IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARION NERDE, GERTRUDE SCHARPFF, MARGARET PIRES, and ADMIRAL COOK TENANTS' UNION, on behalf of themselves and all others similarly situated, Plaintiffs, vs. HAWAII HOUSING AUTHORITY, JAMES T. LYNN, Secretary of the United States Department of Housing and Urban Development, and CHARLES McCLURE, Housing Management Director of the United States Department of Housing and Urban Development, Defendants.	CIVIL NO. 74-46 APR 15 1975

MEMORANDUM AND ORDER

Named plaintiffs brought this class action against the Hawaii Housing Authority (Authority) and officials of the United States Department of Housing and Urban Development alleging violations of the Housing Act of 1937, 42 U.S.C. § 1401 et seq., specifically, section 1402(1)(Brooke Amendment), the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Fifth and Fourteenth Amendments to the United States Constitution. The class consists of low-income lessees of public housing who qualify for the rent limitation of 42 U.S.C. § 1402(1) and who are or were required to pay rent in excess of that limitation by way of a mandatory charge for furniture rental.[1] On May 29, 1974, I held that this court had subject matter jurisdiction of the case under

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[1] Order Determining Class, filed June 6, 1974.

28 U.S.C. §§ 1331, 1343(3), and 1361, and issued an order granting a preliminary injunction enjoining defendants from charging and collecting from the members of the class furniture rental to the extent that such rental results in a total rental charge that exceeds the rent limitation of 42 U.S.C. § 1402(1).

Defendant Authority now moves under Rule 12(b), Federal Rules of Civil Procedure, to dismiss plaintiffs' individual claims for restitution of past rental payments in excess of the rent limitation.[2] The basis for the motion is the Eleventh Amendment to the United States Constitution which provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[3]

Defendant argues that since plaintiffs seek to recover relief in the nature of money damages from an agency of the state and since such a recovery will come from the state treasury, the claims are barred by the Eleventh Amendment.[4] Plaintiffs make several arguments seeking to avoid the prohibition of the Amendment. They assert that a recovery of money damages here will not necessarily affect the state's treasury, the Authority does not occupy the same position as the state for

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[2] Originally, defendant's motion sought to dismiss the entire action. All other issues raised by the motion have been dealt with either by stipulation between the parties or by the Court's Order Granting Preliminary Injunction, filed May 29, 1974.

[3] The prohibition of the Eleventh Amendment also applies to suits brought in federal court by a state's own citizens. See Edelman v. Jordan, 415 U.S. 651, 663 (1974), and cases cited therein. However, the prohibition is not all-inclusive. It is the long-standing rule that the Amendment does not necessarily bar a suit seeking prospective equitable relief. Ex Parte Young, 209 U.S. 123 (1908).

[4] Edelman v. Jordan, 415 U.S. 651 (1974).

purposes of the Eleventh Amendment, and in any case, the state has waived any Eleventh Amendment immunity by participating in the federal low-rent program.

Plaintiffs' waiver argument is not persuasive. Only by the clearest conduct may a court find that a state has waived its immunity under the Eleventh Amendment.[5] While plaintiffs attempt to demonstrate that the federal government conditioned the state's participation in the federal low-rent housing program on its waiver of immunity, the federal rules and regulations to which plaintiffs point do not stand for that proposition.[6] These regulations require each housing authority to make retroactive rent adjustments to comply with the rent limitation of 42 U.S.C. § 1402(1) if the adjustments have not been accomplished by the effective date of the section.[7] At the same time, federal money was made available to pay for these rent adjustments. These regulations do not constitute "the most express language or ... overwhelming implications"[8] necessary to warrant an inference that the state has waived its constitutional protection against suit in federal court by private parties.

Plaintiffs and defendant have argued extensively regarding the relationship of the Authority with the state. It is

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> [W]e will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." Id. at 673, quoting from Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).

See also Great Northern Insurance Co. v. Read, 322 U.S. 47, 54 (1944).

6 HUD Circulars RHM 7465.13 (January 18, 1972), RHM 7475.1 (March 16, 1970 as modified on August 10, 1970), and RHM 7465.4 (June 24, 1970). See 24 C.F.R. § 10.3 (1974).

7 According to the Circulars, compliance with the limitation was to be completed by March 24, 1970, for non-welfare tenants and December 22, 1971, for welfare tenants. Id.

8 Edelman v. Jordan, 415 U.S. 651, 673 (1974).

beyond dispute that action by the Authority would constitute state action for purposes of the Fourteenth Amendment. This, however, is not determinative.[9] The issue may be phrased as whether the Authority is the "alter ego" of the state,[10] or whether the state is the "real, substantial party in interest,"[11] but it is determined by what effect, if any, a money recovery would have on the state's treasury.[12] Just as a county[13] or a bridge authority[14] may not be protected from suit in federal court, so too a housing authority may not be protected if the recovery does not affect the state's treasury. Thus, the parties arguments in respect to the Authority's independence from or dependence on the state are somewhat off the mark.

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[9] In Griffin v. School Board, 377 U.S. 218 (1964), the Court authorized the District Court to require county supervisors "to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." Id. at 223, quoted in Edelman v. Jordan, 415 U.S. 651, 683-84 (1974)(Douglas, J. dissenting). In distinguishing Griffin, the Court in Edelman stated:

> [A]s may be seen from Griffin's citation of Lincoln County v. Luning, 133 U.S. 529 (1890), a county does not occupy the same position as a State for purposes of the Eleventh Amendment.... The fact that the county policies executed by the county officials in Griffin were subject to the commands of the Fourteenth Amendment, but the county was not able to invoke the protection of the Eleventh Amendment, is no more than a recognition of the long-established rule that while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974).

[10] Raymond International, Inc. v. M/T Dalzelleagle, 336 F.Supp. 679, 681 (S.D. N.Y. 1971).

[11] Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 464 (1945).

[12] Edelman v. Jordan, 415 U.S. 651, 663 (1974).

[13] Griffin v. School Board, 377 U.S. 218 (1964).

[14] Raymond International, Inc. v. M/T Dalzelleagle, 336 F.Supp. 679 (S.D. N.Y. 1971).

The concern is as to where the recovery will come from, not the details of the Authority's administrative structure.[15]

This presents plaintiffs' third argument, that is, that a recovery of money damages will not necessarily affect the state treasury. For the reasons given below, I agree with plaintiffs' contentions and hold that plaintiffs' claims are not barred by the Eleventh Amendment.

The decision of the Court in Edelman is a narrow one. Throughout the opinion, the Court makes reference to the fact that the recovery sought would "to a virtual certainty be paid from state funds."[16] Further, the Court implied that a properly tailored award would not be barred by the Eleventh Amendment.[17] This case is proper for such tailoring, and as restricted below, a recovery here will not have the prohibited effect on the state's treasury.

While the Court in Edelman made it clear that equitable labels would not save an otherwise barred recovery, the term "equitable restitution" is more appropriate here than in that case.[18] Additionally, the financial arrangements of

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[15]Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945); Raymond International, Inc. v. M/T Dalzelleagle, 336 F.Supp. 679 (S.D. N.Y. 1971).

[16]Edelman v. Jordan, 415 U.S. 651, 668 (1974). See also Id. at 663.

[17]The Court of Appeals in Edelman decided that since the District Court's award was in the form of equitable restitution it was "capable of being tailored in such a way as to minimize disruptions of the state program." Id. at 665. The Supreme Court stated:

> But we must judge the award actually made in this case, and not one which might have been differently tailored in a different case, and we must judge it in the context of the important constitutional principle embodied in the Eleventh Amendment. [footnote omitted]. Id. at 665-66.

Cf. Downs v. Department of Public Welfare, 43 U.S.L.W. 2270 (E.D. Pa. December 20, 1974).

[18]In Edelman, plaintiffs sought retroactive benefits under the Federal-state programs of Aid to Aged, Blind, or

and federal control over, the Authority's leased housing program strongly favor allowing plaintiffs' claims. Since the program in Edelman was funded in part by the state,[19] there was no question as to the effect an award would have on state funds. Here, both plaintiffs and defendant state that the leased housing program is financed by tenant rents and federal subsidies without state support.[20] It is true that this program is only part of the Authority's total operation, and apparently state money is involved in other programs.[21] However, it is the leased housing program which is under consideration, not other programs. Within this program only tenant rents and federal subsidies are used. Thus, if an award is restricted to funds in the leased housing program the state treasury will not be affected.

As noted above, the federal rules and regulations require the Authority to make retroactive payments to comply with the rent limitation imposed in 1969. While I have held above that such a requirement does not rise to the level of state waiver of immunity, it is relevant to the question of from where the funds will come to meet any award which may be made. The same regulations which require the retroactive payments provide a federal source of funds to meet deficits caused by the limitation.[22] Thus, had the federal government correctly interpreted the 1969 rent limitation, it would have financed

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Disabled. Here, plaintiffs seek a recovery of money previously paid by them to the Authority. Further, the money paid here, unlike the taxes paid in Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945), did not go into the general treasury of the state, but rather were paid to the private owners of the apartment units.

[19] Edelman v. Jordan, 415 U.S. 651, 653 (1974).

[20] Plaintiffs' Reply Memorandum, filed January 17, 1975 at 2; Defendant's Memorandum, filed December 16, 1974 at 8, and Exhibit 1, attached thereto at 20-21.

[21] Defendant's Memorandum, filed December 16, 1974 at 8-10.

[22] HUD Circulars, note 6, supra.

the Authority's resulting deficit.[23] There appears no reason why the federal government should not, under its own rules and regulations, reimburse the Authority if plaintiffs ultimately prevail on the merits.

The relationship between the Authority and the federal government is complicated. It has been said that a "Housing Authority 'is unique because it is to be simultaneously an agency of municipal, state and federal government.'"[24] At the same time it is "an independent entity which contracts (as a principal) with both the state and federal governments."[25] It has also been held that a local housing authority does not become the agent for the federal government by the federal funding of low-rent housing.[26] Nevertheless, the federal government requires submission of rent schedules by the Authority before it approves the rents charged by the Authority.[27] And, although the federal government states that the rent schedules here did not include furniture fees and therefore there was no federal approval of the charges, it admits that it is with the federal government's approval and knowledge that a furniture rental may be charged by the Authority in addition to the maximum allowed by 42 U.S.C. § 1402(1).[28]

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[23] For purposes of this motion, it is assumed that the furniture rental charges, which together with the regular rent exceeded the rent limitation of 42 U.S.C. § 1402(1), were illegal.

[24] Housing Authority of City of Asbury Park v. Richardson, 346 F.Supp. 1027, 1033 (D.N.J. 1972), _quoting from_ O'Keefe v. Dunn, 89 N.J.Super. 383, 396, 215 A.2d 66 (Law Div. 1965), _aff'd per curiam_, 47 N.J. 210, 219 A.2d 872 (1966).

[25] _Id._

[26] Housing Corp. of America v. United States, 468 F.2d 922, 924 (Ct. Cl. 1972)(suit by builder under contract with local housing authority).

[27] HUD Handbook RHA 7465.1 (June, 1969) at 2. 42 U.S.C. § 1402(1) requires federal government approval of rents charged by the Authority.

[28] Letter to the Court from the Office of Regional Counsel, Department of Housing and Urban Development, dated February 26, 1975, filed February 28, 1975 at 5-6.

Thus, the leased housing program is federally funded, federally regulated, and has a federal rent limitation, but is administered by the local housing authority. Whatever the legal relationship is between the Authority and the federal government, clearly the program is in large part controlled by the federal government. Given such control and total funding, it appears appropriate to allow plaintiffs' claims for restitution if restricted to leased housing funds of the Authority.

Plaintiffs also cite section 356-28, Hawaii Revised Statutes for the proposition that the state treasury is legally insulated from any obligation incurred by the Authority, including a judgment in this case, if any.[29] If true, I would not hesitate to follow the rationale of Chief Judge Pettine in the recent case of Bowen v. Hackett,[30] and allow the claims on this basis. However, plaintiffs have not demonstrated that this section refers to any obligation other than bonds and contracts of the Authority. Therefore, it does not appear to this court that the state treasury is insulated from any possible recovery in this case by reason of section 356-28. It is insulated in fact, however, since the source of the funds from which any recovery may be had

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[29] Section 356-28 provides:

> The bonds and other obligations of the Hawaii housing authority (and such bonds and obligations shall so state on their face) shall not be a debt of the State or of any political subdivision; neither the State nor political subdivisions shall be liable thereon, nor in any event shall they be payable out of any funds or properties other than those of the authority. The bonds shall not constitute an indebtedness within the meaning of any debt limitation or restriction. Bonds may be issued under this chapter notwithstanding any debt or other limitation prescribed by any statute.

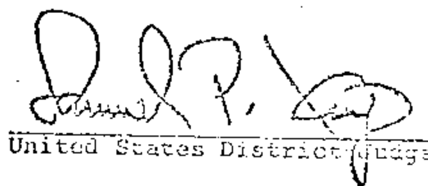
[30] 43 U.S.L.W. 2325 (D. R.I. January 16, 1975).

must be the federal government or tenant rents since I am limiting the source of recovery to funds in the leased housing program. "[T]hat the state legislature may feel morally obligated to replenish the funds in time of emergency is of no consequence."[31]

Given the nature of the claims and the limitation on the funds to be used for any possible recovery imposed by this order,[32] I hold that under the circumstances in this case the Eleventh Amendment does not bar plaintiffs' claims. Accordingly, defendant's motion is denied.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 15, 1975.



United States District Judge

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[31] *Id.*

[32] It should be remembered that I am ruling on a motion to dismiss. Plaintiffs have not as yet prevailed on the merits of the case. It may be that no money judgment will be awarded against the Authority.