

**UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF THE SECRETARY**

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The Secretary, United States Department of  
Housing and Urban Development, on behalf  
of Nicole Williams,

Charging Party,

v.

Quang Dangtran, Ha Nguyen, and  
HQD Enterprise, LLC,

Respondents.

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**FEB - 4 2020**

HUDOHA 19-AF-0148-FH-015

**SECRETARIAL ORDER**

On June 25, 2019, the U.S. Department of Housing and Urban Development (“HUD” or “the Department”) filed a charge against Respondents alleging discrimination based on race in violation of the Fair Housing Act, 42 U.S.C. § 3601 et seq. On August 30, 2019, and September 5, 2019, Respondents filed Motions for Summary Judgment seeking judgment on all claims. On September 12, 2019, HUD filed an Opposition to Respondents’ Motions for Summary Judgment. On September 13, 2019, HUD filed a Motion for Partial Summary Judgment. On October 24, 2019, Administrative Law Judge Alexander Fernández (“ALJ”) issued a Ruling on Summary Judgment (“Ruling”) denying Respondents’ Motions and granting HUD’s Motion for Partial Summary Judgment.

On November 7, 2019, Respondents filed a Motion for Appeal of the Ruling requesting reconsideration and/or reversal of the Ruling. On November 15, 2019, HUD filed an Opposition to Respondents’ Motion for Appeal. HUD argued that no mechanism existed for interlocutory review in a Fair Housing Act case, and that, even if 24 C.F.R. Part 26 applied, the request did not meet the standard for interlocutory review and was untimely. On November 26, 2019, the ALJ issued an Order Certifying Ruling for Interlocutory Review (“Certification”). The Certification treated Respondents’ Motion for Appeal as a request for interlocutory review under 24 C.F.R. §

26.51 because, in the ALJ's analysis, the Motion for Appeal asked the ALJ to reconsider the Ruling. On December 6, 2019, HUD filed Charging Party's Opposition to Respondents' Petition for Interlocutory Appeal ("Opposition"), which further elaborated on its previous arguments made on November 15, 2019. On December 12, 2019, Respondents filed a Memorandum of Points and Authorities in Support of Respondents' Motion for Reconsideration ("Memorandum of Points and Authorities"). On December 19, 2019, HUD filed Charging Party's Opposition to "Respondent's Memorandum of Points and Authorities in Support of the Respondent's Motion for Reconsideration" referencing back to the Opposition. The issue is now before me, as Secretarial Designee, for review.

## ANALYSIS

### **I. Fair Housing Act Cases Are Governed By 24 C.F.R. Part 180, Not 24 C.F.R. Part 26.**

The preliminary issue presented in this case is whether the interlocutory review process outlined at 24 C.F.R. § 26.51 is available in Fair Housing Act cases; and if so, whether there is an interlocutory appeal ripe for review by this office. In the Certification, the ALJ acknowledged that specific rules outlined in 24 C.F.R. Part 180 were promulgated to govern Fair Housing Act hearings and conceded that these procedures do not provide litigants interlocutory appeal rights. However, he argued that his Certification is supported by a recent Secretarial Order, *HUD ex rel. van der Pool v. Heathermoor II, LLC*, HUDOHA No. 18-JM-0253-FH-022 (HUD Sec'y Sept. 20, 2019); 24 C.F.R. Part 26 rules that were promulgated under the Administrative Procedure Act ("APA"); and the inference that Part 180 encourages flexibility in its application evidenced by its reference to the use of the Federal Rules of Civil Procedure ("FRCP") as a guide. *Certification* at 1-3.

HUD argued that the Respondents' Motion for Appeal should be denied because it was untimely; no mechanism for interlocutory appeal exists in Fair Housing Act cases; and even assuming that 24 C.F.R. 26.51 does apply, the ALJ's Ruling on Summary Judgment should be upheld. *See Opposition* at 1. In the Memorandum of Points and Authorities, Respondents presented no arguments regarding the applicability of interlocutory review in Fair Housing Act cases. Based on the analysis below, I find that 24 C.F.R. Part 26, including its interlocutory appeal provision, is not applicable to Fair Housing Act cases.

#### **a. The regulatory history directly shows that 24 C.F.R. Part 180, not 24 C.F.R. Part 26, applies to Fair Housing Act cases.**

Fair Housing Act cases are subject to the rules of practice and procedure set forth in 24 C.F.R. Part 180. Among other things, Part 180 establishes procedures whereby the parties may appeal an ALJ's initial decision to the Secretary. *See* 24 C.F.R. § 180.675. Part 180 does not explicitly provide litigants of Fair Housing Act cases the option of interlocutory review. Part 180 also lacks any reference to 24 C.F.R. Part 26 rules and procedures but does reference the

Federal Rules of Civil Procedure (“FRCP”). *See* 24 C.F.R. § 180.105(b).<sup>1</sup> Upon review, I find that the regulatory history of 24 C.F.R. Part 180 does not support the applicability of interlocutory review in Fair Housing Act cases.

In 1996, the rules and procedures contained in 24 C.F.R. Part 26 were updated and streamlined to govern HUD’s administrative hearing procedures. 61 Fed. Reg. 50208 (Sept. 24, 1996).<sup>2</sup> As noted by HUD in its Opposition, the final rule stated that the rule “streamlines and consolidates *many* of HUD’s regulations containing hearing procedures.” *Id.* (emphasis added). The preamble makes clear that this final rule did not consolidate *all* of HUD’s regulations containing hearing procedures.

On October 4, 1996, one week after updating Part 26, HUD issued a final rule entitled “Consolidated HUD Hearing Procedures for Civil Rights Matters,” creating 24 C.F.R. Part 180 specifically for Fair Housing Act and other civil rights cases. 61 Fed. Reg. 52216 (Oct. 4, 1996). The preamble to Part 180 specifically states that Part 26 is a rule “proposing to consolidate many of [HUD’s] non-civil rights hearing procedures.” *Id.* (*describing* 61 Fed. Reg. 50208 (Sept. 24, 1996)). The creation of a separate and comprehensive set of rules and procedures for civil rights cases, as well as the language in the preamble, strongly supports the Department’s intention for Part 180, not Part 26, to regulate Fair Housing Act and other civil rights cases.

Subsequent amendments to 24 C.F.R. Parts 26 and 180 also strongly suggest that interlocutory appeal rights were never intended for Fair Housing Act cases. In 2008, Part 26 was amended to add a limited right to an interlocutory appeal, yet there was no amendment or reference made to Part 180. *See* 73 Fed. Reg. 52112, 52114 (Sept. 8, 2008). Since its promulgation in 1996, Part 180 has been amended numerous times; however, as HUD noted, the Department has never added the right to an interlocutory review. *See, e.g.,* 64 Fed. Reg. 3801 (Jan. 25, 1999); 72 Fed. Reg. 5588 (Feb. 6, 2007); 72 Fed. Reg. 53879 (Sept. 20, 2007); 73 Fed. Reg. 13723 (Mar. 13, 2008); 74 Fed. Reg. 4635 (Jan. 26, 2009).

The regulatory history regarding the development and amendments to Parts 26 and 180 over the years clearly evidence that HUD did not intend for Fair Housing Act cases to afford litigants the right to the interlocutory appeal process outlined in Part 26.

**b. Compliance with the Administrative Procedures Act does not require the right to interlocutory review.**

In the Certification, the ALJ stated that Fair Housing Act cases are a subset of APA cases and therefore, Part 26 applies. *See Certification* at 3. HUD argued that while Fair Housing Act hearings held under 24 C.F.R. Part 180 must comply with the APA, compliance with the APA does not require also utilizing Part 26. *Opposition* at 10. Additionally, HUD argued that it is not necessary for Fair Housing Act cases to include a right to interlocutory appeal in order to comply

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<sup>1</sup> “In the absence of a specific provision, the Federal Rules of Civil Procedure shall serve as a general guide.”

<sup>2</sup> The right to interlocutory appeal was not included.

with the APA because the APA itself does not even guarantee a right to interlocutory appeal. *Opposition* at 9-10; *See* 5 U.S.C. § 554. For years, Part 26 did not even include a right to interlocutory appeal. After review of the rules and regulations, I agree with HUD. The APA does not include a right to interlocutory review and Fair Housing Act cases do not need to follow Part 26 to comply with the APA because Part 180 on its own complies with the APA.

**c. 24 C.F.R. Part 180 directs litigants to the Federal Rules of Civil Procedure, not 24 C.F.R. Part 26.**

The regulations governing the procedures for Fair Housing Act cases state that “[i]n the absence of a specific provision, the Federal Rules of Civil Procedure shall serve as a general guide.” 24 C.F.R. § 180.105(b). Part 180 does not discuss the use of other sources as a guide to hearing procedures. Additionally, the FRCP does not provide for the right to interlocutory appeal. *See* Fed. R. Civ. P.

The ALJ acknowledged that the Secretary promulgated specific regulations in Part 180 to govern Fair Housing Act cases. *Certification* at 3. Nonetheless, he argued that in cases where the specific regulations are silent, it is appropriate for parties to look to general regulations for guidance. *Id.* Thus, he concluded that since Part 26 provides an avenue for interlocutory review that does not conflict with Part 180, then it should be applied in Fair Housing Act cases. *Id.* HUD argued that Part 26 cannot be a guide because those regulations are not specifically mentioned in Part 180; Fair Housing Act litigants are not put on notice to consider Part 26 regulations; and Part 180 already directs litigants to refer to the FRCP. *Opposition* at 11.

After review, I agree with HUD. To infer that where Part 180 is silent, litigants are permitted to look to more general regulations not specifically outlined in the regulation, defeats the purpose of why the Secretary, when promulgating Part 180, specifically advised litigants to look to FRCP as a guide when necessary. Had the Secretary intended for other regulations or sources to be a guide, the Secretary would have provided for it, as he did when he included FRCP in Part 180. Allowing the application of Part 26 in this case when it is not specifically referenced by the controlling regulation would permit litigants to argue for the application of other unforeseen regulations in future cases when Part 180 is silent on an issue. That would be an untenable situation. Part 180 directs litigants only to FRCP, not Part 26, where Part 180 is silent.

**d. Litigants would be prejudiced in this case and others if 24 C.F.R. Part 26 applied to Fair Housing Act cases.**

The ALJ stated that providing a right to interlocutory appeal does not prejudice the litigants because it saves them and the Court time and resources on potentially needless litigation. *Certification* at 3. HUD argued that the litigants would be prejudiced by applying Part 26 to Fair Housing Act cases in the middle of litigation because it delays the process and

litigants have a right to know the procedures that govern the case before the outset of the process. *Opposition* at 12. After review, I agree with HUD.

The allowance of interlocutory review in Fair Housing Act cases can potentially prejudice future litigants due to its delay of the administrative process. In Fair Housing Act cases, litigants have the option to either proceed to an administrative hearing or elect to have the case litigated in federal district court. 42 U.S.C. § 3612(a). One of the major advantages of the administrative hearing process is the expediency. Adding a potential hurdle – interlocutory review – to the process costs both parties additional time and monetary expense.

In this case, litigants are prejudiced because they were not aware or provided notice prior to the commencement of the case that Part 26 regulations may be implemented in these types of proceedings. Had the litigants known this was a possibility, they may have chosen a different forum to address these alleged violations. To now expect them to adhere to additional rules and procedures in the middle of the case would be unfair. Moreover, the absence of interlocutory review for Fair Housing Act cases does not negatively affect litigants, since they are still afforded the opportunity to petition an initial decision at the conclusion of the case. *See* 24 C.F.R. § 180.675.

## II. Prior Use Of Interlocutory Review In Fair Housing Act Cases

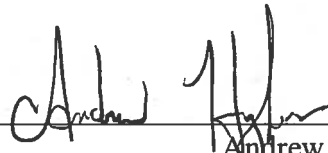
Prior to *HUD ex rel. van der Pool v. Heathermoor*, interlocutory rulings were not mentioned in Fair Housing Act cases. In the Certification, the ALJ cited a recent Secretarial Order in *Heathermoor*, stating the Secretary recently applied 24 C.F.R. § 26.51 in another Fair Housing Act case. *HUD ex rel. van der Pool v. Heathermoor II, LLC*. HUDOHA No. 18-JM-0253-FH-022 (HUD Sec’y Sept. 20, 2019). The ALJ stated that the Secretary weighed in on an interlocutory review. *Certification* at 2. However, this is not completely accurate. Admittedly, the Secretarial Order did state that 24 C.F.R. § 26.51 provides for interlocutory review in Fair Housing Act cases. However, I did not conduct an interlocutory review because I determined that the regulatory requirements were not met to even begin to consider the issue in the first instance. In addition, in *Heathermoor*, there was no opportunity to fully review and analyze whether interlocutory reviews were applicable in Fair Housing Act cases because of the unusual posture of the *Heathermoor* case when it came to this office and the need for quick resolution before the commencement of the hearing in that case. Now, having been presented with arguments regarding the availability of interlocutory reviews in Fair Housing Act cases, it is my position, as outlined above, that interlocutory review under 24 C.F.R. § 26.51 is not available in Fair Housing Act cases.

## CONCLUSION

For the foregoing reasons, I, as the Secretarial Designee, find that 24 C.F.R Part 26 is not applicable to Fair Housing Act cases and thus litigants in Fair Housing Act cases do not have the right to interlocutory review under 24 C.F.R. § 26.51. Therefore, I will not review the merits of

the ALJ's Certification or the timeliness of any potential requests or petitions for interlocutory review that have been filed in this case.

Dated this 4 th day of February, 2020

  
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Andrew Hughes  
Secretarial Designee