

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**24 CFR Part 18**

[Docket No. FR-4143-F-01]

RIN 2501-AC34

Indemnification of Department of Housing and Urban Development Employees

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule adds a new part 18 to title 24 of the Code of Federal Regulations. The provisions of this rule parallel provisions adopted by other departments and agencies, including the Departments of Justice (28 CFR part 50), Treasury (31 CFR part 3), Interior (43 CFR part 22), Education (34 CFR part 60), and Health and Human Services (45 CFR part 36). The rule permits indemnification of HUD employees in appropriate circumstances, as determined by the Secretary.

EFFECTIVE DATE: March 12, 1997.

FOR FURTHER INFORMATION CONTACT: Sam E. Hutchinson, Associate General Counsel for Human Resources, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C., 20410, (202) 708-0888. (This is not a toll-free number.) Hearing-impaired or speech-impaired individuals may access the voice telephone listed in this rule by calling the Federal Information Relay Service during working hours at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: HUD does not at present have a published policy regarding indemnification of Department employees who are sued in their individual capacities as a result of conduct taken within the scope of their employment. Lawsuits against Federal employees in their individual capacities have occurred since the Supreme Court decision in *Bivins v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The potential for adverse judgments against a Federal employee for actions taken within the scope of employment is detrimental to both the individual employee and the Federal government. The prospect of personal liability and the uncertainty as to what conduct may result in a lawsuit against the employee personally tend to intimidate all employees, to impede creativity, and to stifle initiative and decisive action. Employees' fears of personal liability affect government operations, decisionmaking, and policy determinations.

The Department believes that lawsuits against federal employees in their individual capacities seriously hinder the effective functioning of the Department. A published statement of HUD policy regarding indemnification of its employees will help alleviate this problem.

HUD policy permits, but does not require, the Department to indemnify a Department employee who suffers an adverse judgment, or other monetary award, provided that the conduct giving rise to the award was taken within the scope of employment and indemnification is in the interest of the United States, as determined by the Secretary or designee, in his or her discretion. The policy also permits the Department to settle a personal damage claim against a Department employee. Absent exceptional circumstances, the Department will not settle a personal damage claim before entry of an adverse judgment. A notification procedure which should be followed by an employee sued in his or her individual capacity is provided. Questions regarding representation of the employee will be determined by the Department of Justice. Any payment, either to indemnify or settle, is contingent upon the availability of appropriated funds of the Department.

These regulations apply to actions pending against Department employees as of the effective date of the regulations and to actions commenced after that date.

Other Matters*Justification for Final Rule*

In general, the Department publishes a rule for public comment before issuing a rule for effect, in accordance with its own regulations on rulemaking, 24 CFR part 10. However, part 10 does provide for exceptions from that general rule where the Department finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when prior public procedure is "impracticable, unnecessary, or contrary to the public interest." (24 CFR 10.1) The Department finds that good cause exists to publish this rule for effect without first soliciting public comment, in that public procedure is impracticable, unnecessary, and contrary to the public interest. This rule makes clear the Department's policy that, at its discretion, the Department may indemnify a Department employee who suffers an adverse judgment, or other monetary award, provided that the conduct giving rise to the award was taken within the scope of employment,

and indemnification is in the interest of the United States, as determined by the Secretary or designee.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies set forth in this final rule do not have Federalism implications and, thus, are not subject to review under the Order. Nothing in the rule implies any preemption of State or local law, nor does any provision of the rule disturb the existing relationship between the Federal Government and State and local governments.

Executive Order 12606, The Family

The General Counsel, as the designated Official under Executive Order 12606, The Family, has determined that this final rule does not have significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. This rule applies to actions pending against Department employees only.

Environmental Finding

This notice is categorically excluded from the requirements of 24 CFR part 50, the HUD regulations which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA). [See 24 CFR 50.19(b)(3).] This notice does not require environmental review because it does not alter physical conditions in a manner or to an extent that would require review under NEPA or the other laws and authorities cited at § 50.4.

Regulatory Flexibility

Under the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Secretary by his approval of publication of this final rule hereby certifies that this final rule does not have a significant economic impact on a substantial number of small entities. This rule applies to actions pending against Department employees only.

List of Subjects in 24 CFR Part 18

Civil proceedings, Claims, Congressional proceedings, Criminal proceedings, Federal employees, Indemnification, Judgments, Litigation, Subpoenas, Verdicts.

Accordingly, 24 CFR subtitle A is amended by adding a new part 18 to read as follows:

PART 18—INDEMNIFICATION OF HUD EMPLOYEES

Authority: 5 U.S.C. 301; 42 U.S.C. 3535(d).

§ 18.1 Policy.

(a) The Department of Housing and Urban Development may indemnify, in whole or in part, a Department employee (which for the purpose of this part includes a former Department employee) for any verdict, judgment or other monetary award which is rendered against any such employee, provided the Secretary or his or her designee determines that:

(1) The conduct giving rise to the verdict, judgment or award was taken within the scope of his or her employment with the Department; and

(2) Such indemnification is in the interest of the United States.

(b) The Department of Housing and Urban Development may settle or compromise a personal damage claim against a Department employee by the payment of available funds, at any time, provided the Secretary or his or her designee determines that:

(1) The alleged conduct giving rise to the personal damage claim was taken within the scope of employment; and

(2) That such settlement or compromise is in the interest of the United States.

(c) Absent exceptional circumstances, as determined by the Secretary or his or her designee, the Department will not entertain a request either to agree to indemnify or to settle a personal damage claim before entry of an adverse verdict, judgment or monetary award.

(d) When an employee of the Department becomes aware that an action has been filed against the employee in his or her individual capacity as a result of conduct taken within the scope of his or her employment, the employee should

immediately notify his or her supervisor that such an action is pending. The supervisor shall promptly notify the head of his or her operating component and the Associate General Counsel for Litigation and Fair Housing Enforcement, if the supervisor is located at headquarters, or Field Assistant General Counsel—who shall promptly notify the Associate General Counsel for Litigation and Fair Housing Enforcement—if the supervisor is located in the field. As used in this section, the term “principal operating component” means an office in the Department headed by an Assistant Secretary, the General Counsel, the Inspector General, or an equivalent departmental officer who reports directly to the Secretary. Questions regarding representation of the employee will be determined by the Department of Justice pursuant to 28 CFR 50.15 (Representation of Federal officials and employees by Department of Justice attorneys or by private counsel furnished by the Department in civil, criminal, and congressional proceedings in which Federal employees are sued, subpoenaed, or charged in their individual capacities).

(e) The employee may, thereafter, request indemnification to satisfy a verdict, judgment or monetary award entered against the employee or to compromise a claim pending against the employee. The employee shall submit a written request, with appropriate documentation including a copy of the verdict, judgment, award or other order or settlement proposal, in a timely manner to the head of the employee's principal operating component. The head of the employee's principal

operating component shall submit the written request and accompanying documentation, together with a recommended disposition of the request, in a timely manner to the General Counsel.

(f) The General Counsel shall seek the views of the Department of Justice on the request. Where the Department of Justice has rendered a decision denying representation of the employee pursuant to 28 CFR 50.15, the General Counsel shall seek the concurrence of the Department of Justice on the request. If the Department of Justice does not concur in the request, the General Counsel shall so advise the employee and no further action on the employee's request shall be taken.

(g) In all instances except those where the Department of Justice has non-concurred in the request, the General Counsel shall forward for decision to the Secretary or his or her designee the employee's request, the recommendation of the head of the employee's principal operating component, the views of the Department of Justice, and the General Counsel's recommendation.

(h) Any payment under this part, either to indemnify a Department employee or to settle a personal damage claim, is contingent upon the availability of appropriated funds of the Department that are permitted by law to be utilized for this purpose.

Dated: January 28, 1997.

Dwight P. Robinson,

Acting Secretary.

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