

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	66 C 1459, 66 C 1460
	)	(Consolidated)
v.	)	
	)	Hon. Marvin E. Aspen
CHICAGO HOUSING AUTHORITY and	)	
ANDREW CUOMO, Secretary of Department	)	
of Housing and Urban Development,	)	
	)	
Defendants.	)	

**CHICAGO HOUSING AUTHORITY'S SURREPLY IN OPPOSITION
TO PLAINTIFFS' MOTION TO MODIFY CHA JUDGMENT ORDER**

The Chicago Housing Authority (the "CHA") respectfully submits this surreply in response to Plaintiffs' Reply Brief In Support Of Motion To Modify CHA Judgment Order ("Plaintiffs' Reply" or the "Reply"), filed on July 28, 1997.

I. The Motion to Modify the Decree to Add CHA's Section 8 Program Should Be Denied

Plaintiffs' Motion to Modify plainly asks this Court to hold that the CHA must use its HUD funded "Section 8 certificates--in a manner comparable to the companion case's Gautreaux Program--to provide relief to members of the plaintiff class." Motion, ¶ 7. The "Gautreaux Program," to which HUD agreed, was defined in Paragraph 5.8.1 of the Consent Decree. Pursuant to Paragraph 5.8.1, HUD was prohibited from funding the CHA Section 8 program "unless not less than one-third of the units . . . are to be physically located within the General Area, and not more than one-third of the units . . . are to be physically located within Limited Area."

By seeking relief that is similar, if not identical, to the Gautreaux Program in the HUD case, Plaintiffs' Motion asks this Court to control the use of HUD-funded Section 8 certificates by prohibiting the CHA from providing those certificates unless certain geographical standards are met (e.g., not less than X% in Limited Areas; not more than Y % in General Areas; and, to modernize the Gautreaux Program, not less than Z% in Revitalizing Areas). Plaintiffs also want this Court to order the CHA to provide at least some of the additional services that HUD agreed to provide in its Consent Decree, such as counseling services. Reply, p. 13. There is no question that this is the order sought by Plaintiffs, with the "details," such as filling in the percentages to be used in each geographical area, and specifying the services to be provided, to be defined later, either by the parties' agreement or by the Court.

Plaintiffs' Reply beats a full retreat from that position. Now, Plaintiffs assert that Defendants wrongly construed the Motion to Modify as seeking specific relief. Instead, according to Plaintiffs' Reply, the Motion sought only "general relief," a "declaration" that the Gautreaux Decree governs all Section 8 certificates made available to the CHA by HUD.¹ Reply, pp. 1-3. Plaintiffs use this as an excuse for their failure to respond to the many issues raised by Defendants in their initial responses. Reply, p. 9-10. Plaintiffs' avoidance

¹ There is a huge difference between a motion to add additional prohibitions to the Injunction and a motion to construe the Injunction. Indeed, the basic premises for the two motions are directly opposite. The first motion asks the Court to expand the relief granted in the original decree to bring the CHA's Section 8 program under judicial control. The second asks the Court to construe the injunction to find that the Section 8 program is already covered by the decree, and thus already under the Court's control. Two entirely different sets of legal standards apply. All of these differences are ignored by Plaintiffs in their Reply.

of many of Defendants' arguments on such grounds should not be permitted by the Court, and constitutes a waiver of their opportunity to respond to Defendants' arguments.

In essence, Plaintiffs want to bifurcate the issues of their general entitlement to a remedy on the one hand, and the contours of that remedy on the other. First, Plaintiffs want the Court to decide whether they are entitled to a remedy, that is, whether they are entitled to control CHA's Section 8 program by way of the Injunction. Second, they want the Court to decide the exact contours of the remedy, that is, how the Section 8 program should be operated. Yet, the first question can only be decided in the context of a request by Plaintiffs for some form of specific relief. See, e.g., People Who Care, et al. v. Rockford Bd. of Educ., et al., 111 F.3d 528, 534 (7th Cir. 1997)("[E]quitable remediation must be guided by norms of proportionality. That is, the remedy must be tailored to the violation, rather than the violation's being a pretext for the remedy.")(citations omitted). Plaintiffs should file a new motion that specifies the relief sought with respect to the Section 8 program. This is the only way the Injunction could be modified. Each issue raised in Defendants' initial responses presumed that Plaintiffs had proposed and were prepared to defend a specific remedy.

However, given Plaintiffs' current position that they are not seeking specific relief, the Motion to Modify should be denied because any such order entered against Defendants would be unenforceable under Rule 65(d) of the Federal Rules of Civil Procedure. FRCP 65(d)(an injunction must "describe in reasonable detail . . . the act or acts sought to be restrained." Injunctions must specify the prohibited conduct so that the defendant (and others) knows what its obligations are under the injunction. See, e.g., David B. et al. v.

McDonald, 116 F.3d 1146, ____ (7th Cir. 1997). In Reply, Plaintiffs admit that their Motion does not specify the conduct that would be permitted and that which has been enjoined. Reply, p. 2 (“In fact, the motion and its accompanying draft order refrain from proposing a specific form of relief.”)

II. The Effort to Obtain a Declaration that the Program is Now Covered by the Decree Should be Rejected

Plaintiffs’ Reply attempts to transform the Motion to Modify into a motion for a declaration. Reply, pp. 1-3. Plaintiffs’ attempt to change their motion should be rejected for a number of basic procedural reasons. Rely memoranda cannot be used to substitute new theories for relief. Martinez v. Trainor, 556 F.2d 818, 820 (7th Cir. 1977) (“[A]mendments [of motions via memoranda] are not allowed unless they consist of an elaboration of a ground already set out in the original motion.”). A motion to construe the decree, or to “declare” what the Decree means, is not before the Court. Defendants have not had an opportunity to respond to such a motion.

In addition, Plaintiffs’ Reply does not address the issues that would be relevant in a motion to construe the Injunction. In construing the terms of a judgment order that is in the nature of an injunction, the district court must “pay particular heed to the nature of the dispute in which [the injunction] originated.” Youakim v. McDonald, 71 F.3d 1274, 1283 (7th Cir. 1995). In general, the court must “construe injunctions in light of the circumstances that produced them, which may include the nature of the original claim, the relief that was sought, the evidence presented at any hearing or trial, the issues actually decided by the earlier tribunal, and the mischief the injunction was designed to eradicate.” Id. (citations omitted). Courts will, at times, “construe a broadly-worded injunction more narrowly in

order to be faithful to the issues actually raised and decided in the earlier litigation” or, “find that conduct violates an injunction if it threatens the spirit if not the literal language of the earlier order. Id. Plaintiffs’ Reply does not address the circumstances surrounding the entry of the Injunction.

Further, to interpret the language of the Injunction as permitting this Court to take direct supervision and control over Section 8, is to attribute to Judge Austin (the drafter of the Injunction), an intent to take direct control and supervision over all of the federal public housing programs in which the CHA might participate in the future.² The record of this consolidated case demonstrates that Judge Austin (at least as interpreted by the Seventh Circuit in 1971) had the opposite intention. Instead, both Judge Austin and the Seventh Circuit anticipated that any control or supervision over specific federal programs in which the CHA participated would be governed by orders and decrees entered in the companion case to this case.

Plaintiffs filed their complaint against HUD at the same time that they filed their complaint against the CHA in this case. Gautreaux v. Romney, 448 F.2d 731, 733 (7th Cir. 1971). On September 1, 1970, Judge Austin dismissed all four counts of the HUD complaint on the ground. On appeal, HUD urged the affirmance of Judge Austin’s opinion on the grounds, inter alia, that the entry of the Injunction against the CHA had mooted the HUD case. Romney, 448 F.2d at 733. However, the Seventh Circuit reversed Judge

² Indeed, as discussed in the CHA’s Reply, such an interpretation of the Injunction is also problematic, to say the least, given the separation of powers concerns that such an interpretation would create. See CHA Reply, p. 11 (citing Alliance To End Repression v. City of Chicago, 742 F.2d 1007, 1019 (7th Cir. 1984)).

Austin's decision, finding that the case was not moot because "a decree utilizing certain HUD program still remains a possible form of relief not already available through the other case." Id. at 736 (emphasis added).³ The utilization of certain HUD programs was unavailable in the case against the CHA, not because the programs did not exist at the time, but instead because "the decree in the CHA case, thorough though it may be, is not binding against HUD or its Secretary." Id. To hold now that such relief is available from the CHA is to ignore the Seventh Circuit's holding and reasoning as to mootness in the Romney case, a case decided within two years of the entry of the Injunction.

Finally, the CHA does not interpret the Injunction as Plaintiffs purport to do. The CHA's position is that the Injunction does not cover Section 8 certificates and, that whether Section 8 is covered by the Injunction or not, the CHA's use of its Section 8 certificates is in compliance with federal law. If Plaintiffs believe that the CHA is not complying with the decree, Plaintiffs should file a motion for an order of contempt rather than file a motion to construe the Injunction. See, e.g., Youakim, 71 F.3d at 1282. Interestingly, although the Section 8 program was initiated in 1974, it appears that Plaintiffs have not, in the more than twenty intervening years, raised any claim that the CHA's use of its Section 8 certificates violated the Injunction.

³ Indeed, at the time of the Romney case, Plaintiffs reportedly contended that such "other" relief might include "a more vigorous utilization of the several different types of housing programs which HUD administers." Id. And, in reversing Judge Austin's decision, the Seventh Circuit remanded the case to Judge Austin to consider the question whether some form of equitable relief "going beyond the scope of relief made available through the companion case" would be necessary or appropriate. Id. (emphasis added).

III. Even In Reply, Plaintiffs Have Failed To Set Forth The Grounds Required To Justify Their Proposed Modification

Plaintiffs' Reply does not answer the CHA's argument that the stated reasons for their proposed modification are legally insufficient. Despite Plaintiffs' agreement with the CHA that changes in federal housing policy could justify a modification, there is no agreement that such changes require Plaintiffs' proposed modification, as opposed to some other modification. The critical issue is whether Plaintiffs' proposed modification is "suitably tailored to the changed circumstances." Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 391, 112 S.Ct. 748, 763 (1992) ("Once a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the district court should determine whether the proposed modification is suitably tailored to the changed circumstance."). The Supreme Court stated in Rufo, "[i]n evaluating a proposed modification, three matters should be clear." Id. First, a modification must not create or perpetuate a constitutional violation. Id. Second, "once a court has determined that changed circumstances warrant a modification . . . , the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstance." Id., at 391, 112 S.Ct. at 764. Third, "[w]ithin these constraints," the proposed modification should keep in mind both the public interest and "considerations based on the allocation of powers within our federal system." Id., at 392, 112 S.Ct at 764. Plaintiffs' Motion and Reply do not sufficiently address any of these three issues.

Federalism. Plaintiffs' only response to the federalism issues raised by the CHA appears to be their argument that, without direct Court supervision, the CHA would revert to a policy of intentionally segregating its residents on the basis of race. Reply, p.10.

Plaintiffs have provided no evidence to support such an inflammatory accusation, and none exists. Moreover, the Plaintiffs do not define what "segregation" and "desegregation" is in the City of Chicago given the current demographics of the City. If 90% of Section 8 certificates are being used by their recipients in Limited Areas, that does not prove that Section 8 certificates contribute to, or are part of a policy of, segregation. The choice of where Section 8 recipients use their certificates is driven by many factors, including "personal preference" and "economics."

Clearly, significant federalism concerns are raised whenever a federal court orders a local government agency to conduct its governmental activities in accordance with the court's orders, or to engage in direct negotiation with non-governmental actors with regard to public policy. See Youakim, 71 F.3d at 1292-93 (citing Jenkins v. Bowling, 691 F.2d 1225, 1234 (7th Cir. 1982); Pennington v. Didrickson, 22 F.3d 1376, 1388 (7th Cir. 1994); ACORN v. Edgar, 56 F.3d 791, 797-98 (7th Cir. 1995). See also People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 533 (7th Cir. 1997) (citing, inter alia, Hoover v. Wagner, 47 F.3d 845, 850-51 (7th Cir. 1995). Plaintiffs have offered no analysis that justifies judicial control of CHA's use of Section 8 certificates.

Separation Of Powers Implicated. Although Plaintiffs' Reply addresses the CHA's separation of powers arguments in passing, their arguments are not persuasive. Whether the Plaintiffs "merely" propose that the Injunction be modified to permit this Court to take direct control over the Section 8 program, or whether they propose that the Court both take control over Section 8 and impose some form of geographical limitation on the

program, the order would violate the Constitution's separation of powers scheme. See CHA Response, pp. 7-11.

Plaintiffs' argue that if legal barriers to the modification suggested by Defendants "were real," one or more of them would have precluded Section 8 relief in at least some of the many public housing desegregation cases they cite. Reply, p.10. As HUD's Surreply explains, all of the cases cited by Plaintiffs were Consent Decree cases. There is no question that the Section 8 statute permits HUD to create special Section 8 programs. It did this exact thing in the companion case here and it did so in the other Consent Decree cases Plaintiffs' cite. In this case, HUD has not agreed to further Gautreaux relief and has not agreed to set aside Section 8 certificates for Gautreaux purposes.

Plaintiffs' proposed modification seeks judicial control of the Section 8 certificates provided to the CHA through HUD's general allotment to the City of Chicago. Congress, in the statute establishing the Section 8 program, has already set forth program requirements for the general allotment program -- requirements that are in direct conflict with the requirements that Plaintiffs would impose on the use of the certificates. It is in this sense that Plaintiffs' proposed modification "violates federal law," or more properly, would require the CHA to violate federal statutory law if such a modification were entered.

Plaintiffs argue that their Motion "does not request any additional funding or certificates from HUD but addresses only the operation of the CHA program." Reply, at p. 11. Of course the Motion does not state on its face that it seeks additional HUD funding for Gautreaux purposes. The CHA's argument is that the Motion indirectly seeks such

relief. The certificates are funded by HUD. That the language of the order would "address only the operation of the CHA program," does not change the effect of the order.

Equal Protection Concerns. Plaintiffs' Reply and the CHA's initial response do not disagree that "some appropriate remedial preference arrangements are obviously permissible in desegregation cases and do not violate equal protection." Reply, p.12 (emphasis in the original). Cf. CHA Response, p.12 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 1, 91 S.Ct. 1267 (1971) and Shaw v. Hunt, 116 S.Ct. 1894 (1996)). The question that Plaintiffs must address, however, is how their specific proposal would fair under a Shaw analysis. Neither their Motion nor their Reply addresses the question.

Plaintiffs argue that they have made no proposals that would grant a preference to Gautreaux Plaintiffs in the use of Section 8 certificates granted to the CHA. Reply, at p. 12. However, on the next page, Plaintiffs state that they seek some "affirmative arrangements" to guarantee that Section 8 certificate users will not be "clustered in communities with Black populations over 90%." Reply, p. 13, n 21. According to Plaintiffs, "absent the Court's aid, there will be no assurance that CHA Section 8 resources will not continue to be 'clustered in communities with Black population over 90%.'" Id. There has been no showing, or any attempt to show, that CHA has or will use Section 8 certificates in violation of the law. Absent such a showing, a court order cannot be imposed on a local government to assure that it complies with the law. ACORN, 56 F.3d at 797.

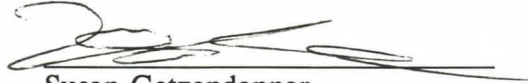
Conclusion

WHEREFORE, for the above reasons, and for the reasons set forth in the

CHA's Response, the CHA respectfully request that this Court deny Plaintiffs' Motion To Modify Judgment Order.

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Chicago, Illinois

Respectfully submitted,



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