

Legal Opinion: GCH-0083

Index: 2.300, 2.390

Subject: HUD Funds--Defense Counsel for Removed IHA Commissioner

April 27, 1993

MEMORANDUM FOR: Michal F. Stover, Regional Counsel, 8G

FROM: Michael Reardon, Assistant General Counsel  
Assisted Housing, GCH

SUBJECT: HUD Funds Used to Acquire Defense Counsel  
for Removed IHA Commissioner

This is in response to your February 2, 1993 memorandum in which you requested a legal opinion concerning whether an Indian Housing Authority (IHA) may expend funds provided by HUD to pay an attorney to represent a member of the IHA's Board of Commissioners in defense of his proposed removal. Based on the regulations governing the use of grant funds and expenditure of operating subsidy funds, and the terms of the general legal services contract, we recognize that there are constraints against expending HUD funds for such purposes. However, after discussions with the Office of Indian Programs in Headquarters and a conference call with the Denver Regional Office and two IHA Board Commissioners and their attorney, we believe that there is flexibility on the part of an IHA to expend funds from its approved operating budget to defend against charges that relate to the operation of the IHA.

The issue arises as a result of the Oglala Sioux Tribe suspending the entire Oglala Sioux Housing Authority (OSHA) Board of Commissioners. Notices to the commissioners required the board members, individually, to address allegations relating to the operation of OSHA, including, but not limited to: OSHA's poor and declining administrative capabilities assessments; failure of OSHA to follow the Utility Allowance procedures; and failure to follow HUD approved tenant selection policies. Individual commissioners now seek approval to use HUD funds to pay for legal advice in defending the removal action against them.

Under the United States Housing Act of 1937 (42 U.S.C. 1437), HUD provides financial assistance to IHAs for the development and operation of Indian housing projects. The responsibilities of IHAs in the administration of HUD programs are set forth in the Annual Contributions Contract (ACC) and in HUD regulations and issuances. Such regulations and documents establish that HUD funds must be used for the development and operation of IHA projects. Regulations governing the expenditure of operating subsidy funds require that such funds are to be spent for the operation of the involved housing programs. See 24 C.F.R. 905.701 (Low Rent); 24 C.F.R. 905.434 (Old and New Mutual Help); 24 C.F.R. <sup>1</sup> 905.523 (Turnkey III).

Under 24 CFR <sup>1</sup> 905.160 an IHA may contract, without HUD approval, for a legal services contract if (1) the IHA has not been determined to be "high risk" in accordance with 24 CFR Part 85 and <sup>1</sup> 905.135; (2) the term of the

agreement is not in excess of two years; (3) the agreement is not in excess of the amount included for such purposes in the HUD-approved operating budget; and (4) the agreement or contract is not for legal or other services in connection with litigation. It is our understanding that OSHA has not been determined to be high risk, and does not require advance HUD approval for the procurement of professional services. It also our understanding that the legal representation that the Board of Commissioners is seeking is not in connection with litigation.

The annual contributions contracts (ACC) for the Low Rent Public Housing and Mutual Help Project (Old Mutual Help) programs provide that operating expenditures must be for necessary costs and charges incurred for the operation of projects in such a manner as to provide decent, safe and sanitary dwellings within the financial reach of low income families. See Art. IV, <sup>1</sup> 406(B), consolidated Annual Contributions Contract (HUD-53041) (Formerly PHA-3041) (September 1963) (Old Mutual Help ACC). The ACC for the New Mutual Help program provides that all expenses approved as part of the operating budget must be incurred "in the efficient and economical operation of the Project" and be necessary to "assure the low income character of the Project." See Art. X, <sup>11</sup> 10.1(c) and 10.2.

The contract involved here is a general legal services contract which is funded from operating subsidy, rental and housing payments receipts and investment income from the various housing programs. The general legal services contract does not include providing defense counsel for removal actions. The agreement itself provides for services to be performed in "connection with the management and development of the Authority's housing program."

The question is whether the use of HUD funds to provide individual legal representation for IHA commissioners in defense of their removal may be considered as necessary for the operation of the IHA. There are no HUD regulations or policy statements defining what the term "necessary for the operation" means. The operation of an IHA is intended to produce a given result - the provision of decent, safe and sanitary housing. Thus, the operation of an IHA includes those day-to-day acts and functions, the purpose of which are, individually and in their totality, to provide decent, safe and sanitary housing.

Tribal ordinances require the creation of a Board of Commissioners. The Board establishes policies and procedures by which the IHA operates to carry out its purpose of providing decent, safe and sanitary housing. While HUD, generally, is not concerned with the makeup of the Board, we may have reason for concern where, as here, the Tribe has sought to remove all Board members at one time, possibly creating a situation where for some period of time there may effectively be no Board.

The Tribe has the discretion to remove Board members. Such actions as they relate to the individual members generally do not affect the operation of either the Board or the IHA with regard to the operations of the IHA and the provision of decent, safe and sanitary housing. As individual members are removed, they are replaced and thus the Board, as an entity, continues. There may be circumstances under which the use of IHA funds to defend individual members is necessary to assure the continued operation of the IHA. However, generally such situations would involve defense of the Board members in their official capacity as IHA officials. In such situations the defense of member actions is itself a defense of the actions of the IHA.

Where, as in the Oglala case, the removal charges are broadly related to the operational aspects of the IHA, rather than to individual acts of the commissioners, we believe that the IHA has the discretion, insofar as funds are available in its legal budget, to provide reasonable funding to pay for representation of the IHA (and its Board members) in preparation of a response to the organizational and operational charges. The IHA should expend none of its funds in defense of charges of malfeasance or misfeasance on the part of an individual commissioner where the allegations involve actions or activities of a commissioner that are clearly outside the scope of his/her duties as a commissioner. We note that charge 7 in the Tribe's statement of allegations is the type of charge that should not be defended with IHA funds.

We believe that the hearing by the Tribal Council is a proper forum in which the position of the IHA may be represented. To the degree that the IHA representative may participate in the proceeding on behalf of the IHA itself, this is preferable. However, if the Tribal Council will not allow IHA representation at the hearing, we believe that it may be appropriate to allow representation of the IHA position in the context of the charges against the individual commissioner, but only insofar as these charges relate to the operation of the IHA.