IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Josie Jaimes, et al.,

Plaintiffs,

vs.

Lucas Metropolitan Housing Authority, et al.,

Defendants.

Case No. C 74-68

MEMORANDUM AND ORDER

YOUNG, J:

In paragraphs VII, VIII, and IX of its original order in this case, filed on June 8, 1983 ["June Order"], this Court ordered the defendant to submit certain plans for action within sixty (60) days after the entry of the Order. In paragraph X of the June Order, the plaintiffs were given thirty (30) days to respond to the defendants' plans, and if plaintiffs objected, the Court was to hold a hearing to approve acceptable plans. Such a hearing was in fact held on April 2 and 3, 1984, and thereafter the parties filed written arguments in support of their respective positions.

This procedure was unique, so far as this Court is concerned. Its normal practice, when the parties cannot agree upon an entry, is to consider the forms of entry proposed, and then make its order without further hearing. A hearing having been had, it seems reasonable that the Court should make its findings and conclusions, pursuant to Rule 52(a) of the Federal

Rules of Civil Procedure, and not simply let the matter lie in limbo.

However, by the time the conflicting proposals were filed and the hearing had, the Court's judgment had been appealed to the Court of Appeals for the Sixth Circuit. This raised a question as to this Court's jurisdiction to take any action so long as the case remained pending on appeal.

On March 25, 1985, the Court of Appeals decided the case and filed its opinion, reversing this Court's judgment in part, and affirming it in part. This Court thereupon took up the matter of entering its order to the extent that the judgment of the Court of Appeals directs it to do so.

The matter is complicated by this Court's practice not to rehear or retry matters which have been remanded to it after a reversal by a higher court. This practice is mandated by local rules in many districts, but not in the Northern District of Ohio. In this case, however, at least a part of the orders involved were not reversed, but were affirmed. As to those matters upon which this Court's judgment was affirmed, no further hearing is needed. Therefore, the reasons which inhibit this Court from retrying or rehearing matters in which it has been reversed do not operate to prevent it from entering its findings and conclusions resulting from the April 2 and 3, 1984, hearing as to the limited matters upon which its judgment was affirmed.

Having taken the matter up, and studying nearly five hundred pages of briefs and transcripts, and an equal or larger amount of other material, and also having submitted a draft of an order to counsel, and received and studied their comments thereon, this Court will make these findings and conclusions resulting from the hearing that are connected with the affirmance of its judgment in the March 25, 1985, opinion of the Court of Appeals.

Much of the evidence at the April 2 and 3, 1984, hearing, and the arguments of counsel have to do with those subsections of paragraph VI, and paragraphs VII and VIII of this Court's June Order, which were stricken down by the Court of Appeals. As to those matters, this Court will make no findings or conclusions herein. What is left is the injunction in section a. of paragraph VI forbidding engaging, or continuing to engage, in any acts or practices which have the purpose or effect of denying equal housing opportunities because of race, color, religion, national origin, or sex, and the provisions of paragraph IX ordering a special plan of affirmative action to reduce the racial segregation within LMHA

locations[1], with certain specific matters to be included in the plan.

Even as to these very limited matters, there is a great deal of dispute amongst the parties. The Court will not discuss all of these matters in minute detail, and will mainly cast its findings and conclusions into the form of the affirmative action plan that the Court of Appeals finds it proper to require. This plan will subsequently be referred to herein as "the plan."

The first major dispute between the parties is the duration of the plan. The defendants propose that the plan shall be in effect only for three years, whether it accomplishes anything or not. The plaintiffs propose that the plan shall be in effect for at least four years, or two years after any specific goal of the plan has been attained.

Essentially this dispute arises out of technical and semantic matters, and overlooks the basics of the problem.

In this case, the Court originally found that after some thirty years after the LMHA was ordered to desegregate, it had still not done so. The Court of Appeals finds no clear error in this finding. The Court then enjoins the defendants

[1]"Location" means any low-rent housing site as established in a Development Program, except that when sites are adjacent or within a block of each other, such sites shall be considered one location. In scattered site developments, the local Authority shall make reasonable determinations of "locations" based on the specific scatterization, including any groupings that may be reasonably consistent with the purpose of this order.
The Public Housing Occupancy Handbook, 1978, 7456.1 Rev. P.2 ¶1d.(1)(a) (second sub-paragraph).

from denying, or continuing to deny, equal housing opportunities. This is a classical restraining order, and is in no sense a mandatory injunction. As such, to use the classical legal term, it is "perpetual," that is, it runs forever. Thus any quibbles about the time period of a plan to keep the defendants in compliance with this order overlooks the fact that there will never come a time when the defendants may, with impunity, engage in discriminatory practices which violate the injunction.

In the legal literature, there is considerable highly technical discussion as to the exact procedural method of dealing with a violation of a perpetual order of injunction. That again is of little practical consequence. Whether enforcement is by a motion in the original action to compel the violator to show cause why he should not be found in contempt, or by a new action seeking to enforce the judgment, is of no consequence. The current practice in Ohio and particularly in this Court, is to proceed by way of a motion in the original action. For example, in the case of Taylor v. Perini, 455 F.Supp. 1241 (N.D. Ohio 1978), after all these years hardly a month goes by without a motion to show cause being filed and ultimately disposed of.

The purpose of the plan is to reduce as much as possible the need to be constantly taking action to enforce the injunction, by detailing, insofar as it is possible to do so, what actions or activities, or lack thereof, will give rise to

charges of violation of the injunction, and to set up some standards which will simplify the determination of whether or not the injunction is in fact being violated.

It should be clear from the foregoing that there is no reason to set an ultimate duration for the plan. Like the injunction itself, the plan must necessarily be perpetual. At the same time, the plan must be subject to modification on motion whenever it appears that it is failing in some respect to accomplish its purpose.

There are a multitude of disputes about the details of those portions of the affirmative action plan which deal with specific actions which the Court, in paragraph IX of the June Order suggests should be used to reduce the racial segregation which the Court found to exist in the LMHA housing projects.

The resolution of these matters can be simplified if again it is born in mind that this is an action to enjoin the continuance of practices which have led to the existing segregation. Much argument is devoted to whether or not there should be some precise, numerical percentage figures which would serve as a touchstone to determine whether any particular one or all of LMHA's housing locations are in fact segregated. The Court of Appeals, on page 40 of its March 25, 1985, opinion, points out some of the problems in this area.

As a practical matter, the closer one comes to fixing precise percentage figures, the closer one comes to a system of

quotas. This Court had considerable knowledge about quotas long before the modern desegregation litigation began. Quotas are one of the oldest, and often one of the subtlest, methods of practicing discrimination. Even the use of the word "goal" comes uncomfortably close to quota in this Court's judgment.

Once again, to go back to basics, it is appropriate to take a look at what evidence will establish the fact, or a presumption, that unlawful segregation exists. In general, such evidence compares the ratio of the numbers of various groups in some larger or general population with the ratio in the particular areas where it is asserted that segregation exists. A marked discrepancy is sufficient to establish at least a prima facie case of discrimination. It is not unreasonable to find that such a marked deviation from the ratio in the large population is the result of deliberate, and of course illegal, efforts to bring it about.

This rule is easy to employ in resolving whether racial segregation exists in the employment of large numbers of not particularly skilled workers. It becomes increasingly difficult to use in cases involving age or sex discrimination in employment, or in professions or highly skilled occupations.

In this particular case, this method is quite workable, if it is employed rationally. The basic ratio of population used cannot properly be the ratios between majority and minority groups in the general population, because the vast majority of the general population does not live in public

housing. But the number of people who do live, or desire to live, in public housing within the jurisdiction of LMHA is sufficiently great that the ratios of the various groups within that limited population affords a reasonable standard for determination of whether a particular project is segregated or not. Affirmative action essentially means taking all possible steps to bring the particular into the same ratio as the general, and to do so with reasonable promptness.

There appears to be little or no dispute that the ratio of minorities to majorities in family housing, both in those housed and those waiting to be housed, is somewhere between seven (7) to three (3) and six (6) to four(4). In the elderly housing, the ratio is somewhere close to even.

The plaintiffs argue that after four years of affirmative action each LMHA family housing project should have a precise ratio of 7.7 minority to 2.3 majority, and in the elderly projects, the precise ratio should be 4.5 minority to 5.5 majority. Conversely, the defendants argue no segregation exists if in family housing the ratios are anywhere between 5.7 minority and 4.3 majority and 9.7 minority to .3 majority. In elderly housing the ratios range from 2.5 minority to 7.5 majority and 6.5 minority to 3.5 majority.

Obviously, in dealing with so complex and difficult a problem, neither exact mathematical precision nor a spread so broad as to be meaningless are proper criteria for the use, or the success or failure, of an affirmative action plan. The

Court therefore concludes that the ratio used to determine the existence of segregation should be that between racial majority and minority in the list of people housed and awaiting housing, not those ratios in the entire population of the Toledo Metropolitan area. So long as the minority population in any family housing location is approximately three-quarters of the total occupancy, and in elderly housing is approximately half of the total occupancy, the injunction is being complied with. The Court will not entertain contempt proceedings so long as, at the end of each six month period after the effective date of this Order, it appears that in each housing location the ratio is measurably closer to this standard than it was at the end of the preceding period. Reporting need not be continued after these ratios have been maintained in all locations for a period of one year.

The much more difficult problem is that of planning for particular methods of bringing about this result. As to this the plaintiffs propose a number of specific actions to be taken. They include not permitting any minority person on the waiting list to be given housing in any location with a minority population of over ninety percent (90%); if vacancies are available in more than one location, permitting minority applicants only to be offered housing in the location having the smallest percentage of minority applicants; during certain periods, giving housing occupants who are willing to transfer to other locations where the transfer will improve the

minority-majority ratio priority over persons on the waiting list for housing and persons entitled to transfer because of hardship; inducing persons to make such transfers by moving them or paying their moving expenses, or by giving them a rent-free month in the new quarters, or both; in cases where a location is at or close to one hundred percent occupancy by one race, arranging so that new or transfer tenants of the opposite race can come in as a group of five families, so that no single family will be the first to change the racial complexion; requiring the federal defendants to grant LMHA additional funds to hire maintenance and administrative personnel to expedite the filling of vacancies in the housing locations; and requiring the federal defendants to grant LMHA large amounts of money to rehabilitate or refurbish older and more decrepit housing locations to make them more attractive.

As opposed to this, the defendants in essence propose to make no changes, but simply to go on running their operations as they have in the past. They oppose all of plaintiffs' suggestions on grounds that they violate the separation of the powers, or are otherwise beyond the jurisdiction of the Court, or would impose discriminatory hardships upon the persons on the waiting list for housing.

The conflicting proposals encapsulate the real problems in this matter.

On Page 184 of the Transcript of the April, 1983, hearing, LMHA's counsel asked plaintiffs' witness Galen Martin,

> ...Is it your statement then, you would prefer the plan that was less intrusive, and permitted the Housing Authority to run the Housing Authority, as you put it?

To which the witness responded,

> No, I think that's kind of far removed from what I was--I was trying to avoid getting drawn into something that I thought was a detail...There's going to take some amount of extraordinary remedies to overcome this vast pattern and practice of discrimination. So, it's got to be a comprehensive plan.

In response to a question from the Court, the witness Martin said,

> ...if these things are left vague, if it seems like the Government is speaking with a forked tongue, it's unclear what the people are to do, they may not do well. But if they have good leadership, and the Government provides the leadership it's supposed to, then the people are going to be very fair-minded....

Thereafter, at the hearing, the Court, responding to a request of counsel that a conversation at recess between the Court and the witness Martin be detailed, responded by saying,

> I don't think our conversation dealt with any factual matters, except Mr. Martin, I think he will agree, that he expressed the same things that he had been expressing here in Court, that what you need to have is an interest and desire to make changes in order to achieve results. And, I was happy with Mr. Martin's testimony because, of course that's what I've been maintaining, not only in this litigation, but in any other Civil Rights litigation I've had. There has to be a fundamental change. There has to be a desire to sell the changes before changes will be made. That is, the Authorities, or whoever it is that are not complying with the requirements, have got to evidence a desire....

Transcript, P. 187.

It is abundantly clear from studying the affirmative action plan submitted by the defendants, and their briefs filed in respect to this portion of this litigation, that there is no desire whatever upon the part of the defendants to do anything to change the ancient pattern of segregation in the LMHA housing locations. Of course, things have changed from the situation when Judge Frank L. Kloeb decided Vann v. Toledo Metro Housing Auth., 113 F.Supp. 210 (N.D. Ohio 1953). There, armed men were planning to use bulldozers as shields when they proposed to resist by force the first movement of minority persons into an all-white housing project. Now the defendants use what psychiatrists call the "passive-aggressive" response to any efforts to make them change their ways. Just as this response is far more subtle than brute force, it is far more difficult to overcome. Looking back at more than thirty years of efforts to enforce the moral, constitutional, and legal requirement of equal protection, it is hard not to despair that any plan this Court may fix will bring about desegregation so long as the defendants do not really want to mend their ways. Nevertheless, since in the posture of this matter this Court's Order stands to propose a plan of affirmative action for the desegregation of the LMHA's housing project, the Court approves a plan which reads as follows:

I. General Provisions

A. The defendants shall undertake this affirmative action plan (hereinafter Plan) to reduce the racial segregation within LMHA projects.

B. The general objectives of the Plan are to remedy the effects of past discrimination and to assure equal housing opportunity without regard to race, color, or national origin.

1. The objective of remedying past discrimination shall be achieved and maintained so long as the ratio between minority and non-minority occupants of family housing locations is approximately three to one (3:1) and in elderly locations, one to one (1:1).

2. Any specific housing location will be considered predominantly minority or predominantly non-minority if the racial composition of its occupants varies by more than two and one-half percent (2 1/2%) from these ratios in either direction.

C. The Plan shall continue until its objectives are achieved.

D. The Plan may be modified at any time by agreement of all of the parties hereto, or when, upon motion of any party at any time, it shall be made to appear that progress is not being made toward achieving the objectives of the Plan.

II. Assignment of New Applicants for Housing

A. All applications for LMHA housing shall be categorized according to the size unit which is appropriate for the

applicant. A waiting list shall be maintained for new applications within each unit size category offered by LMHA.

B. All applications for LMHA housing shall be dated and time stamped when they are submitted. This time and date stamp shall be used for determining the priority of applications of persons otherwise eligible.

C. Applications which are currently on file, or which constitute a waiting list, shall be organized in accordance with the above criteria.

D. All applicants for LMHA housing shall be placed in order on the waiting list on a "first-come-first-served" basis in accordance with the date and time of their application, within the rent ranges established by the LMHA and sanctioned by HUD; provided, however, that LMHA, in determining qualifications for receipt of assistance of persons applying for rental of housing shall not be prohibited from applying factors affecting qualifications, preferences or priorities which do not involve consideration of race, color, or national origin and which have been approved by all parties to this action, or such factors which are required by or are in conformity with directives, circulars or regulations from time to time issued by HUD and approved by the plaintiffs, and those preference factors presently contained in the LMHA Admission and Continued Occupancy Policies and Regulations. LMHA may continue to implement a "rent range" policy designed to assure that a range of income groups occupy LMHA housing and may

continue to implement preferences for persons referred through local mental health centers.

E. Each applicant shall be offered the first available appropriately sized unit in every LMHA housing location in which his or her race does not predominate. If more than one appropriate unit is available in a housing location in which the applicant's race does not predominate, the applicant shall be offered a choice of all such suitable units. If an appropriate unit is not immediately available in such a housing location, the applicant may then be offered an appropriately sized unit located in any other housing location. An applicant may refuse to accept a unit offered in a housing location in which the applicant's race predominates beyond the proportions fixed in this plan, and may wait until an appropriate unit becomes available in a location in which the applicant's race does not so predominate, without losing his or her place or priority by doing so.

F. If the applicant refuses all units offered in locations in which his or her race does not so predominate, other than for good cause, the applicant shall lose his or her place and be placed at the end of the waiting list. "Good cause" shall consist of either:

(1) Physical needs of the occupant;

(2) The location would cause undue hardship with respect to health or employment;

"Good Cause" must be established by the presentation of clear evidence of the precise reason claimed by the applicant.

G. Each new applicant, at the time offered an application to be completed, shall be advised of options under this provision, and before accepting a unit, shall be informed of the unit number of each dwelling which qualifies under this provision as available for his or her choice.

III. Transfers to Promote Integration

A. Any LMHA tenant who resides in a unit located in a location in which his or her race predominates beyond the proportions fixed in this plan may apply for a transfer to an appropriately sized unit located in a location in which his or her race does not so predominate. He or she shall be considered an "integrative transferee." A tenant in non-compliance with the terms of the dwelling lease shall not be eligible to apply for a transfer.

B. Each such tenant who desires to transfer shall submit an application for transfer to the Office of the Executive Director of the LMHA. The application of each tenant shall be dated and time stamped when submitted, and shall be placed on a "transfer waiting list" within the category of each size unit for which the family is eligible.

C. 1. Persons requesting "hardship" transfers, that is, transfers necessary to place a tenant family in a dwelling of a size appropriate to the family size and composition, or to meet a compelling medical or

employment need, shall have first priority in the assignment of dwellings.

2. Integrative transferees shall have second priority in the assignment of dwellings.

3. New applicants for housing shall have third priority in the assignment of dwellings if their assignment will decrease the segregation of the location to which they are assigned.

4. New applicants for housing shall have fourth priority in the assignment of dwellings if their assignment will either not change or will increase the segregation of the location to which they are assigned.

5. Hardship transfer applicants shall be offered the first available unit in a location in which their race does not predominate beyond the proportions fixed in this plan. If an appropriate size unit is not immediately available or expected to become available within one month after filing the application in a location in which the transferee's race does not so predominate, he or she may be offered a unit in which his or her occupancy will cause the least increase in the segregation of the location to which he or she is assigned.

D. Persons who apply for transfer under this Plan shall not be required to re-establish their

eligibility for public housing and shall not be required to provide information on their transfer application other than their name, address, race, number of persons in family, and the sex and age of family members.

E. For integrative transferees, LMHA and HUD shall either pay the actual moving expenses for the transferees at a rate not to exceed $200 per bedroom or shall provide moving services at no cost to the transferee. In addition, HUD and LMHA shall not charge the transferee any rent for the first month after transfer.

IV. Affirmative Action to Market Segregated Locations to Persons Whose Race Does Not Predominate

A. 1. The LMHA shall distribute to each present tenant a letter explaining that the LMHA will be operated as a nonsegregated system without discrimination based on race, color, or national origin, and explaining that in order to correct the effect of past practices alleged to be discriminatory, present tenants will be given the opportunity to apply for a transfer to a unit located in a section in which his or her race does not predominate beyond the proportions fixed in this plan. Each such letter shall explain the portions of this Plan relating to the procedures for accomplishing the transfer. Letters distributed

pursuant to this provision shall also indicate that the ability to transfer is limited by the availability of appropriate units and that the application to transfer must be submitted to the Office of the Executive Director. Each letter shall also include, as an attachment, an application form to be used in applying for a transfer.

2. A similar letter and application form shall be given to each hardship transfer tenant and each new tenant assigned to a project in which his or her assignment does not decrease the segregation in the project to which he or she is assigned.

B. If the defendants encounter difficulties in persuading new or transfer applicants to accept units in projects in which more than ninety percent (90%) of the tenants are of different race from the applicants, insofar as it can be accomplished without creating more than thirty (30) days delay in filling vacant units ready for occupancy, the defendant will so schedule the housing of such applicants that groups of three or more will move into the project at the same time, and an intensive counselling program will be undertaken for both the new tenants and the present tenants in the particular project to facilitate the introduction of the new tenant or tenants into the project.

C. In order to reduce the period that vacant housing units are not rented due to the need to recondition such units,

HUD shall within thirty (30) days of the Plan's approval increase LMHA's annual operating funds in an amount equal to that needed for LMHA to hire an additional four (4) maintenance personnel. These additional maintenance personnel shall recondition vacant units as a priority over other regular maintenance activities.

D. In order to centralize and better coordinate the implementation of the new application, transfer and notice procedures of the Plan, HUD shall within thirty (30) days of the Plan's approval increase LMHA's annual operating funds in an amount equal to that needed for LMHA to hire an additional four (4) intake, occupancy, and management personnel for said purposes.

E. The funds necessary to meet the obligations of paragraphs C & D of this section shall be in addition to LMHA's normal allocation of operating funds from HUD, and said normal allocation of operating funds shall not be diminished in any manner, directly or indirectly, to offset the additional funds required herein.

V. Notice to LMHA Tenants and Applicants

A. In all offices in which applications are taken or in which LMHA business is conducted, LMHA shall post and display a sign indicating that LMHA housing is open to all eligible persons without regard to race, color, or national origin. Such sign shall be prominently and conspicuously placed.

B. 1. In all offices in which applications are taken or in which LMHA business is conducted, LMHA shall post in a prominent place clearly visible to all applicants and potential applicants, a list of all LMHA housing locations, their locations, formal designations, and popular names.

2. The defendants shall develop and give to all new tenants or transfer applicants a guide which shall set forth in detail for each and every housing location information concerning public transportation, public, parochial, and private schools, shopping facilities, recreational facilities, emergency services, and all other pertinent information about the locations and the neighborhoods wherein they are located.

C. The defendants shall send to each present tenant and all applicants on the waiting lists and shall give to all future applicants a letter explaining that the LMHA will be operated as a non-segregated system without discrimination based on race, color, religion, sex, or national origin. Each such letter shall explain the tenant selection and assignment procedures in this Plan in language designed to be clearly and easily understood. At the time an offer is made, LMHA shall also obtain a signed statement from the applicant listing all available appropriately sized units and acknowledging that he/she has been informed of his/her opportunity to choose these units, and an indication of what choice was made.

VI. Monitoring Compliance With the Affirmative Action Plan

A. Thirty days after entry of this Order by the Court, the LMHA shall submit to counsel for plaintiffs a report setting forth all steps taken thus far in conformity with the provisions of the Plan. Such report shall include copies of all signs and notices posted pursuant to the Plan and copies of all letters and notices sent, given or to be sent pursuant to the Plan, together with the name and address of each recipient and the date mailed or given. All records and reports identifying individual tenants and other personal information shall be considered confidential information and not available for public release. Any persons that assist counsel for plaintiffs in monitoring this Plan shall also be bound by this confidentiality provision.

B. Six months following receipt of the notice of the approval of this Plan, and at six month intervals until the racial composition of the LMHA housing locations has been brought into conformity with that required by this Plan, and maintained in that condition for a period of one (1) year, the LMHA shall submit to counsel for plaintiffs a report reflecting the following information:

1. the address of each unit which has been vacated during the previous six month period, together with an indication of the date it was vacated, the date it was re-rented and the number of bedrooms which the unit contains, and the race of the new occupant family.

The initial report under this paragraph shall provide the above information for all units which were vacant at the date of entry of this Order, as well as those vacated within six months after entry of this Order.

2. the name, address and race of each person who applied for a unit during the previous six month period, together with the following information:

(a) date application submitted;

(b) number of persons in family;

(c) size units for which family is qualified;

(d) preference or priority to which applicant is entitled, for reasons not related to this Plan;

(e) if accepted for tenancy, date applicant was so informed;

(f) if not accepted for tenancy, date applicant was so informed, reasons not accepted;

(g) if accepted, but withdrew application, date of withdrawal;

(h) if accepted and placed on waiting list, date placed on waiting list and indication of which list placed;

(i) names of all locations offered to the applicant, and which, if any, was accepted.

The initial report pursuant to this subparagraph 2 shall include the name, address, race, and unit size for each person on a waiting list at the time of the

receipt of the notice of approval of this agreement, together with the date such person applied.

3. the name of each person previously reported as being placed on a waiting list who moved into a unit, together with the address and size of the unit and the date moved in.

4. the name of each applicant who, during the preceding six month period exercised his/her right to refusal, together with the address of the unit or units which that applicant refused.

5. the name, unit number, race and date of application of each tenant who applied for a transfer, together with the size units the family qualified for; if the transfer was granted, the unit number to which the tenant moved and date he/she moved. If the transfer was not granted, the present priority position of the transfer application.

C. The defendants shall respond to all reasonable requests by the plaintiffs for further information concerning defendants' actions and efforts to comply with the plan.

THEREFORE, for the reasons stated, good cause therefor appearing, it is

ORDERED that the plan hereinabove set forth for desegregation of the housing locations maintained and operated by the defendant shall be and become in full force and effect immediately upon the filing of this order; and it is

FURTHER ORDERED that this cause be returned to the Clerk of this Court for reassignment, by reason of this Judge's inability to continue to hear the same after reversal and remand by the Sixth Circuit Court of Appeals.

IT IS SO ORDERED.

Sr. United States District Judge

Toledo, Ohio.