UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Abbas Guvenilir,

Charging Party,

v.

Riverbend Club Apartments, SB Partners, Sentinel Real Estate Corporation and Annette McClanahan,

Respondent

HUDALJ 04-89-0676-1
Decided: October 15, 1991

Geoffrey H. Cederholm, Esquire
For the Respondent

Raymond C. Buday, Esquire,
Steven J. Edelstein, Esquire, and
Theresa L. Kitay, Esquire
For the Secretary

Paul Oliver, Esquire
For the Complainant/Intervenor

Before: ROBERT A. ANDRETTA
Administrative Law Judge

INITIAL DECISION

Jurisdiction and Procedure

This matter arose as a result of a complaint filed by Abbas Guvenilir ("Complainant"), alleging that he had been denied rental accommodation on the basis of his familial status in

violation of the Fair Housing Act, 42 U.S.C. Sections 3601, *et seq*., as amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 120 Stat. 1626 (1988) ("Fair Housing Act" or "Act"). This matter is adjudicated in accordance with Section 3612(b) of the Act and the regulations of the Department of Housing and Urban Development ("HUD") that are codified at 24 CFR Part 104, and jurisdiction is thereby obtained.

On April 19, 1991, following an investigation of the allegations and a determination that reasonable cause existed to believe that a discriminatory housing practice had taken place, HUD's General Counsel issued a Determination Of Reasonable Cause And Charge Of Discrimination against Riverbend Club Apartments, SB Partners, Sentinel Real Estate Corporation, and Annette McClanahan ("Respondents") alleging that they had engaged in discriminatory practices on the basis of familial status in violation of 42 U.S.C. Sections 3604(a) and (b). On May 6, 1991 the Complainant moved to intervene "and to participate as a party to the administrative proceeding," and this motion was granted. A trial was conducted on July 9, 1991, in Atlanta, Georgia, and final briefs were timely submitted by August 26, 1991. Thus, this case became ripe for decision on this last named date.

Findings of Fact

Complainant Abbas Guvenilir is a citizen of Turkey who came to this country in the summer of 1984 to obtain a Ph.D degree in material science and engineering. (T 29 - 30).[1] While studying to improve his English at the American Language Academy at Idaho State University in Pocatello, Idaho, he met and later, married Maria S. Albornoz, a student from Venezuela who came to the United States to obtain a degree in computer science. Upon leaving the Language Academy, Guvenilir attended the Stevens Institute of Technology in Hoboken, New Jersey and Ms. Albornoz went to the University of Southern Mississippi in Hattiesburg. (T 31, 34). They were married in August, 1985. In May, 1986 Guvenilir completed the master's degree program in Hoboken and

[1] Capital T stands for the transcript of the hearing, and the number refers to the relevant page in the transcript. The Secretary's exhibits are referred to with a capital S, the Respondent's exhibits are referred to with a capital R, and the Intervenor's exhibits are referred to with a capital I.

enrolled in the Ph.D program at the University of Windsor in Canada. (T 31 -32). At that time, the couple's first son was three weeks old. (T 32).

When Guvenilir experienced difficulty in timely responding to the needs of his family across international borders, he transferred to the Ph.D program at the University of Alabama. When the project on which he was working was discontinued, he transferred to the Georgia Institute of Technology where he continues to pursue a Ph. D degree in material science and engineering. (T 32-33). The Guvenilirs' second son was born in August, 1988. (T 33). For the academic year of 1988-89 the family was together only at weekends and during semester breaks. (T 34).

It was the family's plan to unite in Atlanta as soon as Ms. Guvenilir's course was finished in Mississippi. Thus they planned ahead by visiting various neighborhoods and discussing them with friends to determine where they would like to live. On a visit near the end of March, 1989 they decided that the Cumberland/Galleria area was where they would like to live, and Guvenilir subsequently used "a very analytical, methodical, and time-consuming process"[2] to eventually narrow his top choices to Riverbend Club Apartments and Palisades North, both apartment complexes, on Akers Mill Road. This choice was made based upon Guvenilir's criteria which he had established for a home for himself and his family:

> 1. that the apartment complex be large so he and his wife could meet more people and make more friends;
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> 2. that it be in a wooded and clean environment;
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> 3. that it be in a safe place so he would not have to worry about his family;
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> 4. that it have amenities such as a fitness center; and

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[2] Intervenor's brief, p. 5.

> 5. that it be accessible to MARTA so he could use MARTA to get to the Institute and he could sell one of his two cars.

(T 53-54). Guvenilir thought it particularly suitable that Riverbend is very wooded and has the Chattahoochee River flowing through it since he is from an area near water in Turkey. Riverbend thus became his first choice since the setting gave him a "much warmer feeling." (T 35-36).

In Hattiesburg, Ms. Guvenilir lived with the two boys in student housing consisting of a two-bedroom apartment having 850 square feet of space. The Guvenilirs not only found these accommodations to be comfortable, but were also able to provide space for Ms. Guvenilir's parents when they visited overnight. (T 48, 52; I 1-4). Since Ms. Guvenilir finished her academic work in May, university rules required her to move out of the student housing by June 6, 1989, or face rent of $20 per day, a considerable increase over the $187.50 per month she had been paying. (T 61-62). Thus, it was necessary for the Guvenilirs to accomplish their move into new quarters in Atlanta as soon as possible, and Guvenilir told prospective landlords that he needed housing by June 15. (T 76).

On May 22, 1989 Complainant called Riverbend and inquired about the size apartments that were available, the rental rates for those apartments, and any rent incentive specials the complex was offering. (T 36). Although two-bedroom apartments were available, Complainant was told he would have to rent a three-bedroom apartment because Riverbend would not allow four people in a two-bedroom apartment. (T 36).

The denial of an available two-bedroom apartment at Riverbend was a "shocking experience" for Complainant. (T 37). He had never encountered a similar occupancy restriction before, and he felt helpless in the face of it. (T 37).[3] Guvenilir than called Palisades North, his second choice. (T 37). After asking the same questions concerning apartment size, price, amenities and availability, Complainant was told once again that he would not be permitted to rent a two-bedroom apartment for himself,

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[3] There was no testimony to the effect that Complainant had ever sought similar housing, other than his wife's campus housing in Hattiesburg, on any previous occasion.

his wife, and his two young sons because of a policy limiting two-bedroom apartments to only three occupants. (T 37).[4]

At this juncture, Complainant faced the choice of either renting a three-bedroom apartment at one of the two complexes that he had originally selected, or living in a less desirable location. He decided not to rent a three bedroom apartment at Riverbend because it would have cost about $100 per month more than a two-bedroom apartment. (T 38). As a graduate student, Complainant had a limited budget and preferred spending the $100 per month on necessities for his family to spending it on a third bedroom that they did not need. (T 38).

As he continued to look for a home for his family, Complainant learned of the 1988 amendments to the Fair Housing Act from employees of another apartment complex. This other complex agreed to rent a two-bedroom apartment to Complainant. Since he had not met the same problem as he had at Riverbend and Palisades, Complainant asked about the two complexes' policy and was told that it might violate the Fair Housing Act's prohibitions of discrimination against families with children. (T 39-40).

Since Mr. Guvenilir still preferred to live at Riverbend and now knew that discrimination against families with children is illegal, he decided to make a last attempt to rent a two-bedroom apartment there. (T 40). He called Riverbend on June 2, 1989 and spoke to Respondent Annette McClanahan, a leasing agent at Riverbend. (T 43). Complainant reminded Ms. McClanahan of the Act and offered that it was absurd that Riverbend's policy would allow he and his wife to share a bedroom while not allowing his infant sons to share another. (T 41). McClanahan repeated the occupancy policy at Riverbend and refused to rent Guvenilir a two-bedroom apartment because of it. (T 41, 43). Complainant then contacted a local fair housing agency which referred his complaint of discrimination to HUD. (T 43; I 5).

Respondent SB Partners is a public limited partnership that owns Riverbend. (T 151). Since 1982, Riverbend has been managed by Respondent Sentinel Real Estate Corporation ("Sentinel"), which maintains its headquarters in New York and manages

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[4] Palisades's denial of a two-bedroom apartment is the subject of another complaint filed by Guvenilir with HUD.

thousands of apartment complexes throughout the country. (T 151-51; 196). Riverbend is part of a portfolio group consisting of 43 multifamily garden apartment complexes. (T 149). In 1989, this group numbered closer to 60 properties and was managed by Millie Cassidy, Sentinel's Managing Director. (T 150, 183). Eighty percent of Ms. Cassidy's portfolio properties were operated as "all-adult" facilities before the Fair Housing Amendments Act of 1988 made such communities illegal. (T 152).

Riverbend was built in the late 1960's and was operated until 1989 as a strictly all-adult apartment community. (T 185, 199). In fact, for years it had a reputation as a "swinging singles" complex. (T 198-9). Riverbend consists of close to 600 units built to over 20 different floor plans, including efficiencies, studios, one-bedroom, two-bedroom, and three-bedroom apartments. (T 198; S 1).[5]

In 1989, as a direct response to the Fair Housing Amendments Act's prohibition of all-adult communities, Respondent Sentinel, acting through Respondent Cassidy, sought, but received no guidance from HUD, in developing a policy that would comply with the new law. (T 200 -1). Eventually, Sentinel adopted a single occupancy policy for all the properties it managed.[6] (T 154, 155). This new uniform policy restricted the number of people in any Sentinel-managed apartment to one per sleeping space plus one additional person. (S 4). Under this so-called "one plus one" standard, two people may occupy an efficiency, studio, or one-bedroom unit, up to three may occupy a two-bedroom unit, and up to four may occupy a three-bedroom unit. (T 187). Thus, the policy prevented Guvenilir's four-person family from occupying a two-bedroom apartment.

HUD's Region IV Office of Fair Housing and Equal Opportunity ("FHEO") investigates all complaints of violations of the Fair Housing Act that arise in Atlanta. With regard to allegations of discrimination on the basis of familial status,

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[5] The units with more rooms generally have more living space. The efficiencies have 514 square feet of space, the studios have 525, the one-bedroom apartments range from 680 to 769 square feet, the two-bedrooms from 950 to 1285, and the three-bedrooms from 1283 to 1637. (S 1).

[6] Prior to 1989, each Sentinel property maintained its own occupancy policy. (T 154-55).

it carefully examines any nongovernmental occupancy restrictions and considers all the facts and circumstances surrounding the adoption and implementation of the challenged restrictions. (T 118). In doing so, FHEO is guided in its investigations by a memorandum dated March 20, 1991 from HUD's General Counsel to all HUD Regional Counsels. This memo states in pertinent part that

> the Department believes that an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act. (S 3).

FHEO treats this rule as creating a presumption of unreasonableness for any occupancy policy more restrictive than two people per bedroom, and this presumption may be rebutted by an examination of a number of factors, including the size of the bedrooms, the size of the unit, the age of the children involved, the configuration of the unit, and other physical limitations of the housing, such as septic, sewer, or other building systems, as well as applicable state and local law.[7] (S 3).

FHEO's investigation of the complaint in this case was carried out prior to the issuance of this memorandum. However, FHEO already was using the two-per-bedroom standard as a "rule of thumb" while investigating each case on its own facts. (T 129). In fact, FHEO was prepared to find reasonable cause on the Guvenilir complaint against Riverbend under a more stringent standard of proof that was set as HUD policy in another memorandum, dated February 21, 1991, which was also from the General Counsel. (T 123-4). This earlier memo stated, in pertinent part, the general rule that

> an occupancy standard no more restrictive than "one person per bedroom plus one" is

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[7] In fact, Cobb County, Georgia, where Riverbend is located, does have a local occupancy code that requires 450 square feet of total space for a dwelling unit to be occupied by four people. It also requires a minimum of 100 square feet in a bedroom to be occupied by two people. Both the total unit size and the bedroom sizes of the apartments at Riverbend exceed these minimums, so they are therefore not applicable to this case. (S 1, 9-12).

> reasonable and should be presumed lawful, absent special circumstances. (S 2).

This memorandum had no practical effect in Atlanta's FHEO office since all familial status complaints alleging discriminatory occupancy restrictions were already being investigated on a case by case basis, "looking for special circumstances." (T 115). In this case, the reason that the Atlanta FHEO was prepared to go forward under either rule is that the special circumstances it considered with regard to Riverbend's one plus one occupancy policy established in, its view, that Riverbend unreasonably limited, and in some instances, excluded families with children from the complex. These special circumstances were that it was a formerly all-adult complex, very few families with children had moved into the complex after the effective date of the Act, and Riverbend has a high number of large apartments that are suitable to families with children. (T 90, 124).

Complainant eventually found a two-bedroom apartment for his family at Kingstown, a complex a few miles away from Riverbend. (T 57). The Guvenilirs moved in on June 13 and lived at Kingstown until they no longer felt safe in that neighborhood. (T 72, 76). They then moved to a three-bedroom apartment in Georgia Tech student housing, where they lived at the time of the hearing. Here, the two boys share a bedroom, and the third bedroom is used for storage and a computer. (T 72-74). At the time of the hearing, the Guvenilirs still owned the second car that Mr. Guvenilir had intended to sell if he could live near MARTA. (T 81).

Applicable Law

The Fair Housing Amendments Act took effect on March 12, 1989. Since then, the codification found at 42 U.S.C. Section 3604(a) has made it unlawful

> ... to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of ... familial status ...[8]

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[8] The term "familial status" is defined in the Act, at 42 U.S.C. Section 3602(k), as

The Act, at 42 U.S.C. Section 3604(b), also prohibits discrimination against any person in the "terms, conditions, or privileges of sale or rental of a dwelling" on the basis of familial status.

During its consideration of the 1988 Amendments Act, the House of Representatives noted that a number of jurisdictions already had in place limitations on the number of people who could occupy a unit "based upon a minimum number of square feet in the unit or the sleeping areas of the unit." H.R. No. 711, 100th Cong., 2d Sess. 31 (1988). The debating Members also recognized that housing providers could circumvent the prohibition of discrimination on the basis of familial status, without so much as mentioning children, simply by limiting the number of "people" or "individuals" who could occupy a sleeping area or apartment. The Act, therefore, struck a balance between the need to maintain building code standards for health and safety reasons, and the pressing need of families with children to obtain decent housing by stating specifically that the prohibition on familial status discrimination is not intended to limit "the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. Section 3607(b)(1).

In addition, Congress recognized that the capacity of rental housing can vary widely, even among units that have the same number of bedrooms. Congress did not intend that owners or managers of housing could not in any way restrict the number of occupants per unit. As a result, neither the legislative history nor the Act itself supports the establishment of any sort of "national occupancy code" beyond existing reasonable and nondiscriminatory governmental limits. *See*, 24 CFR Ch. 1, Subch. A, App. 1, p. 693 (1991) (p. 547 (1989)). Therefore, HUD interprets Section 100.10 *Exemptions* of the Act to permit owners and managers of housing to develop and implement, in appropriate circumstances,

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one or more individuals (who have not attained the age of 18 years) being domiciled with --

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person."

> reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit. *Id*.

However, while HUD decided that the implementation of some privately-developed occupancy restrictions in privately-owned housing is permissible, it also issued a plain warning that it would

> carefully examine any such nongovernmental restriction to determine whether it operates unreasonably to limit or exclude families with children. *Id*.

Discussion

In the absence of direct evidence of discrimination, violations of the Fair Housing Act can be proven by circumstantial evidence under either an adverse impact or disparate treatment analysis, both of which have been traditionally applied to cases involving other forms of discrimination. *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396, 1401 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991). Both theories of discrimination are established through a process of shifting burdens of proof.

HUD's Chief Administrative Law Judge, Alan W. Heifetz, stated the burden of proof test to be applied in housing discrimination cases brought under the Fair Housing Act in *HUD v. Blackwell*, Fair Housing - Fair Lending (P-H) para. 25,001 at 25,005 (HUDALJ No. 04-89-0520-1, Dec. 21, 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990) (hereinafter cited as *Blackwell*); *see also, Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1351 (4th Cir. 1990), *aff'd*, 689 F. Supp. 541 (D. Md. 1988), *cert. denied*, 111 S. Ct. 515 (1990). This statement of law is that the well-established three-part test that is applied by the federal courts to employment discrimination cases which are brought under Title VII of the Civil Rights Act, as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), should also be applied to housing discrimination cases that are brought before this forum. *See, e.g., Politt v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1989); *see also,* R. Schwemm, *Housing*

Discrimination Law, at 323, 405-10 & n. 137 (1983). That burden of proof test is as follows:

> First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence ... Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to "articulate some legitimate, undiscriminatory [sic] reason" for its action .... Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance that the legitimate reasons asserted by the defendant are in fact pretext ....

Politt, supra, at 175, *citing McDonnell Douglas, supra*, at 802, 804.

The shifting burden of proof format from *McDonnell Douglas*, which is spelled out above, is designed to assure that the "plaintiff [has] his day in court despite the unavailability of direct evidence." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1984), citing *Loeb v. Truxton, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979) (disapproved on other grounds in *Trans World Airlines, Inc., supra*). Therefore, it was further established in this forum that where Complainant and the Government can produce direct evidence of discrimination, the shifting burdens of proof analysis set forth in *McDonnell Douglas* need not be applied. *HUD v. Murphy*, Fair Housing - Fair Lending (P-H) para. 25,002 at 25,018 (HUDALJ No. 02-89-0202-1, July 13, 1990), *citing Trans World Airlines, supra,* at 121; *see also Teamsters v. U.S.*, 431 U.S. 324, 358, n. 44 (1977). In this case, there is no evidence of direct discrimination, so any proof of discrimination must be accomplished by the application of the three-part test to the circumstances.[9]

The elements for making out a prima facie case "are not fixed." *Pinchback* at 549. Rather, they vary from case to case,

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[9] Respondents claim that since they were always prepared to rent a three-bedroom apartment to the Guvenilirs, they cannot be guilty of denying housing on the basis of familial status or any other basis. However, the issue is not whether any housing was made available, but rather, whether the housing desired by the Guvenilir family was denied it.

depending upon the allegations and the circumstances. Thus, in this case, to establish a prima facie case under the theory of adverse impact, which alleges a discriminatory effect from a facially-neutral policy, the Secretary must identify the challenged policy and the discriminatory effect. The Respondents then have the burden of justifying the use of the policy for legitimate business reasons. If the Respondents are able to state a justification for the policy, the burden is back on the Secretary to rebut the Respondents' claim of justifiable business necessity or he may demonstrate that alternative policies that accomplish the same goal minimize the adverse impact on the classes of people protected by the Act.

To establish a prima facie case under the theory of disparate treatment, the Secretary must show that a member of a protected class was treated differently from nonmembers on the basis of that class; *i.e.*, in this case, that a person with familial status was treated differently from other people because of his familial status. Respondents can rebut the presumption of discrimination thus raised by the establishment of the prima facie case by articulating a legitimate, nondiscriminatory reason for their actions. To then prevail, the Secretary must show that the reason articulated by the Respondents is pretextual, meaning that the Complainant was treated differently at least in part because of his membership in the protected class.

Adverse Impact

Under the theory that adverse impact establishes a presumption of discrimination, it is not necessary to make a showing of intent. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2nd Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). Therefore, where a housing provider employs a facially-neutral practice which has an adverse impact on a protected class of people, that practice is "fair in form, but discriminatory in practice," and a violation of the Act is presumed to have occurred. *See, Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (Title VII); *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4th Cir. 1984) (Title VIII). So, the Secretary's initial burden is to identify a practice, which is the subject of the complaint, that causes a discriminatory

effect. *See Betsey*, at 988; *cf. Wards Cove Packing Co., Inc. v. Antonio*, 109 S. Ct. 2115, 2124-25 (1989) (Title VII).

The Respondents in this case enforce a facially-neutral policy in the form of an occupancy restriction stated in terms of number of "people" or "individuals" per sleeping area that are permitted to occupy apartments. They have maintained throughout this proceeding that the policy enforced at Riverbend makes no distinction between families with children and groups of unrelated adults and that the applicability of the policy is determined by the number of prospective residents, not their age or relationship. (T 167, 212-13). However, the reality is that the adverse effect of the policy is borne by families with children. Evidence adduced during the hearing showed that at least ten families other than the Guvenilirs were either excluded from Riverbend or told they could not rent the apartments of their choice based upon family size, while there was very little evidence of corresponding exclusions of unrelated adults. (S 6).[10]

Adverse impact may also be demonstrated by statistical evidence. *Betsey, supra; Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148, 154-55 (S.D.N.Y. 1989); *cf. Wards Cove, supra*, at 2121-25 (Title VII). The Secretary introduced evidence both of the number of families with children living at Riverbend and the total population from which Riverbend could draw such tenants. The latter was shown by 1990 census data from Cobb County, Georgia, the county of Riverbend's location, which shows that of total households in Cobb County having at least two members, 54% have children. (S 14). With one-third of the rental market consisting of families with children and over half of the multi-occupant households in the county having children, Riverbend had, at the time of pre-hearing investigation, only 5% of its apartments rented to families with children. (T 198).

The Secretary argues forcefully that these statistics demonstrate the number of families with children that are actually and potentially effected by Riverbend's policy, and further, that they demonstrate that the occupancy restriction at Riverbend has an impact directed at one of the reasons for the

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[10] "Unrelated adults" is not a protected class under the Act.

Act; *i.e.*, "to make decent, affordable housing available to families with children." (T 125; House Report, *supra,* at 19). The Secretary states further that HUD has seen "substantial numbers" of families with children moving to those facilities operating under the less restrictive two per bedroom standard, and argues that the "logical and obvious conclusion is that the one plus one restriction causes the population of families with children to remain at such a low level at Riverbend." (T 125).[11]

The Secretary's theory is sound, but its application misses the mark in this case because there was no evidence adduced to indicate the availability rate of apartments at Riverbend between the effective date of the Act in March, 1989 and the occurrence that following May of the facts related here, and there was also none regarding the later period of investigation. Thus, on the basis of his argument as presented I cannot find discrimination on the basis of adverse impact to be shown by these statistics.

However, it is clear from the face of Riverbend's policy that a family consisting of a father, a mother, and three children could not rent an apartment at Riverbend "under any circumstances." (T 166). Even a family of four would be limited to the more expensive three-bedroom units which are in shorter supply. (T 167). Thus, on the basis of these statistics, it is clear that, no matter how facially neutral, Riverbend's occupancy limits have an adverse impact on families with children, and, again, the prima facie case has been made.

Since the Government has met its burden of identifying a practice that causes an adverse impact on a protected class, the analysis turns now to the Respondents' justification for the practice. As stated above, Respondents must demonstrate a "business necessity" for using the challenged practice. *See Betsey, supra,* at 988 (the inquiry is "whether ... a compelling business necessity exists, sufficient to overcome the showing of

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[11] Respondents counter that the Government's contention that discrimination is shown by the under 5% rate of occupancy is "akin to arguing that Alaska must discriminate against alligators because very few live there." They miss the point. While nature itself may bar the practicality of an alligator deciding to move to Alaska, no such bar exists with regard to families' desires to move to Riverbend. Moreover, while Alaska itself is not known to bar alligators, Riverbend's policy has the effect of barring families.

disparate impact ..."); *see also Huntington, supra,* at 939; *cf. Wards Cove, supra*, at 2125-27 (Title VII). In *Wards Cove*, the Supreme Court defined "business necessity" in the context of an employment discrimination case as a practice that falls somewhere between one that is "insubstantial" and one that is "essential" or "indispensable."

In this case, Respondents cited a need for uniformity as the reason that the one plus one rule was implemented as an occupancy policy at all of its locations nationally. (T 156). Therefore, the occupancy restriction in place at Riverbend serves only for the ease of national management; not for any purposes which suit Riverbend individually. Respondents made a decision not to evaluate the facilities, floor plans, and amenities of each Sentinel property to determine what policy would best suit each. Instead, a uniform policy was implemented which was the "best on average" for all the properties and would avoid "a process of complicated gyrations regarding available facilities at each complex." (T 161-62).

Guidance on such standardization is found at 24 CFR Ch. 1, Subch. A, App. 1, p. 693 (1991). It is that occupancy restrictions may be based upon "factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit." This language plainly requires that occupancy standards are to be based upon factors specific to the dwelling unit at issue; not on generalized speculation or averages. It clearly does not contemplate minor administrative convenience such as would be produced by uniform policies applied from complex to complex.

The courts have also made clear that "administrative convenience" does not rise to the level of a "business necessity." In an employment discrimination case, the Court of Appeals said:

> Administrative inconvenience cannot justify discrimination ... Title VII requires administrative necessity, not merely administrative inconvenience.

Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1087 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).[12] *See also, Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (Title VII). Accordingly, for purposes of the case at hand, I conclude that uniformity for administrative convenience cannot be offered as a business necessity and therefore fails as a "legitimate, nondiscriminatory reason" for implementing the one plus one policy.[13]

Disparate Treatment

The showing of discrimination through the theory of disparate treatment is really a showing of intentional discrimination. Expanding on the requirements stated earlier, to prove discriminatory intent through circumstantial, rather than direct, evidence, the Government must first make out a prima facie case by showing that the Complainant is a member of a protected class, that he sought to rent a dwelling, that he was denied such rental, and that the dwelling he sought remained available. *See, e.g., Phillips v. Hunter Trails Community Assn's*, 685 F.2d 184, 190 (7th Cir. 1982); *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir.), *cert. denied*, 419 U.S. 1021, 1027 (1974); *cf. McDonnell Douglas Corp. v. Green, supra*, at p. 802 (establishing test in employment discrimination case brought under Title VII of the Civil Rights Act of 1964).

The Guvenilirs clearly meet the definition of "familial status" that is codified at 42 U.S.C. Sec. 3604(k). On at least

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[12] The *Gunther* case involved a claim of employment discrimination based upon the theory of disparate treatment. The court, therefore, considered the validity of administrative convenience as justification for a "bona fide occupational qualification." In a footnote, however, the court noted the similarity between a "bona fide occupational qualification" and a "business necessity" when applied to a facially-neutral policy. (n. 8, p. 1086)

[13] While uniformity is not a legitimate justification for the restrictive one plus one policy, a uniform policy of two per sleeping space for Sentinel's properties would have been acceptable in this case. As mentioned earlier, HUD maintains an internal policy that recognizes two per sleeping space as a presumptively reasonable occupancy standard. Thus, barring any special circumstances which would make that standard unreasonable with regard to Riverbend, two per sleeping area would be an acceptable limit there whether it was implemented for reasons peculiar to Riverbend or as a uniform Sentinel policy.

two occasions, Mr. Guvenilir called the leasing office at Riverbend and indicated a desire to rent a two-bedroom apartment. (T 36, 41). Although two-bedroom apartments were available, Guvenilir was told that Riverbend's occupancy policy precluded rental of a two-bedroom apartment to his family. (T 36, 41). Finally, two-bedroom apartments remained available for rent after Complainant's calls. Thus, the prima facie case is established, and the Respondents have the burden of producing a legitimate nondiscriminatory reason for their actions. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Pollitt v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1987)(Title VIII).

If Respondents are able to meet their burden of stating a legitimate nondiscriminatory reason for their policy, the burden of production shifts back to the Secretary to demonstrate that the reason is a pretext and that familial status did form at least part of the basis for Respondent's actions. *McDonnell Douglas, supra,* at 804; *Pollitt, supra*, at 175. In this light, it is important to note that the Secretary is not required to show that familial status was the sole reason for Respondent's policy; only that it was one of the reasons. *See, e.g., Marable v. H. Walker & Assocs.*, 644 F.2d 390, 395 (5th Cir. 1981).

As their legitimate, non-discriminatory reason for refusing to rent a two-bedroom apartment to the Guvenilirs, Respondents cite their uniform Sentinel one plus one policy. Respondents argue that the policy itself makes no distinction between adults and children, but simply counts the number of people wanting to rent a given apartment to determine whether the prospective tenants would comply with the occupancy limit. (T 167, 212-13). In this way, Respondents contend, the occupancy restriction is nondiscriminatory since it would prevent any group of four people from occupying a two-bedroom apartment.

The Secretary has already shown, and I have found, that the Sentinel occupancy policy itself is discriminatory as applied at Riverbend because of its adverse impact on families with children. To demonstrate discriminatory intent I look again at the reasons given for adopting the policy. The Secretary argues that the one plus one policy was adopted with the intent of severely curtailing the number of families with children who can move into Sentinel's previously all-adult complexes, including Riverbend.

The decision to limit the apartments at Riverbend to one occupant per sleeping area plus one was not based upon any analysis of space or engineering factors; such an analysis was considered to be "a process of complicated gyrations." (T 162). In any event, it is hardly likely that Complainant's two infant boys could have much, if any, impact on Riverbend's amenities, such as parking or the health club. Respondents never claimed, much less showed, that the boys would have too much impact on the mechanical systems, such as air conditioning or hot water. Moreover, it is inherently unreasonable to insist that two infant brothers cannot share a bedroom.[14] As for overcrowding, a study of Riverbend's floor plans shows plenty of room for two people per sleeping area and, moreover, two infants hardly fit a scenario of overcrowding. (T 168; S 9-12).

Respondents' claim that it needs a uniform policy for all its apartment complexes is also pretextual. All of its complexes always had their own policies regarding occupancy, rental rates, security deposits, pets, parking spaces, and income qualifications. (T 162-64). The only uniform policy is the one plus one occupancy limitation now in place, and it was only adopted when the Fair Housing Amendments Act became effective; *i.e.*, when the Act created the possibility of families with children seeking to rent Sentinel's previously all-adult apartments. Moreover, the conclusion that Sentinel's policy was intended to limit the children at the complex is supported by Riverbend's current behavior; it has no play facilities or day care, and it does not advertise that it is near schools. (T 211-12). Thus, the reasons stated by Respondents for the adoption of a uniform one plus one occupancy restriction are not credible, and the Secretary has met his burden of proving pretext. Moreover, in accordance with the analysis stated above, I find that the restriction was adopted for the purpose of limiting the number of children at the Sentinel complexes.

Ultimate Conclusions

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[14] Obviously, it is fairly unreasonable to expect teenaged brother and sister combinations to share bedrooms, and it would be reasonable for an apartment complex, e.g., to comply with a local ordinance that prohibited such occupancy. Where the limits of reasonableness lie between these two extreme situations is neither clear nor before this forum at this time.

The occupancy standard implemented by the Respondents had the effect of limiting the number of children and, it follows, the number of families with children, that could move into Riverbend and the other formerly all-adult properties managed by Sentinel. Furthermore, this policy was adopted for the purpose of so limiting people with familial status. Thus, the Secretary has established both violations of the Fair Housing Amendments Act that were alleged in the Determination Of Reasonable Cause And Charge Of Discrimination that commenced this action.

More specifically, by refusing to make a two-bedroom apartment at Riverbend available to Complainant because of his familial status, Respondents have violated the provisions of the Fair Housing Act that are codified at 42 U.S.C. Section 3604(a). By enforcing an unreasonable occupancy standard, Respondents have discriminated against families with children in the terms and conditions of rental of apartments in violation of the provisions of the Fair Housing Act that are codified at 42 U.S.C. Section 3604(b).

Remedies

Section 812(g)(3) of the Act provides that where an administrative law judge finds that a respondent has engaged in discriminatory practices, the judge shall issue an order "for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or equitable relief." 42 U.S.C. Sec. 2613(g)(3). That section further states that the "order may, to vindicate the public interest, asses a civil penalty against the respondent." The maximum amount of a civil money penalty is dependent upon whether the respondent has been adjudged to have committed prior discriminatory practices. Where, as in this case, the respondent has not been adjudged to have committed any prior discriminatory practices, the civil money penalty assessed against the respondent cannot exceed $10,000. *See also* 24 CFR 104.910(b)(3) (1989).

The Government, on behalf of itself and the Complainant, has prayed for: (1) affirmative relief to ensure an end to Respondents' discriminatory practices; (2) the imposition of a civil penalty of $10,000 each against Respondents SB Partners,

Sentinel Real Estate Corporation, and Riverbend Club Apartments;[15] and (3) "a substantial award of damages" for the Complainant.

Equitable Relief

Section 812(g)(3) of the Fair Housing Act authorizes the administrative law judge to order injunctive or other equitable relief in the event of a violation of the Act. *See*, 24 CFR 104. 910(b)(2) (1989). To that end, the Government has requested that the Respondents be ordered to cease certain activities and undertake certain other actions. Substantially all these requests are reasonable and are deemed appropriate under the circumstances of this case. Accordingly, for the most part, they are imposed, and the specific provisions of injunctive relief are set forth in the Order issued below.

Civil Penalty

The Government has also asked for the imposition of a civil penalty of $10,000 per corporate Respondent. This is the maximum that can be imposed on a respondent who has not been adjudged to have committed any prior discriminatory housing practices. *See*, 42 U.S.C. Section 3612(g)(3); 24 CFR 104.910(b)(3) (1991). In addressing the factors to be considered when assessing a request for imposition of a civil penalty, the House Report on the Fair Housing Amendments Act of 1988 states:

> The Committee intends that these civil penalties are maximum, not minimum, penalties, and are not automatic in every case. When determining the amount of a penalty against respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, and any history of prior violations, the financial circumstances of that respondent and the goal of deterrence, and other matters as justice may require.

The Government argues that the nature and circumstances of Respondents' violations of the Act warrant the imposition of the

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[15] The Secretary does not seek a civil monetary penalty against Respondent McClananhan.

maximum penalty because the occupancy restriction was adopted with the intent of limiting the number of families with children. The Secretary's counsel calls this "a deliberate and premeditated violation of the Act." She also argues that, contrary to Respondents' claim that HUD provided no guidance in the establishing of occupancy restrictions, the regulations contain the appropriate bases for nongovernmental occupancy restrictions. (T 201; 24 CFR Ch.1, Subch. A, App. 1, p. 693 (1989)). There, it is stated that reasonable occupancy restrictions may be "based upon factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit."

While I agree, and have even found, that Respondents' occupancy restriction was adopted with an intent to limit the number of children who could move into previously all-adult apartment complexes, I do not agree that this constitutes a "deliberate and premeditated violation." It is indeed a violation because of its intent and its effect, but it was a violation borne of an attempt to limit, as much as legally possible, what Respondents perceived to be the adverse effect of a new law on their business. That is to say, it was an action analogous, *e.g.*, to citizens' undisputed right to legally limit tax liability. In other words, I believe that Respondents believed, however unreasonably, that they were in bare compliance and not that they knew they were violating the Act and decided to go forward anyway.

The Respondents that the Government wishes to penalize heavily are indeed large, national corporations that have the benefit of counsel. Thus they can be held to a higher standard than the average mom and pop operation. *See, e.g., Secretary of HUD v. Baumgardner*, Fair Housing-Fair Lending (P-H) para. 25,006 (HUDALJ No. 05-89-0306-1, Nov. 15, 1990). Nonetheless, the circumstances here simply do not rise to the level of deliberate, premeditated violation to which the Government assigns worthiness for the maximum permissible penalty.

There is no evidence of record that the Respondents have been adjudged to be in violation of the Act before. Moreover, it is unlikely that they could have been since the Act became effective in March, 1989 and the facts of the instant case arose soon thereafter. There is also no evidence of Respondents' financial circumstances, which is within their knowledge, but

which they failed to demonstrate for the record. Thus, a penalty, limited to $10,000 each, may be imposed without consideration of their financial circumstances. *See Campbell v. United States*, 365 U.S. 85, 96 (1961); *Secretary of HUD v. Jerrard*, Fair Housing-Fair Lending (P-H) para. 25,005 at 25,092 (Sep. 28, 1991).

There is a final matter that justice requires be taken into account, and that is answering the question of what role, if any, should the HUD General Counsel's memo play in determining the appropriate civil penalty. (S 2; *see also* p. 5). The memo came after the facts of this case arose, but it is clear that throughout the time between enactment and the effective date of the Act, the nature and use of new occupancy restrictions for previously limited apartments was a hot topic both in the housing industry and HUD itself. Also, many housing providers, including those involved in this case, looked for guidance on this matter. While the General Counsel's memo declaring the one plus one rule to be reasonable and presumed to be lawful absent special circumstances was an internal memo provided for guidance to the regional offices, its contents were widely known and, more to the point, they reflected where some thinking in the home office was headed and had been headed for some time.

That the Government is not estopped by misleading pronouncements of its employees is too widely known to require citation. Moreover, even if estoppel could be invoked it would not apply well to the facts of this case since Riverbend's occupancy code as applied to the Guvenilirs was unreasonable and did not take into account the special circumstance that the two children were infants and of the same sex. Nonetheless, it would not be fair not to take into account that, at least for a while, the General Counsel of HUD agreed, and suggested to his subordinates, that the one plus one rule is presumptively reasonable. In *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976), the Court said that the "most comprehensive statement of the role of interpretive rulings" such as this one is to be found in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), where the Court had said:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the counts [sic] by reason

> of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

How much of the maximum possible penalty this is worth is a bit clouded by the other considerations discussed in this section. However, after taking all of these matters into consideration, I conclude that a civil penalty of $10,000 ought to, and will be, imposed, jointly and severally, but not individually, upon the corporate Respondents of this case.

Damages

The Fair Housing Act provides that relief may include actual damages suffered by the Complainant. 42 U.S.C. Section 3612 (g)(3). In this case, Mr. Guvenilir described additional costs in rent as "$80 or $90." (T 62). He also claimed that the need to do additional apartment hunting caused him to drive his car about 700 miles. (T 63). At the Internal Revenue Service rate of 25 cents per mile, this comes to $175. Thus, Complainant ought to be compensated $350, and will be in the Order below.

In addition to his actual damages, Complainant is entitled to recover damages for inconvenience and emotional distress caused by the Respondents' discrimination. *See, e.g., Blackwell, supra*, at 25,001; *Parker v. Shonfeld*, 409 F. Supp. 876, 879 (N.D. Ca. 1976). Because these abstract injuries are not subject to being quantified, courts have ruled that precise proof of the actual dollar value of the injury is not required. *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983); *Steele v. Title Realty Co.*, 478 F. 2d 380, 384 (10 Cir. 1973).

The administrative law judge assigned to decide a case of housing discrimination is accorded wide discretion in setting damages for emotional distress, and is guided in determining the

size of the award by the egregiousness of the Respondent's behavior and the Complainant's reaction to the discriminatory conduct. R. Schwemm, *Housing Discrimination Law*, 260-62 (1983).

Awards of damages for emotional distress have already been made by this forum in housing discrimination cases, and these can be looked to for some guidance. In *Blackwell*, $40,000 was awarded to a black couple for the embarrassment, humiliation, and emotional distress of having been denied a house because of their race. This was a clear case of open and blatant racial discrimination perpetrated by a real estate agent. In *Murphy, supra*, awards of $150, $400, $800, $1,000, and $5,000 were made for emotional distress and loss of civil rights, with the award of $150 being made to a party who "... suffered the threshold level of cognizable and compensable emotional distress." *Id*. at 25,057. In *HUD v. Guglielmi and Happy Acres Mobile Home Park*, Fair Housing-Fair Lending (P-H-) para 25,070 at 25,079 (HUDALJ 02-89-0450-1, Sept. 21, 1990). I awarded $2,500 to the Complainant where I found that the Respondents had "... contributed significantly to [Complainant's] actual and perceived loss of civil rights, feelings of embarrassment and humiliation, and general emotional distress" for the better part of a year, and in *HUD v. Baumgardner*, Fair Housing-Fair Lending (P-H) para. 25,094 at 25,101 (HUDALJ 02-89-0306-1, Nov. 15, 1990). I awarded $500 to a young man who had been discriminated against on the basis of sex "because men are messy tenants". He did not appear to be a man of vulnerable constitution, but he said that he was angry, hurt, and frustrated by the denial of the house he wanted and that it was a source of anger and distress for a few months.

In like manner, Mr. Guvenilir did not appear to be a man of vulnerable constitution who would be easily driven to distress in the sense of needing medical attention or even in the sense of becoming distracted from his usual pursuits. However, he, like the Complainant in *Baumgardner*, was justifiably angry and frustrated. He and his wife could not live with their sons where they had chosen to live. They did not like the alternative housing they occupied, and decided to move again. The delay in moving his wife to Atlanta and the inability to occupy the chosen housing also caused tension between spouses who were trying to live in the same city and house for the first time in their married life. Base upon this review of the relevant case law and the effect on the Complainant and his wife

that is described, I conclude that the Complainant is entitled to an award of $2000.[16]

Order

Having concluded that Respondents Riverbend Club Apartments, SB Partners, Sentinel Real Estate Corporation, and Annette McClanahan violated the Fair Housing Act by discriminating against Complainant Abbas Guvenilir on the basis of his familial status, it is hereby

ORDERED that,

1. Respondents are permanently enjoined from discriminating against the Complainant, Abbas Gevenilir, or any member of his family, with respect to housing, because of race, color, or familial status, and from retaliating against or otherwise harassing Complainant or any member of his family. Prohibited actions include, but are not limited to, all those enumerated in the regulations codified at 24 CFR Part 100 (1989).

2. Respondents shall institute record-keeping of the operation of Riverbend Club Apartments, and all other properties owned or otherwise controlled by the Respondents within the jurisdiction of HUD's Atlanta Office, which are adequate to comply with the requirements set forth in this Order, including keeping all records described in paragraph 3 of this Order. Respondents shall permit representatives of HUD to inspect and copy all pertinent records at reasonable times after reasonable notice.

3. On the last day of every third month beginning December 31, 1991, and continuing for three years, Respondents shall submit reports containing the following information regarding the previous three months, for all properties owned or otherwise controlled by the Respondents within the jurisdiction of HUD's Atlanta Office, to HUD's Regional Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, 75 Spring Street, S.W., Atlanta, Georgia 30303-3388, provided that the director of that office may modify this

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[16] Unlike the situation in the above-cited cases, the Government did not ask for compensation in this case for loss of civil rights.

paragraph of this Order as deemed necessary to make its requirements less, but not more, burdensome:

a. a duplicate of every written application, and written description of every oral application, for all persons who applied for occupancy of all Respondents' properties effected by this Order, including a statement of the person's familial status, whether the person was accepted or rejected, the date of such action, and, if rejected, the reason for the rejection;

b. a list of vacancies at all Respondents' properties effected by this Order including the departed tenant's familial status, the date of termination notification, the date moved out, the date the unit was next committed to rental, the familial status of the new tenant, and the date that the new tenant moved in;

c. current occupancy statistics indicating which of the Respondents' properties are occupied by families with children;

d. sample copies of advertisements published or posted during the reporting period, including dates and what, if any, media was used, or a statement that no advertising was conducted;

e. a list of all persons who inquired in any manner about renting one of Respondents' units, including their names, addresses, familial status, and the dates and dispositions of their inquiries; and

f. a description of any rules, regulations, leases, occupancy standards, or other documents, or changes thereto, provided to or signed by any tenants or applicants.

4. Respondents shall inform all their agents and employees, including resident managers, of the terms of this Order and shall educate them as to these terms and the requirements of the Fair Housing act.

5. Within seven days of the date this Initial Decision and Order is issued, Respondents will place advertisements in the metropolitan Atlanta newspapers, for four consecutive weekends, announcing the revised occupancy standards for all their properties within the jurisdiction of the Atlanta Office, these advertisements to list all the names and addresses of such properties.

6. Respondents will prominently display the fair housing logo and slogan in all advertising and documents routinely provided to the public and will display the HUD fair housing poster in a prominent place in the principle offices of all their properties effected by this Order. *See*, 24 CFR Parts 109, 110 (1991).

7. Within 30 days of the date this Initial Decision and Order is issued, the corporate Respondents shall pay damages in the amount of $2,350 to Complainant to compensate him for the losses that resulted from Respondents' discriminatory activity.

8. Within 30 days of the date this Initial Decision and Order is issued, the Corporate Respondents shall pay a civil penalty of $10,000 to the Secretary, United States Department of Housing and Urban Development.

9. Within 15 days of the date this Initial Decision and Order is issued, the Corporate Respondents shall submit a report to HUD's Atlanta Regional Office of Fair Housing and Equal Opportunity that sets forth the steps they have taken to comply with the other provisions of this Order.

This order is entered pursuant to 42 U.S.C. Sec. 3612(g)(3) of the Fair Housing Act and the regulations codified at 24 CFR Sec. 104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

/S/

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ROBERT A. ANDRETTA
Administrative Law Judge

Dated: October 15, 1991.