Thus, in addition to the terms of the lease, the provisions of certain federal regulations were applicable to the tenancy.

In late December 2020, just two months after Rush moved into Shady Moss, law enforcement officers received information that a wanted fugitive named Terrence Lamount Melvin was staying at Rush's apartment. [R. p. 189-191] Melvin was listed by the National Crime Information Center ("NCIC") as being wanted for attempted murder. [R. pp. 189-191]

On the afternoon of December 30, 2020, officers of the City of Conway Police Department, as well as members of the United States Marshals Task Force, went to Rush's apartment in an attempt to apprehend Melvin. [R. pp. 189-191] The officers gained lawful entry into the apartment and arrested Melvin. [R. pp. 189-191] As they made the arrest, the officers saw what appeared to be marijuana on a living room table. [R. pp. 189-191] The officers asked Rush to leave the apartment while a search warrant was obtained and executed. [R. pp. 189-191] During the subsequent search of the apartment, the officers

discovered 9.6 grams of marijuana, 1 gram of heroin, an illegally possessed firearm, and an unspecified amount of cash in small bills. [R. pp. 189-191] As a result of the search and seizure of those materials, Melvin was charged with several criminal offenses. [R. pp. 189-191]

After learning of this incident, a representative of Shady Moss sent Rush a Notice of Lease Violation ("NLV") on February 8, 2021. [R. p. 187] The NLV specified that Rush had violated section 26.v of the Lease Agreement, which references "drug-related criminal activity engaged in on or near the Community by any Tenant, household member or guest, or any such activity engaged in or on the Community by any other person under Tenant's control" as grounds for termination of the lease. [R. pp. 179-180][1] The NLV further indicated that there was no ability to correct this type of violation. [R. p. 187] Four days later, Shady Moss sent Rush a Notice of Termination of Lease based on the same grounds. [R. p. 188] That notice gave Rush thirty days to vacate the premises, or judicial proceedings would be commenced. [R. p. 188] There is no record evidence that Rush vacated the premises or made any efforts to challenge Shady Moss' decision during that time period. Thus, Shady Moss commenced the eviction action on March 23, 2021.

STANDARD OF REVIEW

"In an eviction action first heard by the magistrate and affirmed by the circuit court, the court of appeals is without jurisdiction to reverse the findings of fact of the circuit court

[1] Section 26 of the Lease Agreement also lists as a ground for termination: "Criminal activity by a Tenant, any member of Tenant's household, or a guest or other person under Tenant's control that threatens the health, safety, or right to peaceful enjoyment of the residences or Community by others (including other tenants and property management staff), regardless of whether the Tenant, any member of the Tenant's household, a guest or another person under the Tenant's control has been arrested or convicted for such activity." [R. pp. 179-180]

if there is any evidence supporting them." *City of Charleston Housing Auth. v. Brown*, 437 S.C. 514, 520, 878 S.E.2d 913, 916 (Ct. App. 2022) (citing *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 233, 312 S.E.2d 20, 21 (Ct. App. 1984)). "However, the court of appeals 'retains de novo review of whether the facts show the circuit court's affirmance was controlled or affected by errors of law.'" *Id.* (quoting *Bowers v. Thomas*, 373 S.C. 240, 245, 644 S.E.2d 751, 753 (Ct. App. 2007)).

ARGUMENT

This Court should affirm because the courts below correctly interpreted and applied the governing federal regulations addressing termination of a lease due to criminal activity.

Rush argues on appeal that the lower courts should not have granted the eviction request because Shady Moss did not give him an opportunity to "cure" the reason for the lease termination. The Magistrate's Court and the Circuit Court both rejected that assertion, concluding that the applicable federal regulations allowed Shady Moss to terminate the lease without giving any opportunity to cure. Those decisions were based on the only reading of the key federal regulation that makes any logical sense, and this Court should affirm.

(A) The plain language of 7 CFR §3560.159 supports the right to terminate a lease without providing a right to cure in situations involving criminal activity.

(1) Legal Standards

"Regulations are interpreted using the same rules of construction as statutes." *Murphy v. S.C. Dept. of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). "'When interpreting a regulation, [courts] look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand the regulation's operation." 396 S.C. at 639-40, 723 S.E.2d at 195 (quoting

Converse Power Corp. v. S.C. Dept. of Health & Envtl. Control, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002)). "Whe[n] the language of a regulation is plain, unambiguous, and conveys a clear and definite meaning, interpretation is unnecessary and improper." *Blackmon v. S.C. Dept. of Health & Envtl. Control*, 436 S.C. 529, 539-40, 873 S.E.2d 774, 780 (2022). "However, if applying the regulation's plain language would lead to absurd result, [courts] will interpret the regulation in a manner that avoids the absurdity." *S.C. Dept. of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 261, 725 S.E.2d 480, 483 (2012).

If it becomes necessary, "[i]nterpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation." *Kiawah Dev. Partners, II v. S.C. Dept. of Health & Envtl. Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014). "If the statute or regulation 'is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference.'" 411 S.C. at 33, 766 S.E.2d at 171 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).

(2) Discussion

Shady Moss is a participant in the USDA's subsidy program for multi-family housing in rural areas for people who meet certain requirements relating to low income levels and/or disabilities. This program is substantially similar to other federal housing subsidy arrangements administered by both the USDA and the U.S. Department of Housing

and Urban Development ("HUD"). As a participant in the USDA program, Shady Moss is subject to regulations enacted by the USDA pursuant to authority the U.S. Congress has granted to that agency. *See* 42 U.S.C. §1480(k).

The issue in this appeal involves one of those federal regulations – 7 CFR §3560.159. Specifically, Rush disagrees with the lower courts' conclusions that subsection (d) of that regulation "stands alone" as a basis for termination of a lease and is not subject to the notice and cure requirements contained in subsection (a). Instead, Rush contends that subsection (a) essentially subsumes and controls the rest of the regulation. A careful reading of the regulation as a whole fails to support that position.

Subsection (d) of §3560.159, upon which both lower courts relied, states: "Criminal activity. Borrowers[2] may terminate the tenancy for criminal activity or alcohol abuse by household members in accordance with the provisions of 24 CFR 5.858, 5.589, 5.860, and 5.861." This short, plain statement does not impose any procedural duties on landlords, and it does not grant any additional rights to tenants. It simply gives landlords the right and ability to terminate leases based on criminal activity. Even Rush must concede that this subsection, in and of itself, neither creates nor acknowledges any right by the tenant to cure a lease termination for criminal activity. There is no way to interpret this subsection in that manner, other than to add provisions to it that are not present.

The other regulations referenced in §3560.159(d) come not from the USDA, but from HUD.[3] 24 CFR §5.858 requires leases to contain provisions that drug-related criminal

[2] The regulations use the term "borrower" because the owners of the housing facilities participating in this USDA program receive federal monetary subsidies. To avoid any confusion, however, Shady Moss will use the more familiar term "landlord" in its discussion of the regulations.

activity constitutes grounds for terminating a lease. Section 5.859 makes the same declaration for any criminal activity that "threatens the health, safety, or right to peaceful enjoyment of the premises" by other residents of the premises or persons who reside in the immediate vicinity of those premises. Section 5.860 provides that leases must state that alcohol abuse which "threatens the health, safety, or right to peaceful enjoyment of the premises" of other residents is a ground for termination. Section 5.861 states that landlords "may terminate tenancy and evict the tenant through judicial action for criminal activity by a covered person in accordance with this subpart if you determine that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying a criminal conviction standard of proof of the activity." Significantly, while sections 5.858-860 require leases to contain the provisions noted above, those sections do not mention, let alone mandate, a tenant being given an opportunity to cure in such situations.[4]

Section 3560.159(d) states that landlords may terminate leases for criminal activity "in accordance with the provisions of 24 CFR 5.858, 5.589, 5.860." It follows that the absence of any cure provisions in those HUD regulations means there is also no right to cure in §3560.159(d). Otherwise, there would have been no reason to include and incorporate the HUD regulations.

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[3] This fact weighs against Rush's apparent argument that the purposes and requirements of this USDA program are somehow different from those for the low-income housing programs that HUD administers.

[4] A manual from HUD designed to assist program participants in following the applicable rules and regulations also does not reference any ability to cure when discussing lease terminations due to criminal activity. *See* hud.gov/sites/documents/DOC_35654.PDF, pp. 8-13 – 8-16.

Rush appears to argue that §3560.159(d)'s references to the HUD regulations are only intended to show what types of provisions regarding criminal activity must be included in leases for facilities participating in the program. As Rush notes in his brief, however, the USDA regulations already contain a section setting forth the requirements for lease provisions. *See* 7 CFR §3560.156(c). The existence of that section means subsection (d) would not need to mention the HUD regulations for the purpose of establishing mandatory lease provisions. Rather, subsection (d) incorporates the HUD regulations (and the underlying policies and agency guidance that come with them) and uses them as a separate and distinct ground for terminating a lease. Were this not so, subsection (d) would serve no purpose.

Contrary to Rush's arguments, subsection (a) of §3560.159 does not lead to any other conclusion. Subsection (a) is an entirely separate provision that does not control subsection (d). In relevant part, subsection (a) states:

> (a) Tenants in violation of lease. Borrowers, in accordance with lease agreements, may terminate or refuse to renew a tenant's lease only for material non-compliance with the lease provisions, material non-compliance with the occupancy rules, or other good causes. Prior to terminating a lease, the borrower must give the tenant written notice of the violation and give the tenant an opportunity to correct the violation. Subsequently, termination may only occur when the incidences related to the termination are documented and there is documentation that the tenant was given notice prior to the initiation of the termination action that their activities would result in occupancy termination.
>
> (1) Material non-compliance with lease provisions or occupancy rules, for purposes of occupancy termination by a borrower, includes actions such as:
>
> (i) Violations of lease provisions or occupancy rules that are substantial and/or repeated;

> (ii) Non-payment or repeated late payment of rent or other financial obligations due under the lease or occupancy rules; or
>
> (iii) Admission to or conviction for use, attempted use, possession, manufacture, selling, or distribution of an illegal controlled substance when such activity occurred on the housing project's premises by a tenant, a member of the tenant's household, a guest of the tenant, or any other person under the tenant's control at the time of the activity.

7 CFR §3560.159(a). This subsection does provide for a right to cure by the tenant, and it lists drug activity as an example of material non-compliance with a lease. Contrary to Rush's position, however, those basic facts do not end the inquiry. A proper reading of this regulation must take all of the subsections into account. When viewed in that manner, it is apparent that subsections (a) and (d) are not intertwined.

Significantly, subsection (a) is not the only one that sets forth a specific process for terminating a lease. Subsection (b), which addresses lease terminations due to a tenant becoming ineligible for the assistance program, also specifies a method for informing the tenant of the termination and commencing legal proceedings. If, as Rush contends, the "right to cure" provision of subsection (a) applies to the entire regulation, there would be no need to include separate procedural instructions in the very next subsection. Yet, that is exactly what the agency did when drafting the regulation.

It is also important to note that subsection (c), like subsection (d), does <u>not</u> contain any procedural requirements for termination. This is because both of those subsections deal with situations in which an ability to "cure" the issue is either impossible or unwarranted. Subsection (c) covers situations in which terminations are necessary due to "conditions which are beyond the control of the tenant, such as a condition related to required repair or

rehabilitation of the building, or a natural disaster ….” Tenants in those situations could not possibly do anything to “cure” the problem, meaning a right to cure would be pointless.

Similarly, there is no practical way to “cure” the criminal conduct addressed in subsection (d). Presumably a tenant could promise not to engage in such conduct in the future, or to prevent household members or guests from doing so, but such promises could easily be broken. And simply taking the word of such a tenant at face value would not serve the goal of protecting the safety of the housing facility and its residents. This is clearly why there is no right to cure for lease terminations involving criminal conduct under either §3560.159(d) or the HUD regulations it incorporates.

A question may arise as to why §3560.159(a)(1)(iii) lists drug activity as an example of a material breach of a lease, when such activity arguably could also fall within the scope of subsection (d). A reading of the entire regulation, coupled with the HUD regulations included in subsection (d), suggests that the agency sees some drug-related activities as more serious – and more of a threat to the community – than others. In other words, some kinds of drug activities rise to the level of “criminal conduct” so as to trigger subsection (d), while other kinds might not. Although the regulation does not state that position directly, it serves as a logical explanation for the wording of subsections (a) and (d), and it harmonizes them.

Although Rush argues that the lower courts’ application of subsection (d) creates an absurd result, it is actually Rush’s interpretation that does so. If Rush were correct, and subsection (a) provided for a right to cure in <u>all</u> situations, including criminal activity, then subsection (d) would serve no purpose whatsoever. Criminal conduct would <u>always</u> constitute a material breach of the lease, so there would be no reason to have a different

subsection specifically addressing criminal activity. A rationale could still be stated for having subsections (b) and (c), which deal with things that are not lease violations, but under that interpretation subsection (d) would be entirely superfluous.

Rush fails to provide any reasonable explanation for the existence of §3560.159(d) if his interpretation of that regulation is accurate. Again, Rush claims that because criminal activity amounts to a material violation of the lease agreement, all such activity must come under the provisions of subsection (a) of §3560.159. Yet, if that is true, what purpose would subsection (d) serve? Why would the agency list "criminal activity" as a separate ground for terminating a lease agreement, if that type of conduct were already included in subsection (a)? Rush has not answered those questions, nor can he. That inability is significant because regulations must not be read in such a way as to render parts of them unnecessary or ineffective. *See, e.g., Lightner v. Hampton Hall Club*, 419 S.C. 357, 364, 798 S.E.2d 555, 558 (2017) ("'A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous'") (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)); *Murphy v. S.C. Dept. of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012) ("Regulations are interpreted using the same rules of construction as statutes.").

To the extent Rush might argue that subsection (a) covers "drug crimes" and subsection (d) includes "all other criminal conduct," any such assertion must fail for at least two reasons. First, and most significantly, the HUD regulations incorporated into §3560.159(d) include references to drug crimes. *See* 24 CFR §5.858. Thus, there is no textual basis for concluding that §3560.159(d) does not apply to drug crimes; by its express terms it plainly does. Second, there is no logical basis for concluding that the agency

intended to treat drug-related crimes as somehow less significant than other types of criminal activity. As discussed below in section (B) of this brief, providing subsidized housing that is safe and free from all criminal activity – including illegal drugs – is a universal policy goal of all federal housing subsidy and funding programs. Given that policy and goal, it makes no sense at all to read §3560.159 in such a way as to give procedural protections to drug criminals that other types of criminals do not get.

Furthermore, even assuming *arguendo* that the agency intended to treat drug crimes and other crimes differently, it would not change the result in this specific case. In addition to the illicit drugs found in Rush's apartment, there was also an illegal firearm, not to mention the presence of a fugitive from the law. Those things certainly constituted criminal activity, even if no drugs had been found. Consequently, the termination of the lease was appropriate under §3560.159(d) regardless of the presence of illegal drugs.

Rush's reliance on *The CBM Group v. Llamas*, 12 Cal. App. 5th Supp. 34, 219 Cal. Rptr. 3d 683 (App. Div. Superior Ct. of CA, Fresno County, 2017), does not support a reversal of the lower courts' decisions in the present case. Although the court in *CBM* did appear to interpret §3560.159 the same way that Rush does, multiple issues call its persuasive force into question.

First, the primary basis for the court's decision in *CBM* was <u>not</u> the failure to provide a right to cure. Rather, the primary issue was whether the lower court could rely on allegations of drug crimes by the tenant or members of the household to grant a lease termination and eviction, when the landlord's actual stated basis for termination was only the failure to pay rent. After the court determined that the lower court had erred in considering evidence of drug crimes, the rest of the decision was unnecessary, and its

discussion of whether or not §3560.159(d) is subject to a cure provision is largely, if not entirely, dicta.

Second, and perhaps more significantly, the court in *CBM* cited no authority whatsoever for its interpretation of §3560.159, other than the regulation itself. The court appears simply to have given its own reading of the regulation without examining how the USDA, or any other courts or jurisdictions had interpreted or applied the regulation. Perhaps this is a major reason why, in the six years since *CBM* was decided, it has apparently not been cited as binding or persuasive authority by any other courts in either published or unpublished decisions. This hardly suggests that *CBM* represents the definitive word on this issue throughout the country.[5]

Third, the court in *CBM* never referenced, let alone analyzed, an argument that its interpretation of §3560.159 rendered subsection (d) of that regulation superfluous. As discussed above, there is no reason to have a separate and distinct subsection dealing with criminal activity if such conduct is treated the same as all other lease violations for purposes of subsection (a). The *CBM* court's failure to address that point further strips its decision of any persuasive force, particularly as it relates to the present case. For all of those reasons, this Court should decline to follow *CBM* or to adopt its reasoning in this case.

[5] As Rush notes, there do not appear to be any other published decisions interpreting §3560.159(d) in this context. However, just because *CBM* is the only published case does not necessarily mean that it is correctly decided, or that this Court should accept it at face value. Indeed, at least one other state's appellate court took a different view in a closely analogous setting. *See AHEPA 192-1 Apts. v. Smith*, 810 N.W. 2d 25 (Iowa Ct. App. 2011) (unpublished) (noting that there is no right to cure under HUD regulations when the lease is terminated due to criminal activity). *See also Tamerlane & Tamerlane III v. Hollis*, 2018 N.J. Super. Unpub. LEXIS 2716, 2018 WL 6518115 (NJ Ct. App. 2018) (noting that §3560.159(d) allows for eviction based on criminal activity without even a notice of violation).

Instead, the Court should apply the plain language of the regulation, which expressly makes criminal activity a separate and distinct basis for a lease termination and does not subject terminations on that basis to the requirements of subsection (a). If Rush's interpretation were correct, the regulation would end after subsection (c) because there would be no logical reason or need to have subsection (d). But the USDA did include subsection (d) as a separate provision, and it also had that subsection incorporate by reference several HUD regulations. It must have done those things for a reason. Therefore, the lower courts' readings and applications of §3560.159 are correct, and this Court should affirm.

(B) Even if construction of §3560.159 is necessary, the result reached in the lower courts is still correct.

Although it is unnecessary due to the plain language of §3560.159, an examination of the federal government's policies regarding the prevention of crime in federally-assisted or subsidized housing gives further support to the lower courts' decisions. Taking that policy into consideration also demonstrates the shortcomings of the arguments in section B of Rush's Appellant's Brief.

Rush contends that if construction of §3560.159 is required, the Court should look to a handbook that the USDA issued to provide guidance to owners/landlords participating in the USDA's housing programs. Although that seems to make sense on a surface level, a closer examination demonstrates that the handbook section upon which Rush relies is not instructive on the actual issue on appeal.

The handbook section quoted by Rush[6] does not contain any reference to "criminal activity," the specific term used in §3560.159(d). In fact, that handbook section reads like a summary of §3560.159, but only subsections (a) through (c). The substance of subsection (d) is missing. That absence is understandable, however, because subsection (d) references and incorporates HUD regulations in establishing "criminal activity" as a separate and independent ground for terminating a lease agreement. Thus, the guidance for applying §3560.159(d) must come from HUD's handbooks and manuals. This provides the logical explanation for why the USDA handbook omits any discussion of terminations specifically based on "criminal activity."

As noted above, the HUD handbook does not mention or acknowledge any right to cure in situations involving lease terminations based on criminal activity. Nothing in the USDA handbook contradicts or challenges that policy. The USDA handbook states there is an opportunity to cure for the kinds of lease violations identified in §3560.159(a). But that handbook is silent as to "criminal conduct" as referenced in subsection (d). Again, this is because subsection (d) incorporates and relies upon HUD regulations, which bring into play that agency's interpretations and policies.

Rush further argues that the lower courts' interpretation of §3560.159 fails to acknowledge the USDA's claimed rejection of the "one-strike rule" for drug-related activity adopted by other federal agencies such as HUD. This argument must fail for at least two reasons.

First, the USDA comment that Rush quotes does not provide the support for his position that he believes it does. The passage in question reads:

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[6] Section 6.32(A) of USDA Handbook HB-2-3560 MFH

> [C]ommenters stated that the Agency's policy to not allow the lessee or other adult members occupying the unit who commit a drug violation to enter the premises unless the individual agrees not to commit a drug violation in the future, participates in a counseling or recovery program, or has completed such a program is too lax. These commenters recommended that the Agency employ HUD's one-strike policy.
>
> Response: The Agency thanks the commenters for their recommendations; however, the Agency disagrees with the commenter's view that the above-stated policy established in §3560.156(c) of the interim final rule is too lax. It provides the borrower with the authority to take specific actions to limit the access of such persons and ultimately terminate tenancy if further drug-related violations are committed.

Reinvention of the Sections 514, 515, 516, and 521 Multi-Family Housing Programs, 69 Fed. Reg. 69032, 69064 (Nov. 26, 2004) (emphasis added). As the underscoring demonstrates, the policy referenced by the USDA deals with drug-related "violations." It does not say anything at all about the kind of "criminal activity" that triggers §3560.159(d). Thus, the response has no impact on how §3560.159 is to be applied.

The manner in which the agency paraphrased the commenters' concerns demonstrates that the kinds of "drug violations" in question do not rise to the level of "criminal activity" for purposes of §3560.159(d). Promises not to repeat the violation and participation in counseling or recovery programs might be legitimate reasons to excuse a first strike for something like personal, recreational drug use, but those things would not address more serious criminal activity.[7]

[7] Under Rush's interpretation, a violent criminal caught having a large amount of narcotics and stolen or illegally possessed guns on the premises would be allowed to stay as long as he surrendered those items and promised not to do it again, or claimed to be in a treatment program for drug use. The owner would have no ability to immediately rid the premises of that dangerous person. Surely that cannot be the result intended by USDA.

Second, Rush's position fails to acknowledge the federal government's stated goal of having assisted and subsidized housing that is safe and free from criminal activity. As one court has noted, "Congress intended to prevent crime in federally-assisted housing" and "intended to establish a 'One-Strike Policy' regarding criminal activity involving residents of federally subsidized housing." *Housing Auth. of Norwalk v. Brown*, 19 A.3d 252, 259 (Conn. Ct. App. 2011) (emphasis added).

Indeed, the force of this policy is so strong that the Supreme Court of the United States has held that certain federal regulations permit tenancy terminations even when the tenant in question had no knowledge of a household member's criminal conduct that serves as the basis for the termination. *Department of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed.2d 258 (2002). The Court gave the following explanation for its decision: "Regardless of knowledge, a tenant who cannot control drug crime, or other criminal activities by a household member which threatens health or safety of other residents is a threat to other residents and the project." 535 U.S. at 134 (emphasis added). *See also Scarborough v. Winn Residential L.L.P. / Atlantic Terrace Apts.*, 890 A.2d 249 (D.C. Ct. App. 2006) (refusing to apply a D.C. Code section that gave tenants a right to cure lease violations, where that statute conflicted with the federal policy to provide safe and crime-free subsidized housing).

Admittedly, the regulations at issue in these cases were from HUD, not the USDA, but the federal government's intention to provide assisted housing that is as crime-free as possible is not limited to HUD projects.[8] It would be absurd to claim that the same

[8] Furthermore, as discussed above, §3560.159(d) incorporates and adopts HUD regulations, meaning that any federal policies and goals related to HUD and programs must also be applicable to §3560.159(d).

government that funds HUD somehow has a lesser interest in preventing criminal activity in housing subsidized through USDA, one of its other agencies. Thus, even if, as Rush argues, the USDA has chosen to be more lenient than HUD concerning minor drug violations, it does not follow that the same leniency would apply to "criminal activity" as contemplated by §3560.159(d) and the HUD regulations it incorporates.

Interpreting §3560.159 as allowing tenants a right to cure in all circumstances, including lease terminations for criminal activity, would defy and hinder the federal government's stated interest in providing safe and crime-free subsidized housing. Under that view, a landlord would have almost no ability to act quickly and decisively to protect the safety of the facility and its other tenants. The lower courts properly rejected that interpretation and concluded that §3560.159(d) serves as an independent basis for lease terminations, one that does not fall within the procedural requirements of §3560.159(a). This Court should affirm that decision.

CONCLUSION

Rush allowed into his apartment a dangerous fugitive from the law, as well as an illegal gun and amounts of drugs and related items that indicated an intent to sell. Regardless of whether Rush participated in any of his guest's criminal activities, or even knew about them, by allowing that guest to stay with him, Rush put the safety of the premises and other tenants in jeopardy. Under those circumstances, the management at Shady Moss notified Rush of a lease termination without an opportunity to cure the violation. That is precisely the kind of situation §3560.159(d) was designed to address.

Subsection (d) stands alone and allows for lease terminations without a right to cure in the event of criminal activity. This ground for termination is separate and distinct from

the bases set forth in the regulation's subsection (a). Any other reading of the regulation would defy subsection (d)'s plain language, render that subsection superfluous, and ignore the underlying goals and policies of federally-subsidized housing provided through agencies such as the USDA and HUD. Thus, the lower courts' decisions properly read and applied the regulation, and this Court should affirm.

Respectfully submitted,

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RULE 211(b) CERTIFICATION

The undersigned certifies that this Final Respondent's Brief complies with Rule 211(b), SCACR.

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