IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARION MEADE, GERTRUDE SCHARPFF, and MARGARET PIRES, on behalf of themselves and all others similarly situated,	CIVIL NO. 74-46
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.	

MEMORANDUM AND ORDER

Named plaintiffs brought this action on behalf of themselves and all others similarly situated[1] against Hawaii Housing Authority (HHA) and two officials of the United States Department of Housing and Urban Development (HUD).

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[1]This court ordered that the action be maintained as a class action on June 6, 1974. Subsequently, the class was modified, and now includes:

> all elderly low-income tenants who reside or formerly resided at the Admiral Cook Apartment in Honolulu, Hawaii and who qualify or qualified for the rent limitation set forth in 42 U.S.C. § 1402(1) and paid a furniture charge in excess of such limitation.

Order Modifying Class, filed August 8, 1975.

The amended complaint alleges that HHA's mandatory rental charge for furniture violates 42 U.S.C. section 1402(1) (Brooke Amendment),[2] and that the federal defendants have failed to perform their duties to insure compliance with 42 U.S.C. sections 1402(1) and 1421b(d)(2).[3] A second cause of action alleging that certain lease provisions violated HUD regulations was dismissed on August 23, 1974. I found subject-matter jurisdiction under 28 U.S.C. sections 1331, 1343(3) and 1361, and granted plaintiffs' motion for a preliminary injunction enjoining HHA from charging and collecting furniture rental to the extent such rental exceeds the rent limitation of the Brooke Amendment.[4] Subsequently, plaintiffs and the federal defendants filed cross-motions for summary judgment which are now before this court.

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[2] 42 U.S.C. § 1402(1) provides in part:

> [I]ncome limits for occupancy and rents (which may not exceed one-fourth of the family's income, as defined by the Secretary) shall be fixed by the public housing agency and approved by the Authority....

[3] 42 U.S.C. § 1421b(d)(2) provides in part:

> Each [contract between a public housing agency and an owner of a structure containing approved dwelling units] shall provide (with respect to any unit) that--
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> ....
>
> (2) ...the rental and other charges to be paid by the tenant shall be determined in accordance with the standards applicable to units in low-rent housing projects assisted under the other provisions of this chapter....

[4] Order Granting Preliminary Injunction filed May 29, 1974. Preliminary Injunction, filed June 6, 1974.

Although HHA disputes certain facts which plaintiffs claim to be uncontested,[5] the facts material to the issues before the court are not disputed.[6] The federal defendants do not claim that there are any facts in dispute which affect their liability.

The material facts as shown by the record are that HHA obtained possession of the Admiral Cook Apartments in Waikiki in order to provide a supplementary form of low-rent housing. This arrangement is part of HHA's leased housing program which is funded by the federal government and tenant rents.[7] When HHA acquired the apartments it had to take the furniture along with the units. Thus, all the apartments in Admiral Cook are offered furnished. Plaintiffs were charged a fixed amount for the use of the furniture which was in addition to the rent charged for the apartment. If a prospective tenant did not want the furniture or did not want to pay the additional rental, the housing in Admiral Cook was not made available. There may or may not have been an unfurnished apartment available in another unit at the time one reached the top of the waiting list, but there are no other units offered on an unfurnished basis in or around

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[5] Hawaii Housing Authority's Memorandum of Points and Authorities, filed July 31, 1975.

[6] Defendant HHA does dispute the amount charged in excess of the section 1402(1) limitation. Id.

[7] See Memorandum and Order (denying defendant's motion to dismiss plaintiffs' claim for restitution of past rental payments in excess of the rent limitation), filed April 15, 1975. See also Deposition of William A. Hall at 34 and 40, filed July 30, 1975.

the Waikiki area.

When computing the rent to be charged to a tenant, HHA is constrained by 42 U.S.C. section 1402(1) which provides in part that rent fixed by public housing agencies may not exceed one-fourth of a low-rent housing tenant's income as that term is defined by the Secretary of HUD. All plaintiffs are, or were, low-income tenants who qualify for this rent limitation, but were charged more than one-fourth of their income when the furniture charge was added to the basic rent for dwelling space.[8]

HHA argues that the practice of charging for the use of furniture was done with HUD approval and in reliance upon HUD interpretation of federal law. This interpretation is that the rent ceiling of section 1402(1) applies to the charge for an unfurnished apartment and consequently no federal money may be used to subsidize the rental of furniture. The federal defendants argue that since the rent ceiling applies to the charge for an unfurnished apartment, it has no control over HHA's practice of charging for the use of furniture.[9] In support of this interpretation the federal defendants point to the rent ceiling previously imposed by

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[8]Some tenants did not pay more than one-fourth of their income even with the furniture charge because of their income levels. This action does not involve these individuals and they are not included in the plaintiff class. See note 1, supra.

[9]The attorney for the federal defendants admitted at oral argument that HUD has a duty to enforce compliance with 42 U.S.C. § 1402(1). Thus, the liability of both HHA and the federal defendants hinges on whether the rent limitation of 42 U.S.C. § 1402(1) applies to the furniture charges under consideration.

section 306 of the Housing Act of 1949.[10] This section expressly referred to rent as including the reasonable value of utilities. The ceiling was in effect until 1959, when it and the statutory reference to utilities was removed. Since 1949, HUD has interpreted rent to include the cost of dwelling space and utilities. Therefore, they argue, the 1969 amendment imposing the rent ceiling must be interpreted in light of this consistent HUD interpretation.[11]

Plaintiffs argue that the rent ceiling of section 1402(1) applies to the total cost of housing including furniture rental. The legislative history of the amendment[12] and the federal government's policy with respect to low-rent housing as expressed in the statute[13] are cited as supporting plaintiffs' position.

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[10] 63 Stat. 424. See 1949 U.S. Code Cong. Service, p. 1565.

[11] Federal defendants also refer to the deference normally given to an agency's interpretation of statutes which it must administer. See Udall v. Tallman, 380 U.S. 1, 16 (1965). But see National Tenants Organization, Inc. v. Department of Housing and Urban Development, 358 F.Supp. 312, 313-14 (D.C. 1973).

[12] Senator McIntyre, co-sponsor of the amendment stated that the ceiling "would set a standard used in other housing programs, that tenants would pay 25% of their income as rent in public housing." 115 Cong. Rec. 21974 (1969)(remarks of Senator McIntyre). Also, Senator Brooke stated that the sponsors believed "that no public housing tenant should pay more than 25 percent of their income for housing." Id. at 26721-22 (remarks of Senator Brooke).

[13] 42 U.S.C. § 1401 provides in part:

> It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this

Unfortunately, none of these arguments provides much assistance. The legislative history of section 1402(1) is, at best, ambiguous since the sponsors did not define their meaning of the term rent as including the cost of dwelling space or all charges. Additionally, federal defendants' use of past HUD interpretation overlooks Congress' removal, in 1959, and failure to reinsert, in 1969, the statutory language supporting that interpretation.

What is clear, is that the furniture charges under consideration were mandatory. A prospective tenant either took an apartment furnished and paid the additional fee or could not move into Admiral Cook. Even assuming availability of unfurnished units,[14] the tenant would have to accept an

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> chapter, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban, rural nonfarm, and Indian areas, that are injurious to the health, safety, and morals of the citizens of the Nation. In the development of low-rent housing it shall be the policy of the United States to make adequate provision for larger families and for families consisting of elderly persons.

[14] Eleanor Nagano, an employee of HHA, stated by affidavit:

> Applicants can take any unit of the appropriate size or wait indefinitely for particular projects, particular unit location, etc.... The wait can be anywhere from a few weeks to several years depending on the turnover of units and the applicant's preferences. ... If an elderly is willing to take any unit of the suitable size the wait

area outside Waikiki.[15] Thus, reasonable options were not given to members of the plaintiff class.

Under these circumstances, I am of the opinion that the rent ceiling of section 1402(1) applies to these charges for furniture. HUD's interpretation that the statutory scheme is directed at unfurnished dwellings may be correct, but when a low-income individual is forced to pay more than the statutory maximum, defendants cannot avoid that maximum by claiming that the individual received an additional benefit even though the benefit may have been unwanted. The basic premise of the statute is that a low-income family should be able to move into an apartment by paying no more than one-fourth of its income. HHA's mandatory charge, which, when added to the basic rent, exceeds one-fourth of the income of these families, negates this premise and therefore violates the statute.[16] I see nothing in the statute which requires HHA to offer furniture and therefore I do not intend to say that HHA may not provide furniture as an option for additional cost. It is the present practice of requiring the added payment which is violative of section 1402(1).

Similarly, since the federal defendants have an admitted

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is estimated to be within a three-month period.

Affidavit of Eleanor Nagano, filed July 31, 1975.

[15] Since the members of the class are all elderly individuals, the location of residence takes on added importance. See Deposition of Marion Meade at 21, filed August 1, 1975.

[16] Cf., Fletcher v. Housing Authority of Louisville, 491 F.2d 793, 806 (6th Cir. 1974).

duty to ensure HHA's compliance with section 1402(1), they have, by permitting this practice, violated that duty. Therefore, federal defendants' motion for summary judgment is denied.

In addition to injunctive and declaratory relief, plaintiffs' complaint prays for restitution of rent paid for furniture which exceeded the rent ceiling. HHA moved to dismiss this claim and I held that, if properly tailored, the claim was not barred by the Eleventh Amendment to the United States Constitution.[17] While it is admitted that HHA charged amounts exceeding the section 1402(1) rent ceiling, the total amount charged is disputed.[18] Although plaintiffs are entitled to restitution, the amount thereof remains subject to proof. Therefore, partial summary judgment for plaintiff as to the entitlement to restitution[19] and the other relief sought is granted, but summary judgment is denied, at this time, as to the amount due.[20]

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[17] Memorandum and Order, supra note 7.

[18] Hawaii Housing Authority's Memorandum of Points and Authorities, supra note 5.

[19] Recovery will be restricted to HHA funds in the leased housing program. HHA is not liable to pay any amounts from any other funds over which it has control.

[20] This court's Order Determining Class found that the requirements of Rule 23(b)(2), Federal Rules of Civil Procedure, had been met and ordered that the action be maintained as a class action pursuant to Rule 23(b)(2). The Advisory Committee notes regarding Rule 23(b)(2)(1966 amendment) provide in part:

> The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.

Judgment will be entered enjoining Hawaii Housing Authority, its agents and employees, and all persons in active concert or participation with it, from charging or collecting from all members of the plaintiff class who reside at Admiral Cook Apartments furniture rental to the extent that such rental charge, together with the rent for the dwelling exceeds the rent limitation of 42 U.S.C. section 1402(1).

Defendants, James T. Lynn and Charles McClure, their agents and employees, and all persons in active concert or participation with them, will be mandated to perform their legal duty of ensuring HHA's compliance with the judgment,[21] and to take such action as is permitted by law in case of noncompliance.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 19, 1975.

Samuel P. King
United States District Judge

Thus, there is a question whether this action should be maintained under Rule 23(b)(1), (2), or (3). However, in light of the denial of summary judgment as to the amount of past excess rent paid, the question does not, at this time, require an answer. It appears to the court that there is cohesiveness in the class and that the interests of the absent members have been protected by named plaintiffs' counsel. There is no reason to assume that defendants will not comply with the court's order. Therefore, notice to the class will not be required at this time. Prior to final determination, the parties will submit arguments on the class issue and the appropriate notice to be provided to the members thereof.

[21] It is intended that any future liability of the federal defendants based upon the judgment herein be, and the same hereby is limited to the duty to ensure that mandatory furniture charges are not imposed on members of the plaintiff class.