



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

OFFICE OF FAIR HOUSING
AND EQUAL OPPORTUNITY

August 12, 2008

G. Michael Payton
Executive Director
Ohio Civil Rights Commission
30 East Broad Street, 5th Floor
Columbus, OH 43215-3414

Dear Mr. Payton:

Thank you for participating in the conference call with Barbara Knox and me on July 25, 2008 related to the Fair Housing Advocates Assn., Inc. v. Chance decision, the Ohio Civ. Rights Comm. v. Akron Metro. Hous. Auth. decision, and the April 21, 2008 letter to Assistant Secretary Kim Kendrick from the National Fair Housing Alliance (NFHA) related to the substantial equivalence of the Ohio fair housing law.

As I indicated during the conference call, the court decisions and the NFHA letter raise significant issues with regard to the continued substantial equivalence of the Ohio fair housing law. If Ohio does not adopt administrative rules and/or amend its fair housing statute to sufficiently address the issues raised, Ohio Civil Rights Commission (OCRC)'s continued participation in the Fair Housing Assistance Program (FHAP) may be jeopardized. I have listed all of the issues below, and the agreed-upon course of action for each issue. Additionally, as indicated below, until an amendment sufficiently addressing the matter is enacted, HUD will not refer tenant-on-tenant harassment cases to OCRC.

Fair Housing Advocates Assn., Inc. v. Chance, Case No. 05-CV-0673 (9th App. Dist. 2008)

In Fair Housing Advocates Assn., Inc. v. Chance, the Ohio Court of Appeals of the Ninth Judicial District held that private fair housing organizations do not have standing to file civil actions under Ohio's fair housing law. **Course of action:** As previously indicated, HUD will not refer fair housing complaints filed by private fair housing groups that arise in the affected counties of Lorrain, Medina, Summit, and Wayne. OCRC will refer such complaints to HUD for processing. OCRC will enact an administrative rule or seek amendment to the Ohio fair housing law to define *aggrieved person* to include organizations.¹ After such administrative rule or amendment is enacted, HUD will again refer the subject cases to OCRC.

¹ See the Fair Housing Act, at 42 U.S.C. 302(d), which defines *person* to include *one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 [of the United States Code], receivers, and fiduciaries.*

Ohio Civ. Rights Comm. v. Akron Metro. Hous. Auth., 2008 WL 2714670

On July 8, 2008, in Ohio Civ. Rights Comm. v. Akron Metro. Hous. Auth., the Ohio Supreme Court held that a landlord is not be liable under the Ohio fair housing law for failing to take corrective action against a tenant whose racial harassment of another tenant creates a hostile living environment. **Course of action:** OCRC will seek an amendment to the Ohio fair housing law that explicitly authorizes housing provider liability for failing to take corrective actions against a tenant whose harassment of another tenant creates a hostile living environment. HUD has also decided that until such an amendment is an enacted, we will not refer fair housing complaints to OCRC alleging that a housing provider failed to take corrective action because of tenant-on-tenant harassment based on race, color, national origin, sex, religion, disability, or familial status. Additionally, we request that OCRC refer such complaints to HUD for processing. We recognize that we did not discuss this during our July 25, 2008 conference. However, to protect the rights of aggrieved persons, we believe this is necessary.

Complainant's Right to Intervene/Participate

The NFHA letter claims that the Ohio fair housing law effectively bars a complainant's attorney from examining or cross examining witnesses, or presenting any evidence on behalf of the complainant. HUD's review indicates that the Ohio fair housing law does not clearly establish a complainant's rights at an administrative hearing. Under the Ohio statute "[t]he attorney general shall represent the *commission* at any hearing held ... and shall present the evidence in support of the complaint." Ohio Rev. Code § 4112.05(B)(6) (emphasis added). Further, while "[a]ny person who has or claims an interest in the subject of the hearing and in obtaining or preventing relief against the unlawful discriminatory practices complained of may ... appear for the presentation of oral or written arguments," such intervention is at "the discretion of the person ... conducting the hearing." Ohio Rev. Code § 4112.05(D). This language is related to intervention in administrative hearings. The Ohio fair housing law is silent regarding intervention in civil actions pursuant to election by a complainant, aggrieved person, or respondent. In contrast, under the Fair Housing Act, "each person may appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain issuance of subpoenas." 42 U.S.C. § 3612(c). In an administrative hearing under the Fair Housing Act, "[a]ny aggrieved person may intervene as a party in the proceeding." 42 U.S.C. § 3612(c). Similarly, in a civil action pursuant to an election under the Fair Housing Act, "[a]ny aggrieved person with respect to the issues to be determined may intervene as of right in that civil action." 42 U.S.C. § 3612(o)(2).

Course of action: OCRC will seek amendments to the Ohio fair housing law that include explicit, unqualified rights to intervene in an administrative hearing and in a civil action pursuant to an election. OCRC will also seek amendments to the Ohio fair housing law that reflect the rights to appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain issuance of subpoenas at an administrative hearing.

Respondent's Right to Request Subpoenas at Investigation Stage

The second issue raised by the NFHA letter relates to the recent Ohio Supreme Court decision in the matter of State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm., 117 Ohio St. 3d 441 (2008). In that case, the Ohio Supreme Court held that OCRC had a clear duty to issue subpoenas at the request of a respondent at the *investigation* stage of complaint processing. In contrast, the Fair Housing Act only allows a respondent to obtain a subpoena after a charge has been issued. 42 U.S.C. § 3612(c). The ruling by the Ohio Supreme Court may have a negative impact on housing discrimination complainants. Subpoenas issued at the request of respondents, especially sophisticated entities, may have the effect of harassing individual complainants. In addition, subpoenas issued for a respondent during the investigation stage of a complaint are likely to prolong investigations. **Course of action:** OCRC will seek an amendment to the Ohio fair housing law that removes a respondent's right to request a subpoena during an investigation.

During our conference call, you anticipated resolution on the above matters by no later than the end of Spring 2009. As such, **by June 30, 2009**, please send enacted statutory and/or administrative rule amendments that address these issues to me at the following address:

Kenneth J. Carroll
Director, Fair Housing Assistance Program Division
Office of Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
451 Seventh Street SW, Room 5206
Washington, DC 20410

As you probably know, OCRC is due for a determination of recertification. Following receipt of enacted amendments that effectively address the above issues and assuming OCRC continues to sufficiently perform as a certified agency, I intend to recommend recertification of OCRC. If such amendments are not enacted, HUD may proceed with further corrective actions enumerated at 24 C.F.R. § 115.211 including, but not necessarily limited to, suspension and withdrawal of OCR's certification.

We appreciate your cooperation in addressing these issues. If you have any questions, comments, or concerns, do not hesitate to contact me at (202) 402-7044.

Sincerely,



Kenneth J. Carroll
Director
Fair Housing Assistance Program Division

cc: Barbara Knox, FHEO Region V Director