UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

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17p.

PEARL TUCKER and MURIEL MISH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs

VS.

HOUSING AUTHORITY OF THE CITY OF NORWALK, ALPHONSE SICONOLFI, INDIVIDUALLY AND AS EXECUTIVE DIRECTOR OF THE HOUSING AUTHORITY OF THE CITY OF NORWALK,
Defendants

CIVIL ACTION NO. B-251

MEMORANDUM OF DECISION ON:
(1) PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION;
(2) PLAINTIFFS' MOTION TO PROCEED AS CLASS ACTION; AND
(3) DEFENDANTS' MOTION TO DISMISS THAT PORTION OF THE COMPLAINT WHICH PURPORTS TO SET FORTH A CLASS ACTION

This civil rights action brought by plaintiffs as a purported class action pursuant to Rule 23(b)(2), Fed. R. Civ. P., on behalf of applicants for admission to federally funded housing in Norwalk, Connecticut, seeking declaratory and injunctive relief with respect to certain of defendants' procedures and regulations relating to housing applicants' eligibility and admissions, is before the Court on (1) plaintiffs' motion for preliminary injunction; (2) plaintiffs' motion to proceed as a class action; and (3) defendants' motion to dismiss that portion of the complaint which purports to set forth a class action.

On April 19, 1971, the Honorable William H. Timbers, Chief Judge, ordered referral of said motions to the undersigned United States Magistrate for hearing and report as to all pertinent issues of law and fact, said report to include appropriate findings of fact and conclusions of law. Following a full evidentiary hearing before the undersigned on April 26-April 28, 1971, the parties have filed proposed findings of fact and conclusions of law and the motions are now ripe for decision.

The questions presented are whether the action may be maintained as a class action, and whether plaintiffs are entitled to a preliminary injunction. Plaintiffs not having established all of the prerequisites to maintenance of a class action as set forth in Rule 23(a) and (b)(2), Fed. R. Civ. P., the action may not be maintained as a class action. The individual named plaintiffs, however, are entitled to preliminary injunctive relief limited to enjoining the enforcement of certain of defendants' regulations, for the reasons set forth below.

I. JURISDICTION

This Court has jurisdiction over the subject matter and the parties pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4). See Holmes v. New York City Housing Authority, 398 F.2d 262, 264-265 (2 Cir. 1968). (Jurisdiction is also invoked under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, which does not independently confer jurisdiction. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-672 (1950).)

II. CLASS ACTION

The class sought to be represented by plaintiffs Pearl Tucker and Muriel Mish is composed of

> "all persons who have applied for admission to the Housing Authority of the City of Norwalk who were not advised in writing, within a reasonable time of application, of their eligibility and their approximate position on the waiting list or of their ineligibility, the reasons therefor and of their right to a due process hearing before the final determination of ineligibility; all those persons who were never given a due process hearing; all those persons who were determined ineligible because of 'severe sanitary conditions' [bad housekeeping habits] or a prior criminal record; all those persons who were never allowed to read the complete regulations, promulgated by the defendants, pursuant to their application for admission to the defendant Housing Authority".

Plaintiffs Pearl Tucker and Muriel Mish are adult citizens of the United States, residents of Norwalk, Connecticut, and indigent recipients of assistance from the Connecticut State Welfare Department; each has been determined by defendants to be ineligible for admission to public housing.

Defendant Housing Authority of the City of Norwalk ("Housing Authority") is a public corporation organized pursuant to the laws of the State of Connecticut and operated pursuant to the United States Housing Act, 42 U.S.C. § 1401, et seq., and regulations promulgated thereunder, with funds supplied by the United States Department of Housing and Urban Development ("HUD"). Defendant Alphonse Siconolfi is Executive Director and Secretary of the Housing Authority, responsible for its administration.

The Housing Authority operates two federally funded, low-rent housing projects, with a total of 356 units; there are 61 one-bedroom apartments, 147 two-bedroom apartments,

109 three-bedroom apartments, 26 four-bedroom apartments and 13 five-bedroom apartments. The number of applications is approximately 125 to 150 per year; very few applicants have been determined to be ineligible under the Housing Authority's admissions regulations. Vacancies occur irregularly and without substantial prior notice; the vacancy rate is currently approximately 35 units per year. The period of time an applicant is on a waiting list varies with the size of the apartment unit sought or required; in some instances, in the largest unit category, applications dating from 1964 are still pending. It is impossible to predict a precise waiting period for the benefit of the applicants.

A. PLAINTIFF PEARL TUCKER

In March, 1970, Mrs. Tucker made application for admission to public housing by defendant Housing Authority. On May 20, 1970, Mrs. Tucker was required to vacate the premises in which she had been living because the premises had been posted by the Health Department of the City of Norwalk as unfit for occupancy. Thereafter, she was hospitalized in mental institutions until September 1970. She presently sublets an apartment from an acquaintance, a Mrs. Reilly, sharing apartment space with Mrs. Reilly; the apartment has three bedrooms, one occupied by the principal tenant, Mrs. Reilly, one by Mrs. Reilly's son, and one by Mrs. Tucker and one of her children. Another child of Mrs. Tucker's has been living in a foster home since Mrs. Tucker's hospitalization; her third child is presently placed at a school for retarded children. Mrs. Reilly has refused to permit overnight visits to the apartment by the latter two children because of space limita-

tions.

In November, 1970, Mrs. Tucker was informed by the Housing Authority that she was ineligible for public housing because of her prior criminal record. (In October of 1969, Mrs. Tucker had pleaded guilty to the felony of aggravated assault, in violation of Conn. Gen. Stat. § 53-16, and to the felony of risk of injury to children, in violation of Conn. Gen. Stat. § 53-21.) The pertinent Housing Authority regulations provide that only those applicants are eligible who do not have a "criminal record", but that the exclusionary requirement may be waived on an individual basis. Mrs. Tucker was not advised in writing of the reasons for the finding of ineligibility or of a right to a hearing on the question of ineligibility, nor was she afforded an opportunity to review the Housing Authority's full set of regulations.

B. PLAINTIFF MURIEL MISH

In November, 1970, Mrs. Mish applied for admission to public housing by defendant Housing Authority. In the same month she was required to vacate the premises in which she had been living because the premises had been posted by the Health Department of the City of Norwalk as unfit for occupancy. She presently resides in her father's home, a seven room, two-story single-family dwelling; occupying the residence are Mrs. Mish, her five children and one grandchild, and Mrs. Mish's father. The building is in a deteriorated condition; it has four bedrooms and two of the children have no permanent place to sleep.

In December, 1970, defendant Alphonse Siconolfi in-

formed Mrs. Mish's attorney that Mrs. Mish was ineligible for public housing because of poor housekeeping habits. The pertinent Housing Authority regulations provide that only those applicants are eligible who have good housekeeping habits, as evidenced by a home visit; a condensed version of the regulations also in use provides that if "sanitary conditions" of the family are "severe", there will be referral to an (undesignated) agency for aid; subsequent improvement is a precondition to acceptance into housing. Mrs. Mish was not advised in writing of the reasons for the finding of ineligibility or of a right to a hearing on the question of eligibility, nor was a complete set of regulations of the Housing Authority made available for her review.

C. APPLICABILITY OF CLASS ACTION

As the basis for a class action, plaintiffs invoke Rule 23(b)(2), Fed. R. Civ. P., which provides:

> "(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;"

The "prerequisites of subdivision (a)" are those of Rule 23(a), Fed. R. Civ. P., which provides:

> "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative

parties will fairly and adequately protect the interests of the class."

The purported class set forth by plaintiffs in the instant action is a means to mounting a wholesale attack upon defendants' alleged policies with respect to application for and admission to federally funded public housing, defendants' alleged failure to provide formal notice of eligibility status, formal notice of specific reasons for ineligibility determinations and of the applicant's right to a hearing to contest the determination of ineligibility, and an opportunity to review the pertinent regulations. Plaintiffs contend that defendants' policies contravene the Housing Authority's governing statutes and regulations and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Plaintiffs also challenge the validity of the particular exclusionary regulations involved in their cases, and further demand that hearings on ineligibility conform with certain asserted due process requirements. The class is not well defined, and perhaps not genuinely a single class, as it necessarily entails consideration of a number of distinct issues crucial to the varying claims of each separate element of the class. It is at best an awkward class, difficult of management. Whether an appropriate representative party for the claimed class can be found is open to question; these plaintiffs are clearly not appropriate representative parties.

Those persons who are concededly eligible for admission to public housing, or who are simply in ignorance of their eligibility in the absence of notice from the Housing

Authority, are in a very different posture from that of the remainder of the asserted class, and concerned with wholly different issues. Those deemed ineligible are vitally concerned with obtaining the requested relief of requiring adequate notice of the reasons for ineligibility, adequate hearing on the issue, and access to the relevant regulations. The named plaintiffs are in this second category; since in order to obtain relief for themselves plaintiffs need not establish the right of the entire class to the various categories of relief sought, plaintiffs hardly have standing to represent the entire purported class, and the Court cannot assume that plaintiffs will or are in a position to fairly and adequately represent or protect the interests of the entire class. Plaintiffs' essential claims are also not typical of the claims of the entire alleged class. Plaintiffs have not satisfied the prerequisites to maintaining a class action set forth in Rule 23(a)(3) and (4), Fed. R. Civ. P. See Hyatt v. United Aircraft Corp., Sikorsky Aircraft Div., 50 F.R.D. 242, 245-247 (D. Conn. 1970); Burney v. North American Rockwell Corp., 302 F. Supp. 86, 90 (C.D. Cal. 1969). Indeed, for similar reasons the action cannot be salvaged as a class action on behalf of a sub-class composed of those who have been determined to be ineligible. Plaintiffs attack the validity of particular regulations applied in their cases. If initially those regulations are held invalid, plaintiffs will be afforded effective relief, while those determined ineligible under other, unchallenged, regulations will not. As to such a hypothetical sub-class, moreover, plaintiffs would further have failed to satisfy an additional pre-

requisite to maintaining a class action, the prerequisite of numerosity established by Rule 23(a)(1), Fed. R. Civ. P. The record discloses only a few persons actually found ineligible for any reason, certainly not a sufficient number to render joining all such persons impracticable.

It should finally be noted that defendants' critical action in plaintiffs' cases was to declare them ineligible for housing under exclusionary regulations relating to possession of a criminal record and to poor housekeeping habits. In so acting, defendants did not act "on grounds generally applicable to the class" as required by Rule 23(b)(2), Fed. R. Civ. P., upon which plaintiffs rely in making their class action claim. The question of the validity of those regulations is virtually dispositive of plaintiffs' claims, but falls far short of making relief with respect to the class as a whole appropriate even if all the prerequisites of Rule 23(a), Fed. R. Civ. P., had been met. See Rule 23(b)(2), Fed. R. Civ. P.

Plaintiffs are not entitled to maintain the instant action as a class action. Plaintiffs' motion to proceed as a class action is denied, and defendants' motion to dismiss that portion of the complaint which purports to set forth a class action is granted.

III. MOTION FOR PRELIMINARY INJUNCTION

Having concluded that the action may not be maintained as a class action, there remains for decision whether plaintiffs individually are entitled to preliminary injunctive relief. It is a fundamental proposition that issuance of a

preliminary injunction is an extraordinary equitable remedy, to be granted within the sound discretion of the trial court only upon a showing by plaintiff of probable success at trial and of irreparable injury if defendant is not enjoined pending a full trial of the issues. American Metropolitan Enterprises of New York v. Warner Bros. Records, 389 F.2d 903, 904 (2 Cir. 1968).

Plaintiffs seek an order in this regard

> "requiring that the defendants state in writing the reasons for plaintiffs' ineligibility for public housing, that the defendants provide an immediate due process hearing on that determination of ineligibility, that the defendants immediately supply the plaintiffs with a complete set of regulations governing admission and management, that the defendants cease to enforce the present regulations insofar as they relate to criminal record and sanitary conditions [poor housekeeping habits], and that the defendants publish and make available to the plaintiffs a chronological waiting list of eligible applicants."

The apparently patent facial invalidity of defendants' above-described exclusionary regulations regarding an applicant's "criminal record" or "housekeeping habits" is dispositive of the application for a preliminary injunction. Under a HUD circular dated December 17, 1968, the Housing Authority has been instructed that it may establish admissions standards by regulation bearing on whether an applicant's conduct would be likely materially to interfere with other tenants' enjoyment of the premises, but that the standards must directly relate to actual or threatened conduct; automatic exclusion of a class such as unwed mothers or persons with criminal records is prohibited. Such circulars are conceded by defendants to be binding, mandatory rather than advisory. See Thorpe v. Housing Authority of the City of

Durham, 393 U.S. 268, 276 (1969). The questioned regulations adopted by the defendant Housing Authority provide that (1) only those applicants are eligible for admission to public housing who do not have a "criminal record", although that disqualification may be waived on an individual basis, and (2) only those applicants are eligible for admission to public housing who have good housekeeping habits as evidenced by a visit to the home. A condensed version of the regulations also in use provides in connection with the latter category that if "sanitary conditions" of the family are "severe", there will be referral to an unidentified municipal agency for aid and improvement prior to acceptance of the applicant. That is the entire extent of the relevant regulations. The criminal record disqualification requires no comment. What constitutes a "criminal record" is totally without definition. Possible waiver of the disqualification does not render the regulation valid; there is no provision of standards governing appropriate exercise of the waiver. This regulation is wholly devoid of express criteria by which to measure an individual's presumed history of undesirable conduct as reflected in a "criminal record", of whatever variety or degree, against the likelihood of his disruption of the public housing community. The poor housekeeping disqualification also requires but little comment. The valid relationship of satisfactory housekeeping habits on the part of a prospective tenant to the minimal social requirements and health needs of any public housing community is obvious. This regulation, however, contains not even a rudimentary definition of what behavior is sufficient

o disqualify an applicant. It is circumscribed by no express standards controlling the Housing Authority's decision, and sets forth no essential factors to be considered by the Housing Authority in reaching a decision. The housekeeping regulation cannot even be taken on its face as necessarily distinguishing between conditions unavoidably resulting from the inferior facilities with which an applicant may be forced to contend and those conditions within a tenant's control and created by the tenant's conduct. As presently written, these regulations either automatically exclude persons by inappropriate class designation or provide the Housing Authority with unfettered discretion to engage in arbitrary selection. In either event, these regulations as presently constituted contravene the HUD circular mandate and, more significantly, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. See Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955); Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134, 138-139 (S.D. N.Y. 1968); Thomas v. Housing Authority of the City of Little Rock, 282 F. Supp. 575, 578-581 (E.D. Ark. 1967); cf. King v. New Rochelle Municipal Housing Authority, ___ F.2d ___, Slip. Op. p. 2983, at p. 2987 (2 Cir. May 12, 1971); Holmes v. New York City Housing Authority, supra. The Court does not in any way indicate that it is inappropriate for the Housing Authority to consider an applicant's criminal record or poor housekeeping habits, or that actual practices and policies which may have been followed in fact by the Housing Authority in applying the regulations in individual instances are unsound. The vice

of the current regulations is that they provide no formal and explicit ascertainable standards and criteria by which it can be determined that a person will not be refused admission into public housing simply because of membership in a class which may not properly be excluded per se, or because of a capricious individual decision. Allowance of absolute discretion is an impermissible invitation to the arbitrary exercise of power, and the Housing Authority must establish ascertainable standards with respect to the subject matter of these regulations to assure that worthy applicants are admitted and unworthy applicants are fairly rejected; it is highly desirable for a substantial element of human judgment to remain the prerogative of the Housing Authority in its admissions procedures, as long as that discretion is within the bounds of the Fourteenth Amendment. Colon v. Tompkins Square Neighbors, Inc., supra at 139; see also McDougal v. Tamsberg, 308 F. Supp. 1212, 1215-1216 (D. S.C. 1970). These regulations are readily susceptible to prompt and necessary amendment without further guidance from the Court; the obvious infrequency with which these regulations have been invoked clearly establishes a balance of convenience in plaintiffs' favor for the grant of preliminary relief. In their present skeletal, inadequate form, enforcement of the exclusionary "criminal record" and "housekeeping" regulations should be restrained.

Plaintiffs have shown not only probability of success at trial as to this issue, but also irreparable injury. A determination of eligibility will by no means insure immediate housing for the applicant. Plaintiffs have not established that they are entitled to priority treatment as

present occupants of "unsafe, insanitary, or overcrowded dwellings" as defined in Housing Authority regulations not here challenged, although their present housing appears undesirable and the need for more adequate housing is plain. The facilities available in public housing are few, the openings both irregular and infrequent, and the typical wait long. Nevertheless, the applicant "cannot start to wait out the necessary delays until . . . declared eligible, and time once lost can never be regained." Davis v. Toledo Metropolitan Housing Authority, 311 F. Supp. 795, 797 (N.D. Ohio 1970).

In this posture, ruling on plaintiffs' other claims for preliminary injunctive relief would of course be inappropriate. If plaintiffs are hereafter determined to be ineligible under valid regulations, defendants concede that the Housing Authority must

> "promptly notify . . . [the] applicant determined to be ineligible for admission . . . of the basis for such determination and provide the applicant . . . within a reasonable time . . . with an opportunity for an informal hearing on such determination . . . ." 42 U.S.C. § 1410(g)(4) (as amended December 24, 1969); see also HUD circular RHM 7465.1, dated June 24, 1970.

It would be premature to decide plaintiffs' constitutional claims as to the nature and scope of an eligibility hearing which may be dictated by the requirements of due process. Thorpe v. Housing Authority of the City of Durham, supra at 283-284; cf. Goldberg v. Kelly, 397 U.S. 254, 266-271 (1970); Escalera v. New York City Housing Authority, 425 F.2d 853, 861-864 (2 Cir. 1970). (Although defendants are also admittedly under a duty to post admissions policy regulations

in a conspicuous place for review by prospective tenants, this is not a matter of concern to the plaintiffs at this time.) If on the other hand, with enforcement of the current criminal record and housekeeping regulations preliminarily enjoined, plaintiffs are determined to be otherwise eligible for admission by the Housing Authority, the Housing Authority will then concededly be under a duty promptly to notify plaintiffs "of the approximate date of occupancy insofar as such date can be reasonably determined". 42 U.S.C. § 1410(g)(4) (as amended December 24, 1969). With the unquestioned irregularity and unpredictability with which openings occur, it would not be appropriate at this stage for the Court to compel defendants to go further to publish and make available for the convenience of these plaintiffs a chronological waiting list of eligible applicants as requested by plaintiffs.

IV. CONCLUSION

Plaintiffs having failed to establish all of the prerequisites to maintenance of a class action set forth in Rule 23(a) and (b)(2), Fed. R. Civ. P., the action may not be maintained as a class action. Plaintiffs' motion to proceed as a class action is therefore denied, defendants' motion to dismiss that portion of the complaint which purports to set forth a class action is granted, and that portion of the complaint purportedly alleging a class action is hereby ordered dismissed.

Plaintiffs individually having shown probability of success at trial and irreparable injury with respect to

their claims that defendant Housing Authority's exclusionary regulations concerning applicants' criminal records and housekeeping habits are facially invalid, a preliminary injunction will issue forthwith enjoining defendants from enforcement of said regulations as presently constituted. In all other respects, plaintiffs are not entitled to the preliminary injunctive relief sought. It is accordingly hereby ordered that the defendants be and are enjoined from enforcing the defendant Housing Authority's admissions regulations, as presently constituted, providing that only those applicants are eligible who do not have a criminal record and who have good housekeeping habits. ("Statement of Policies Governing Admissions and Continued Occupation of the PHA-Aided Low-Rent Housing Projects Operated by the Norwalk Housing Authority", Section 1.A.7. and 11; [condensed] "Regulations Establishing Admission Policies of Norwalk Housing Authority", p. 2, policies no. 2 and 6")

The foregoing memorandum of decision and order constitutes the undersigned's report, including findings of fact and conclusions of law, pursuant to the Court's order of reference of April 19, 1971 and Rule 53, Fed. R. Civ. P.; it shall constitute the findings of fact and conclusions of law of the Court, pursuant to Rule 52(a), Fed. R. Civ. P., upon adoption by being "SO ORDERED" by a Judge of the Court. In accordance with the Court's order of reference of April 19, 1971 and the corresponding express stipulation of counsel, the within memorandum of decision and order of the undersigned, when filed with the Clerk of the Court, may be [illegible] of the Court without further pro-

ceedings, and upon its being "SO ORDERED", the Clerk of the Court shall enter the appropriate order or judgment thereon.

Dated at New Haven, Connecticut, this 19th day of May 1971.

Edith H. Latimer
United States Magistrate

SO ORDERED

M. T. Timbs
United States District Judge
May 24, 1971

A true copy
Attest:

GILBERT C. EARL
Clerk, U. S. District Court
By: Augusta Tedesco
Deputy Clerk