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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PEARL WRIGHT, JOHN PENNICK and JOYCE TRAYLOR on behalf of themselves, their Minor Children and all other persons similarly situated

Plaintiffs

-vs-

Civ-77-88

BUFFALO MUNICIPAL HOUSING AUTHORITY, and FRANK M. ABBATE, FRANK J. GLINSKI, CHESTER S. JACKSON, ELIZABETH LEKKI, PHILLIP STRAUSS, ORA WRIGHTER, AND ALBERT L. WOODSON, individually and in their official capacities as members of the Buffalo Municipal Housing Authority Board, and GEORGE E. WYATT, JR., individually and in his official capacity as Executive Director of the Buffalo Municipal Housing Authority

Defendants

WILLIE BLACK, RACHEL SHAW on Behalf of Themselves, their Minor Children and all Other Persons Similarly Situated

Plaintiffs

Civ-77-107

-vs-

BUFFALO MUNICIPAL HOUSING AUTHORITY and GEORGE E. WYATT, JR., individually and in his Official Capacity as Executive Director of the Buffalo Municipal Housing Authority

Defendants

APPEARANCES: NEIGHBORHOOD LEGAL SERVICES, INC. (GEORGE L. COWNIE, ESQ. & FRANK W. BARRIE, ESQ., of Counsel), Buffalo, New York, for the Plaintiffs.

RICHARD J. LEHNER, ESQ., Counsel, Buffalo Municipal Housing Authority, Buffalo, New York, for the Defendants.

These two suits were commenced as class actions by five public housing tenants of the defendant, Buffalo Municipal Housing Authority [BMHA]. BMHA is a public corporation organized under New York State law and operates thirteen federally funded and four state funded low rent public housing projects in Buffalo. Three of the plaintiffs reside in federally funded projects and two reside in state funded projects. The cases were consolidated on March 4, 1977.

These actions were commenced in order to enjoin BMHA from evicting its tenants without prior hearings. The plaintiffs argued that they had a right under 42 U.S.C. §1983 and the due process clause to an administrative hearing prior to termination of their leases.

The evictions or threatened evictions arose out of attempts by the defendants to assess high utility charges against the plaintiffs. The plaintiffs alleged that

the bills were unreasonable because the defendants failed to provide adequate utility allowances to the plaintiffs. Two of the plaintiffs paid the bills in order to avoid eviction, and three refused to pay them. Since the defendants' policy was to refuse to accept rental payments where the tenants did not pay excess utility charges, the tenancies of the three plaintiffs, Wright, Shaw, and Black, were terminated and eviction proceedings were commenced.

In addition to asserting their due process right to a pre-eviction hearing, the three federal plaintiffs argued that the defendants' lease and grievance procedure did not conform to applicable HUD regulations, under which the plaintiffs are entitled to file grievances concerning the excess utility bills prior to eviction.

The complaints were filed in mid-February of 1977. BMHA agreed not to evict plaintiff Wright until a hearing was held on the plaintiffs' motion for a preliminary injunction. As to plaintiffs Black and Shaw, I issued a temporary restraining order enjoining BMHA from evicting them pending resolution of the motion.

On February 28, a hearing was held on the motions for a temporary restraining order and for class certification. At that time, the defendants agreed to follow a

snow emergency measure adopted by HUD which prohibited evictions from public housing in Buffalo and to extend the measure to tenants of state funded housing. As a result, preliminary relief was unnecessary and the motions were adjourned.

The plaintiffs' attorneys then began negotiating with HUD concerning BMHA's lease and grievance procedure. When the snow emergency notice was suspended, the plaintiffs renewed their motions for preliminary relief and class certification, and further negotiations were undertaken. As a result of these negotiations, the parties filed two stipulations with the court on April 5 and May 2 in which BMHA agreed not to institute eviction proceedings against tenants from either state or federally funded housing projects without giving them notice of their right to institute grievance proceedings in accordance with state and federal regulations respectively. As part of the stipulations, the defendants agreed to redraft their lease and grievance procedure in light of HUD requirements. On June 20, the plaintiffs withdrew their motions for class certification and summary judgment.

On August 8, 1977, the plaintiffs moved for attorneys' fees, and I directed them to file supporting briefs and affidavits. Further briefing was requested by the court and numerous additional papers were filed. Since the Supreme Court was currently considering some of the questions involved, decision was delayed. Hutto v. Finney, 46 U.S.L.W. 4817 (U.S. June, 1978), has now been decided, and the court is prepared to rule on the motion. For the reasons stated below, I find that the plaintiffs are entitled to an award of attorneys' fees.

The Civil Rights Attorney's Fees Awards Act of 1976 provides that in actions brought under certain civil rights statutes including 42 U.S.C. §1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. §1988. Since these cases were brought under 42 U.S.C. §1983, the Act applies.

The defendants object to an award under this provision on a number of grounds. First, they argue that the plaintiffs were not the "prevailing" parties. It is well established, however, that §1988 applies to settlements as

well as cases proceeding to judgment. Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 507, 513 (2d Cir. 1976); Brooker v. Mount Vernon Housing Authority, Civ. No. 76-2359 (S.D.N.Y. Apr. 6, 1978); Buckton v. National Collegiate Athletic Association, 436 F.Supp. 1258, 1265 (D.Mass. 1977). In order to obtain an award in cases which were settled, the plaintiff "must show at minimum that the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect" on the achievement of the desired result. Vermont Low Income Advocacy Council, Inc. v. Usery, supra.

These requirements were met in this case. The tenancies of three of the plaintiffs were terminated without a hearing and eviction proceedings were commenced. The filing of these cases was necessary in order to stop the eviction proceedings. Each time the motions for temporary relief and class certification were pressed by the plaintiffs, the defendants began negotiating with the plaintiffs and the motions were adjourned. As a result of these negotiations, a stipulation was filed in court in which the defendants agreed to modify their lease and grievance procedure in accordance with the plaintiffs' demands. It is

clear that these actions were both necessary to prevent evictions of three of the plaintiffs and instrumental in obtaining administrative hearings for tenants residing in BMHA's housing projects.

The fact that the plaintiffs withdrew their motions after the defendants agreed to comply with HUD regulations does not in any way detract from their entitlement to fees under the Act. Once their demands had been met, it would have been fruitless to continue the actions. The operative factor is success, not how the success was achieved. Buckton v. National Collegiate Athletic Association, supra.

The defendants argue that the upward adjustments in the utility allowances would have been made even if the lawsuits had never been commenced and that utility allowances involve policy decisions by BMHA which are excluded from HUD's lease and grievance procedure. They also contend that the cases were unnecessary because BMHA would have complied with HUD's regulations in any event and that the regulations did not become effective until February 16, 1977.

Even accepting defendants' argument that the utility allowances would have been adjusted in the absence of the lawsuits, the lawsuits nevertheless caused a major procedural change in BMHA's lease and grievance procedure, as the stipulations filed in court on April 15 and May 2, 1977 make clear. The HUD regulation effective in 1977 merely superseded older HUD circulars dating back to 1971 by imposing more stringent requirements on federally funded housing authorities. As the plaintiffs point out, BMHA had never met the older requirements. The fact that HUD never found BMHA out of compliance with its regulations and never exercised its right to withhold federal funds cannot be used by BMHA as an excuse for noncompliance or as proof of compliance. If anything, HUD's inaction suggests that these lawsuits were necessary to enforce HUD regulations. Although BMHA may eventually have adopted the procedures, the defendants cannot seriously argue that these cases did not act as catalysts, prompting speedier compliance.

The second reason cited by the defendants for not awarding fees under the Civil Rights Attorney's Fees Awards Act involves 28 U.S.C. §2412. This provision prohibits fee

awards against the federal government or federal agencies unless specifically authorized by statute. Since BMHA receives federal funds, the defendants argue that they qualify for the protection granted to federal agencies by §2412.

The defendants rely on National Association of Regional Medical Programs v. Mathews, 551 F.2d 340 (D.C. Cir. 1976) [NARMP], in support of their position. That case involved a class action against HEW and its Secretary seeking release of illegally impounded grant funds appropriated by Congress under 42 U.S.C. §§299-299j for the planning and establishment of regional cooperative arrangements formed among medical institutions for the purpose of conducting specific types of research. The Court of Appeals reversed an award of attorneys fees to the plaintiff's attorney out of unexpended grant funds because it found that the true owner of the funds was the government rather than the medical institutions.

NARMP does not preclude an award against BMHA in this case. Although the court in NARMP speaks in terms of tracing the source of the award to the government, id at 342-43, a careful reading indicates that ownership or title

to the funds deposited into court was the primary consideration before the court. The court followed its decision in National Council of Community Mental Health Center v. Mathews, 546 F.2d 1003 (D.C.Cir. 1977), a similar case in which the sole question considered by the court was whether the government or the medical program was the owner of the unexpended grant funds:

> Whether these monies are labeled unexpended direct operations or unexpended grant funds is not important. Both of these funds were part of the same congressional appropriation and subject to the same general rules and regulations. Both lapse at the end of the budget period into the United States treasury and cannot again be reached by the grantees without an authorization from HEW. We held in NCCMHC that such unexpended funds properly belong to the government and therefore an award of attorney's fees from these funds would be an award against the United States prohibited by section 2412, unless otherwise specifically authorized by another statute. At 241 of 178 U.S.App. D.C., at 1007 of 546 F.2d.

NARMP at 343.

The court in NARMP clearly implied that §2412 would not have barred the fee award had it found that the funds in question had been owned by the grant recipients

rather than by the United States government. In the case before this court, BMHA does not dispute its ownership of the funds out of which a fee award would be payable. Accordingly, §2412 as interpreted in NARMP does not bar the award.

Furthermore, there are significant differences between the two cases which serve to distinguish them. The only defendants in NARMP were HEW and its secretary, and they were charged with illegally impounding grant funds. Any award taxed against the defendants necessarily would have been an award against the government. The court was not confronted with the question of whether §2412 applied to recipients of federal funds. In this case, in contrast, the grant recipient rather than a federal agency is the defendant.

The nature of the dispute is also different. In NARMP, the merits of the case concerned a specific federal appropriation which was held by the court pending resolution of the controversy. Here, the funds out of which any fee award would be payable have not been earmarked or deposited into court. The case concerns BMHA's lease and grievance procedures, not its funding.

I find that it would unduly expand the doctrine of sovereign immunity to find BMHA immune from awards of costs and fees under 28 U.S.C. §2412 simply because it contracts with the federal government for receipt of federal funds. BMHA is not a federal agency. BMHA was created under state law as a public housing authority. N.Y. Pub. Housing Law §404. Although it receives federal funds, it also receives a substantial amount of its funding from the state and the city. See Addendum to Defendant's Memorandum of Law in Reply to Plaintiff's Third Memorandum of Law at 14-15. Both legally and financially, BMHA is independent of the federal government.

In participating in the federal public housing program, BMHA enters into contracts with the federal government. In exchange for funds, HUD retains certain liens, exercises budget approval authority, and exercises various other powers over BMHA. However, BMHA remains a local agency with independent authority over its housing programs. This is acknowledged in the Housing Act's declaration of policy, which states that one of the policies of the United States is "consistent with the objectives of this chapter, to vest in local public housing agencies the

maximum amount of responsibility in the administration of their housing programs." 42 U.S.C. §1437.

A third argument raised by the defendants is that BMHA is a state agency and the eleventh amendment bars a fee award against it. This question was recently resolved by the Supreme Court, which held in Hutto v. Finney, supra, that the eleventh amendment does not immunize states from fee awards under the Civil Rights Attorney's Fees Awards Act.

I have considered the other arguments raised by the defendants and find them without merit. Plaintiffs' motion for attorney's fees is granted. The parties are directed to meet to agree upon an appropriate amount and report to the court on or before November 21, 1978.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: October 25, 1978