IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL.	*	
	*	CIVIL ACTION NO.
v.	*	
	*	CA3-85-1210-R
U.S. DEPARTMENT OF HOUSING	*	
AND URBAN DEVELOPMENT, ET AL.	*	CLASS ACTION
	*	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT FOR THE CLASS AGAINST DHA AND HUD

I. The uncontested facts establish DHA's liability

Under any burden of proof, the record is clear that DHA maintained a purposeful system of racial segregation in its program as the Court has already found. Rather than even comply with what were by HUD's own admissions rather weak and ineffective agency desegregation requirements, DHA engaged in a variety of obstructionist tactics designed to avoid implementation of the HUD requirements. Since 1965 DHA has been overtly resisting or politely ignoring federal desegregation requirements during the following periods: 1965-1966, 1967 -1976, 1980 - through the date of the filing of this suit.

The history of DHA's de jure segregation in the public housing program, its resistance to HUD's remedy attempts, its own recognition of a duty to use its other programs to desegregate and its failure to do so, and the racial occupancy patterns in all of DHA's programs all support a finding that DHA maintained a program of purposeful racial segregation in all of its programs up to the approval of the consent decree in this case. Walker v. HUD, 734 F.Supp. 1272, 1276, 1293-1309 (N.D. Tex. 1989).

DHA's racial segregation violated the equal protection principle of the Fourteenth Amendment to the U.S. Constitution enforceable through 42 U.S.C. § 1983, 42 U.S.C. § 1982, Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, and the Fair Housing Act, 42 U.S.C. § 3604. Detroit Housing Commissioners v. Lewis, 226 F.2d 180, 183-184 (6th Cir. 1955); Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582 (N.D. Ill. 1967), 296 F.Supp. 907 (N.D. Ill. 1969), 436 F.2d 306 (7th Cir. 1970); Jaimes v. LMHA, 758 F.2d 1086 (6th Cir. 1985); Young v. Pierce, 628 F.Supp. 1037 (E.D. Tex. 1985), 822 F.2d 1368, 1376 (5th Cir. 1987) - scope of class narrowed.

Public housing authorities such as DHA have a constitutional and legal obligation to not only cease de jure segregation but also to remedy the effects of that segregation. Detroit Housing Commissioners v. Lewis, 226 F.2d 180, 183-184 (6th Cir. 1955); Hills v. Gautreaux, 425 U.S. 284, 293-94 (1976). The test for whether a plan for desegregation is legally adequate is whether it works. Failure to adopt and implement an effective desegregation plan is a purposeful violation of the equal protection principle. Ayers v. Fordice, ___ U.S. ___, 120 L.Ed.2d 575 (1992); Green v. School Board of New Kent County, 391 U.S. 430, 437-38 (1968). DHA will not discharge its constitutional obligations until it eradicates the policies and practices traceable to its prior de jure dual system that continues to foster racial segregation. Ayers v. Fordice, ___ U.S. ___, 120 L.Ed.2d 575 (1992).

II. The uncontested facts establish HUD's liability

Since 1965 HUD has been under a constitutional and statutory duty to disestablish the dual system of federally assisted housing in Dallas. Clients Council v. Pierce, 711 F.2d 1406 (8th Cir. 1983); 42 U.S.C. §§ 1981 and 1982; Title VI; Title VIII. HUD has a constitutional and statutory duty to administer all its programs in Dallas in such a manner that de jure segregation and its effects are eliminated. Hills v. Gautreaux, 425 U.S. 284 (1976); Shannon v. U.S. Department of Housing and Urban Development, 436 F.2d 809 (3rd Cir. 1970).

HUD and its federal predecessors knowingly funded and other wise supported de jure racial segregation in DHA's low income housing programs. Rather than comply with its constitutional obligation to dismantle the dual system and its effects, HUD has chosen to continue to perpetuate racial segregation. HUD's actions violate the equal protection principle under either the failure to disestablish segregation analysis or the facially neutral, invidious purpose rationale.

HUD's actions in knowingly funding, supporting and directing the City of Dallas and DHA's perpetuation of racial segregation in DHA's low income housing programs violate the Fifth Amendment to the U.S. Constitution, 42 U.S.C. § 1981, 42 U.S.C. § 1982, 42 U.S.C. § 2000d (Title VI), and 42 U.S.C. § 3608 (Title VIII). Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) - Constitution and Title VI; Clients' Council v. Pierce, 711 F.2d 1406 (8th Cir. 1983) - Constitution and Title VIII; Young v. Pierce, 628 F.Supp. 1037 (E.D. Tex. 1985) reversed in part on other grounds 822 F.2d

1368 (5th Cir. 1987) on remand 685 F.Supp. 975 (E.D. Tex. 1988) - Constitution, 42 U.S.C. §§ 1981 and 1982, Title VI, and Title VIII; Jaimes v. Toledo MHA, 715 F.Supp. 835, (N.D. Ohio 1989) - HUD's actions supporting and maintaining racial segregation in a public housing authority violate Title VI and Title VIII.

HUD's involvement with DHA includes funding, monitoring and direct control. HUD has continued to fund DHA throughout DHA's violations of the consent decree. HUD has also continued to provide funds to the City of Dallas when HUD was aware of the City's involvement in perpetuating the racial segregation in DHA's programs. HUD's direction, influence, control and joint action with DHA and the City of Dallas, both state actors, make the entire claim actionable under 42 U.S.C. § 1983. Knights of Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895, 900 (5th Cir. 1984).

There is a direct cause of action for injunctive relief for federal violations of the equal protection principle incorporated in the Fifth Amendment's due process provisions. Davis v. Passman, 442 U.S. 228, 242 (1979) citing Bolling v. Sharpe, 347 U.S. 497 (1954). Sovereign immunity does not bar such injunctive relief. Larson v. Domestic and Foreign Commerce Corp, 337 U.S. 682, 690-691 (1948); Dugan v. Rank, 372 U.S. 609, 621-622 (1962); Gautreaux v. Romney, 448 F.2d 731, 735 (7th Cir. 1971).

Whether or not there are applicable private causes of action under the Fifth Amendment, 42 U.S.C. §§ 1981, 1982, 2000d, and 3608, HUD's actions are challengeable and reviewable under the

"compel agency action unlawfully withheld or unreasonably delayed" 5 U.S.C. § 706(1), "not in accordance with law" (5 U.S.C. § 706(2)-(A), "contrary to constitutional right" 5 U.S.C. § 706(2)(B), "short of statutory right" 5 U.S.C. § 706(2)(C), and "unwarranted by the facts" 5 U.S.C. § 706(2)(F) provisions of the APA. HUD probably will not contest that the 5 U.S.C. § 702 waiver of sovereign immunity would apply to the APA review but rather will insist that such review is limited to an arbitrary and capricious review of an administrative record. Under the U.S. Supreme Court's standards for determining the scope of judicial review of challenged federal action, the facts in this case should be determined and reviewed de novo by this Court.

The scope of judicial review available under a statute providing for review of federal agency action is to be determined by: 1) examining the wording of the statute for language limiting review to a "substantial evidence" or "administrative record" review, 2) examining the legislative history for the intent of Congress to limit review, 3) the presence of statutory language which indicates that a normal civil action is anticipated. Chandler v. Roundebush, 425 U.S. 840, 844-846 (1976); Newsome v. Vanderbilt University, 653 F.2d 1100, 1107 (6th Cir. 1982).

There is no language limiting review in the provisions of 5 U.S.C. §§ 706(1), 706(2) (A), (B), and (C). The "to the extent that the facts are subject to trial de novo by the reviewing court" language of § 706(2)(F) does not state to what extent de novo review is actually available but leaves the question open. The

only reference to the "record" is in the last sentence of § 706, "In making the foregoing determination, the court shall review the whole record or those parts of it cited by a party...". This reference does not include the adjectives "administrative" or "agency" as limitations on the "record". Neither does it refer to a "judicial" or "court" record.

The legislative record is clear.

Senate Report No. 752, 79th Congress, 1st Session (1945):

page 26, referring to section on judicial review, now 5 U.S.C. 706, "However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record".

page 28, "The sixth category, respecting the establishment of facts upon trial de novo, would require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8. It would also require the judicial determination of facts in connection with rule making or any other conceivable form of agency action to the extent that other facts were relevant to any pertinent issues of law presented...

The requirement of review upon the whole record means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case."

Senate Document No. 248, "Administrative Procedure Act Legislative History 79th Congress 1944-1946":

page 279, "...In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined de novo be the reviewing court respecting either the validity or the application of such rule or order - because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court."

In order to make this intent effective, Congress specifically provided that in the absence or inadequacy of a special statutory

judicial review proceeding, any applicable form of action for declaratory or injunctive relief is available in civil proceedings for judicial enforcement. 5 U.S.C. § 703.

The only possible special statutory review or administrative record proceeding which could have applied to the actions of HUD and DHA would have been an administrative termination of funds under the authority granted by Title VI, 42 U.S.C. § 2000d-1. HUD never invoked this authority by seeking to terminate or suspend funds to DHA or to terminate funds to the City of Dallas.

Any judicial restriction of the review in this case would violate the clear direction given by Congress for the judicial enforcement of the APA. "Except in a few respects, this is not a measure conferring administrative powers but is one laying down definitions and stating limitations...It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection..." Sen. Report 752, supra at 31.

The statute does not contain any explicit, applicable limitations of review to the administrative record. The Congressional intent to provide for de novo determination and review of the facts is clear. The implementing section of the statute, 5 U.S.C. § 703, states that normal civil proceedings will be available for judicial review. The Chandler standards are satisfied.

The courts have a long history of making a record, weighing the facts, deciding the law, and ordering appropriate remedies in cases involving official involvement in unlawful racial segrega-

tion. HUD has been a leading offender in cases involving racial segregation in housing. Cases collected at Young, supra 628 F.Supp. 1055. There is no practical reason to defer to HUD's administrative ability or inclinations in this matter.

The Supreme Court and the Fifth Circuit have recognized that 42 U.S.C. §§ 1981 and 1982 are enforceable against the federal government in suits seeking equitable relief. Hurd v. Hodge, 334 U.S. 24, 30 (1948); District of Columbia v. Carter, 409 U.S. 418, 421-423 (1973); Penn v. Schlesinger, 490 F.2d 700 (5th Cir. 1973) - cause of action recognized but held barred by sovereign immunity prior to 1976 amendment of 5 U.S.C. § 702, reversed on other grounds, 497 F.2d 970 (5th Cir. 1974). C.f. Baker v. F&F Investment Co., 489 F.2d 829 (7th Cir. 1973); City of Milwaukee v. Saxbe, 546 F.2d 693, 703 (7th Cir. 1976); Jaffree v. Barber, 689 F.2d 640, 643 (7th Cir. 1982).

Neither the Supreme Court nor the Fifth Circuit have ruled on the existence of a private cause of action against the federal government under Title VI and Title VIII. Cases collected at Clients's Council, supra at 711 F.2d 1424. Plaintiffs urge this court to accept the same arguments which persuaded the court in Young v. Pierce, 544 F.Supp. 1010, 1013-1019 (E.D. Tex. 1982) to find private Title VI and Title VIII causes of action against the federal government for injunctive relief.

There is no authority to bar review of plaintiff's statutory civil rights claims for injunctive relief on grounds of sovereign immunity.

The 1976 amendment to 5 U.S.C. § 702 clearly waived the defense of sovereign immunity in all cases seeking injunctive relief unless some statute specifically limits or conditions such waiver. Cases and legislative history collected at Young v. Pierce, supra at 628 F.Supp. 1058.

Conclusion

The Court has already granted plaintiffs' motion for partial summary judgment on the issue of DHA's liability to the individual plaintiffs. Plaintiffs request that the Court enter a partial summary judgment that HUD and DHA are liable to the class for any injuries suffered as a result of DHA's policies and practices of racial segregation. Plaintiffs further request that the Court schedule further proceedings to determine the appropriate injunctive relief.

Respectfully Submitted,

MICHAEL M. DANIEL, P.C.
3301 Elm Street
Dallas, Texas 75226-1637
214-939-9230

By: _____
Michael M. Daniel
State Bar No. 05360500
Laura B. Beshara
State Bar No. 02261750

Elizabeth K. Julian
3301 Elm Street
Dallas, Texas 75226-1637
214-939-9230

By: _____
Elizabeth K. Julian
State Bar No. 11048500

Attorneys for Plaintiffs

Certificate of Service

I certify that a true and correct copy of the above document was served upon counsel for all defendants by being placed in the U.S. mail, first class postage prepaid, on the 12th day of JAN, 1993.

Michael M. Daniel