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 Angela Bye and Randall S. Bye, Charging Party, and Angela Bye and Randall S. Bye, Leatrice E. Smith, and Leadership Council for Metropolitan Open Communities, Intervenors, v. Michael Sparks, and Sparks and Associates, Inc., Respondents.

HUDALJ 05-92-1274-8
Issued: February 14, 2003

Stephen Stern, Esq.
For the Intervenors,

Michael Kalven, Esq.
Barbara Sliwa, Esq.
For the Government

Gerald Golden, Esq.
William Tarnow, Esq.
David Weininger, Esq.
For the Respondents

Before: THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION

Complainants Angela Bye and Randall S. Bye initiated this proceeding by filing a complaint with the Department of Housing and Urban Development ("HUD," "Secretary," or "Government"), alleging that Respondents violated the Fair Housing Act, 42 U.S.C. §3601 *et seq.* ("the Act") by discriminating against them on the basis of race or color when they attempted to rent an apartment in Arlington Heights, Illinois. Respondents have denied the allegations and have moved to dismiss the Charge of Discrimination issued by HUD on the ground that HUD has violated mandatory procedural requirements imposed by the Act, causing extreme prejudice to Respondents. The motion will be granted.[1]

FINDINGS[2]

1. Angela Bye and Randall S. Bye are husband and wife. She is Black; he is

[1]An on-the-record hearing was held to address Respondents' motion, after which the parties submitted affidavits and reciprocal briefs. Under the Federal Rules of Civil Procedure, the procedural history of this case authorizes conversion of Respondents' motion to dismiss governed by Rule 12(b) into a motion for summary judgment governed by Rule 56. Under Rule 56, a court may rely on materials outside the pleadings (*viz.*, affidavits) to resolve a dispositive motion.

[2]These findings are based on the pleadings and affidavits submitted by the parties and their counsel. Respondents object to alleged hearsay in affidavits submitted by HUD and Intervenors. The Government and Intervenors lodge the same objection to affidavits submitted by Respondents. All hearsay objections are overruled. The statements objected to are either not inadmissible hearsay or not relied upon in this decision.

White. More than 10 years ago, on July 27, 1992, Complainants filed a complaint alleging that in May 1992 Respondents refused to rent them an apartment at Twelve Oaks Apartments ("the Apartments"), misrepresented the availability of housing, discriminated against them in the terms and conditions of rental, and used racially derogatory language regarding Mrs. Bye, namely, "you people." In 1992 Michael Sparks ("Respondent Sparks") was the sole owner of the Apartments, and Sparks and Associates, Inc. ("Respondent Corporation") was the managing agent of the Apartments.

2. On September 30, 1992, Respondent Sparks filed for bankruptcy. In November 1992 HUD attempted to conciliate the case, but Respondents' counsel refused, stating that he was unwilling to discuss conciliation because the automatic stay provision in the Bankruptcy Code (42 U.S.C. §362(a)) barred HUD's prosecution and because the Complainants had made no specific settlement demand.

3. HUD completed its investigation of the complaint in December 1992 but ceased processing the case because HUD's counsel agreed with the argument that the Bankruptcy Code precluded prosecution of Respondent Sparks during pendency of the bankruptcy proceeding.

4. Pursuant to court order, in October 1994, Respondents turned over all records pertaining to the operation of the Apartments to a court-appointed receiver who took possession of the property. Respondents did not make or retain copies of the records.

5. In July 1996 Respondent Sparks' reorganization plan was approved by the bankruptcy court. HUD thereafter made a Reasonable Cause Determination and on October 2, 1996, issued a Charge of Discrimination ("Charge") against the Respondents seeking damages on behalf of Complainants as well as civil penalties and an injunction on behalf of the Secretary.[3] HUD did not attempt to conciliate the complaint before issuing the Charge.

6. On November 14, 1996, the Leadership Council for Metropolitan Open Communities ("Leadership Council"), Leatrice E. Smith, and Mr. and Mrs. Bye became Intervenors. The Leadership Council and Ms. Smith were permitted to intervene as allegedly aggrieved persons because Mr. and Mrs. Bye had complained

---

[3]When originally issued, the Charge also named Eloise Humphrey as a Respondent. She participated in rental decisions at the Apartments as an employee of Respondent Corporation. The Charge was dismissed as to Ms. Humphrey on motion of the Secretary in July 2002.

to the Leadership Council before they filed their complaint with HUD, and the Leadership Council had conducted a test of the rental practices at the Apartments that allegedly revealed racial discrimination. Ms. Smith, who is Black, participated in the test.

7. On December 20, 1996, HUD's Chief Administrative Law Judge, citing the Federal Rules of Civil Procedure, dismissed the Charge without prejudice on the ground that this tribunal lacked jurisdiction to proceed because HUD had not personally served Respondents. HUD had served Respondents' attorney, but Respondents had not authorized the attorney to accept service of the Charge.

8. In April 1997, after contacting telephone directory assistance and the Illinois Secretary of State, researching Respondent Sparks' bankruptcy documents, and conducting research on the Internet, HUD informed the Leadership Council that HUD was unable to find the Respondents.

9. Thirteen months later, in May 1998, the Leadership Council gave HUD what was thought to be the correct address of Respondent Sparks. Without attempting to conciliate the complaint, HUD refiled the Charge on July 10, 1998, but was unable to serve Respondents because the address supplied by the Leadership Council proved incorrect. HUD sent a copy of the Charge to Respondents' attorney.

10. On July 16, 1998, Respondents' attorney wrote to HUD and the Leadership Council asking for confirmation that the case would not be prosecuted based on service of the Charge upon him. Neither HUD nor the Leadership Council responded to the attorney's letter.

11. On August 25, 1998, HUD withdrew the Charge.

12. On June 7, 1999, the Leadership Council filed a Freedom of Information Act request with HUD seeking information concerning the status of this and other cases. On July 1, 1999, HUD replied that the case remained open, stating, "Respondent apparently fled from the area during a contentious divorce. We continue to try to serve respondent." However, HUD in fact had made no attempt to serve the Respondents since August 1998, and approximately seven weeks later, on August 23, 1999, HUD closed the case administratively without notifying either the Leadership Council or the Complainants. HUD took no action on the case for the next two years.

13. On August 1, 2001, the Leadership Council again contacted HUD to

determine the status of the case. On September 13, 2001, HUD replied that the case had been closed administratively on August 23, 1999, but an attempt to reopen the case would be made if the Respondents were located.

14. On October 10, 2001, the Leadership Council gave HUD the Respondents' correct business address, which had been obtained through the services of a collection attorney. Seven months later, on May 16, 2002, HUD refiled the Charge and successfully served it on Respondent Sparks. HUD made no attempt to conciliate the complaint with Respondents before refiling the Charge.

15. HUD's counsel and case investigator assigned to this case estimate that they spent the following number of hours in connection with searches for Respondents' addresses from 1996 through 2002:

	Counsel	Investigator
1996	15	2
1997	4.5	1
1998	6.5	3
1999	0	0
2000	0	0
2001	3	1
2002	1	0
TOTALS	30	7

16. No one at HUD other than HUD's counsel and HUD's investigator spent time looking for Respondents' addresses.

17. From September 1995 until February 2000, Respondent Sparks resided in an apartment operated by his furnished apartment business. Respondent Sparks believes that his personal telephone number was not listed during that period.

18. Since February 2000 Respondent Sparks has resided at 14 W. Euclid, Arlington Heights, Illinois, with a telephone number listed in the local telephone book and with telephone directory assistance.

19. During the period beginning before May 1992 and ending in October 1994, the offices of the Respondent Corporation were located at 1130 S. New Wilke Road, Arlington Heights, Illinois, with a telephone number listed in the local telephone book and with telephone directory assistance.

20. From October 1994 to the present, the Respondent Corporation's headquarters have been located at 545 E. Algonquin Road, Arlington Heights, Illinois. Respondent Sparks asserts that throughout this period a telephone number and address for the company have been listed in the local telephone book and with telephone directory assistance.

SUBSIDIARY FINDINGS AND DISCUSSION

The Act contains no statute of limitations binding HUD to file a charge within a specified period after receiving an apparently valid discrimination complaint. However, when Congress authorized administrative adjudication under the Act in 1988, it intended to provide a "speedy, fair, and inexpensive" procedure for resolving housing discrimination complaints.[4] Toward that end, the Act contains numerous time limitations. For example, HUD is required to complete its investigation and issue a reasonable cause determination within 100 days of the filing of the complaint;[5] an administrative hearing must begin no later than 120 days after the issuance of a charge of discrimination;[6] the decision of the administrative law judge is to be issued within 60 days after the end of the hearing;[7] and the Secretary's discretionary review must be completed not later than 30 days after issuance of the decision.[8] Taken together, the time limitations add up to 310 days, indicating that Congress expected that HUD would resolve a housing discrimination complaint brought before an administrative law judge within less than a year after the filing of the complaint with HUD.

In this case, however, it took HUD nearly 10 years–from July 1992 to May 2002–to investigate the complaint, issue a reasonable cause determination, and file

---

[4]134 Cong. Rec. H4608 (remarks of Rep. Edwards, the bill's chief sponsor in the House, describing the new administrative procedure).

[5]42 U.S.C. §§3610(a)(1)(B)(iv) and (g).

[6]42 U.S.C. §3612(g)(1).

[7]42 U.S.C. §3612(g)(2).

[8]42 U.S.C. §3612(h).

and properly serve the Charge now before me. Although the Act permits the cited time limitations (except the period set for Secretarial review) to be extended when it is "impracticable" to comply, the record clearly shows that HUD could have presented this case for adjudication many years ago. The record supports Respondents' argument that HUD's delay was both unreasonable and inexcusable, and that the delay has materially prejudiced their ability to defend themselves.

Delay attributable to Respondent Sparks' bankruptcy proceeding

The Charge in this case was first filed on October 3, 1996, more than four years after Complainants filed their complaint on July 27, 1992. Counsel for the Secretary argues that this delay was justified because Respondent Sparks' personal bankruptcy petition was being adjudicated between September 1992 and July 1996, a period when counsel for the Secretary believed in good faith that proceedings under the Act fall within the automatic stay provision of the Bankruptcy Code (42 U.S.C. §362(a)). Counsel has now reversed the position taken in 1992 and argues that proceedings under the Act fall not within the automatic stay but rather within the exception to the automatic stay (42 U.S.C. §362(b)). Counsel argues that the Secretary's position in 1992–though incorrect–was reasonable because the question had never been addressed before. Whether the Secretary's position in 1992 was reasonable need not be decided here.[9] For the purposes of Respondents' motion, the Government's current argument that its position in 1992 was wrong estops the Government from denying that this case could have been prosecuted to completion in 1992-93. In the language of the statute, the Government must concede that it was not "impracticable" for the case to proceed in 1992, notwithstanding Respondent Sparks' personal bankruptcy proceeding. Because it was not impracticable to prosecute this case in 1992-93, the failure to do so is inexcusable.

The Secretary and the Intervenors argue that Respondents cannot be heard to complain about the four-year delay between 1992 and 1996 because the Secretary discontinued processing the case during most of that period at Respondents' insistence. There is superficial appeal to this argument. To complain after getting what you asked for appears at least unseemly. But closer examination of the argument shows that it has no substantive merit. HUD decided to delay processing

---

[9]Nevertheless, it should be noted that the reasonableness of an answer to a question does not hinge on the novelty of the question.

in contravention of the Government's duty to process housing discrimination claims expeditiously. That duty was not relieved by endorsing and adopting an argument posed by opposition counsel that HUD admits was examined only superficially, that had never been scrutinized by any court, and that the Government now deems incorrect.

Moreover, because Respondent Sparks' 1992 bankruptcy proceedings could not under any circumstances bar prosecution of the complaint against Respondent Corporation and Eloise Humphrey, the Government cannot deny that at least these two parties could have been prosecuted in 1992-93. While confessing ignorance of HUD's policies, counsel argues that these parties were not prosecuted in 1992 because HUD did not know much about them relative to what was known about Respondent Sparks, and because HUD wanted to save money and maximize the impact of this case on the housing industry by prosecuting all of the Respondents at the same time rather than in two trials. To be sure, one trial is cheaper than two, but two trials obviously could have more impact on the housing industry than one. It is equally obvious that HUD's relative ignorance about Respondent Corporation and Ms. Humphrey vis-a-vis Respondent Sparks could have been dispelled by further investigation. The Government's argument is incoherent and does not persuade me that it was impracticable to prosecute Respondent Corporation and Eloise Humphrey in 1992-93.

Furthermore, if the case had been pursued in 1992 against all of the Respondents, none of the service problems discussed below would have arisen.

Delays attributable to failures to serve Respondents

Failure to serve the Charge in 1996

The Government attempted to serve Respondents in October 1996 at their place of business and through their counsel. The attempt failed because the address used was two years out of date and because counsel for Respondents had not been authorized by his clients to accept service. Government counsel asserts that HUD used the last known address for the business as revealed in HUD's file, which address was confirmed by the Illinois Secretary of State in 1996 and by documents out of Respondent Sparks' bankruptcy proceeding.[10] Counsel further asserts that an

[10]Counsel makes inconsistent statements as to when the Secretary of State's office was contacted. At several points in the pleadings he says the office was contacted in August 1996 (before issuance of the Charge). In his affidavit he says this contact was made in 1996 after unsuccessful service of the Charge.

unidentified person at the Secretary of State's office told him in 1996 that Respondent Corporation was "not in good standing," and that when he contacted local telephone directory assistance in 1996, he was told that there was no listing for either Respondent Sparks or Respondent Corporation. Counsel also asserts that he unsuccessfully searched the Internet and bankruptcy records in 1996 and early 1997 for an address for Respondents different from the address HUD had used in October 1996.[11]

Respondent Sparks concedes that his personal telephone number probably was not listed in 1996 and 1997, but he swears in his affidavit that Respondent Corporation was always listed in the telephone book and with directory assistance. Counsel for Respondents has submitted into the record an excerpt from the list of all Illinois corporations filing annual reports in 1996, which was published in 1997 by the Illinois Secretary of State. The list includes Respondent Corporation, showing Respondent Sparks as the President and Secretary with an address at 545 E. Algonquin Rd., Arlington Heights, Illinois, the address Respondent Sparks swears the company has had since October 1994.

For purposes of Respondents' motion, all well-pleaded facts in the Government's pleadings, including the affidavits, are presumed true, and all reasonable inferences based on the pleadings and the affidavits must be made in the Government's favor. *See, e.g., Sanville v. McCaughtry,* 266 F.3d 724, 732 (7th Cir. 2001); *Travel All Over The World v. Saudi Arabia,* 73 F.3d 1423, 1429 (7th Cir. 1996); *EEOC v. Massey-Ferguson, Inc.,* 622 F.2d 271, 276 (7th Cir. 1980). Accordingly, any factual conflict in the record between the Government and Respondents must be resolved in the Government's

[11]Counsel states that he received "voluminous" copies of records from Respondent Sparks' bankruptcy proceeding, most of which he did not review, and all of which he discarded after the failed attempt to serve the Charge in 1998. Respondents assert that the bankruptcy records contained their addresses.

favor.

The first factual conflict of note concerns what information was on file with the Secretary of State's office in 1996. When HUD's counsel contacted that office in 1996, the clerk would have consulted the list published in 1996 covering corporations that filed annual reports in 1995. If Respondent Corporation did not timely file an annual report in 1995 (Respondents do not claim that it did), the company presumably would not have been in "good standing," and the address shown in the records would reflect an annual report filed in 1994 or earlier. Such reports would have shown the address as 1130 S. New Wilke Road, which address HUD's counsel says the Secretary of State's office gave him in 1996.

The Illinois corporations list submitted by Respondents was published in 1997 based on annual reports filed in 1996. Respondents' failure to submit the list published in 1996 covering annual reports filed in 1995 (the list that would have been used by clerks in the Secretary of State's office in 1996) raises an adverse inference: the list published in 1996 would support HUD counsel's assertion that a clerk in the Secretary of State's office told him in 1996 that Respondent Corporation was not in good standing with the Illinois Secretary of State and that the address on file was 1130 S. New Wilke Road, Arlington Heights.

The second factual conflict centers on what information was on file with the telephone company in 1996. Respondent Sparks says his company's telephone number was always listed, whereas Government counsel says directory assistance told him in 1996 that the company was not listed. This conflict need not be resolved by resorting to the presumptions governing motions to dismiss and summary judgment because I find that HUD's attempts to locate Respondents during the fall of 1996 and early 1997 were reasonable.[12] More specifically, I find that it was reasonable for HUD to rely on the information that the agency received from the Secretary of State's office in 1996 for the purpose of serving Respondents with the Charge. Considering all the circumstances, I conclude that the portion of HUD's delay in prosecuting this case that is attributable to the failure to serve Respondents in 1996 is excusable.

---

[12]This factual conflict could perhaps also be resolved without impugning the credibility of either party. For example, Government counsel could have inadvertently posed the wrong question to directory assistance (e.g., "Do you have a listing for Michael Sparks & Associates, Inc.?"), or directory assistance could have given an incorrect response to the correct question.

Failure to serve the Charge in 1997, 1998, 1999, 2000, 2001, and early 2002

After early 1997, HUD never again consulted the Secretary of State or telephone directory assistance to search for Respondents' business address. HUD apparently assumed that such efforts would be fruitless. That assumption was wrong and unreasonable. Although it was reasonable for HUD to rely upon information received from the Secretary of State in 1996, it was not reasonable, based on Respondent Sparks' personal bankruptcy and a single oral statement from a clerk in the Secretary of State's office that Respondent Corporation was "not in good standing," to assume that Respondent Corporation went out of business and would never again file an annual report revealing its correct address. Nor was it reasonable, based on an oral report from directory assistance together with an Internet search, to assume that neither Respondent Corporation nor Respondent Sparks would ever again list their telephone numbers in the Arlington Heights area.[13] Uncontested evidence in the record shows that if the Government had consulted the Secretary of State's office at any point after the list of Illinois corporations was published in 1997, or if an Arlington Heights telephone book had been consulted after 1997, the correct address of Respondent Corporation would

---

[13]An affidavit in the record from the Litigation Director of the Leadership Council during 1997-98 indicates that an investigator for the Leadership Council was unable in mid-1997 to locate Respondent Sparks by searching for his official divorce file, checking bankruptcy records, and comparing listings in local telephone books with information on file with the Illinois drivers' license bureau. The Leadership Council apparently searched for an address and telephone number for Respondent Sparks but not for Respondent Corporation. The Leadership Council did not independently contact the Illinois Secretary of State in search of Respondents.

have been revealed and, we must assume, proper service of the Charge would have been achieved. Because Respondent Sparks is President and Secretary of Respondent Corporation, both Respondent Sparks and Respondent Corporation could have been served at the address of Respondent Corporation.

HUD's attempted service of the Charge that was refiled in 1998 was based on an address supplied by the Leadership Council. HUD apparently did nothing to confirm the accuracy of that address before refiling the Charge, and when the address proved incorrect, service failed and the Charge had to be withdrawn.

For the next three years the Government did nothing to advance the prosecution of this case. In fact, HUD "administratively" closed the case in 1999 (without notifying Complainants or the Leadership Council), and HUD counsel resisted the Leadership Council's attempts to resurrect it in 2001 before the Leadership Council found Respondents' correct business address.[14] The record suggests that without the Leadership Council's prodding, the case would remain closed today.[15]

Finally, it must be noted that the Leadership Council gave HUD the Respondents' correct business address by letter dated October 10, 2001, but HUD

---

[14]According to counsel for HUD in one pleading, "On August 23, 1999, HUD administratively closed the case as an Administrative Judge dismissal." According to the Director of HUD's Chicago Office of Fair Housing and Equal Opportunity in an affidavit submitted into the record, the case was closed administratively "as a technical move to make the aged-case numbers look better."

[15]On August 31, 2001, the Leadership Council wrote a letter to HUD stating in part:

> Over the past few days, I made inquiry to Michael Kalven, who was the HUD attorney of record, to determine the status (we never received any indication that the case was closed administratively, of the results of HUD's subsequent efforts to serve the Respondent, or that any other activity had occurred since July 1st of 1999). Apparently, there is some uncertainty as to where the file is housed, but Michael reported to me that your computerized system indicates the file is closed. Having had past experience with the TEAPOTS system not accurately reflecting case activity, I requested that we be given some paper to that effect (I had already requested that we be provided with whatever post-1999 documentation [if any] was in the file). Michael then questioned why the Leadership Council was asking HUD to run around a lot; I suggested that he needn't do anything except ask support staff to look for the file and get the documents. This resulted in further questioning of the utility of our request.

did not refile the Charge until May 16, 2002, more than seven months later. During that period, HUD's counsel and investigator spent a total of four hours on the case. The record does not show why it took HUD seven months to refile the Charge.

In sum, uncontradicted evidence in the record shows that from mid-1997 through mid-2002, Respondents were openly conducting business at an address that could have been identified readily. But HUD failed to find and serve Respondents during this five-year period as a result of unreasonable assumptions and unexplained inaction. That failure cannot be excused.

There is no merit to the argument that Respondents are themselves responsible for the delayed prosecution of this case because they could have given their counsel authority to accept service of the Charge in 1996 and in 1998 but refused to do so. This argument attempts to turn the law upside down. The law imposes a duty on the Government to effect proper service on respondents; the law does not impose a duty on respondents to authorize counsel or anyone else to accept service on their behalf.

Consequences of HUD's delays

Missing records

Pursuant to court order, in October 1994, Respondents turned over all records pertaining to the operation of the Apartments to a court-appointed receiver who took possession of the property. Respondents did not make or retain copies of the records, and they argue that they are unable to defend themselves without those records. In particular, they allege that the records would show that they rejected Complainants' rental application based on objective financial criteria that they applied equally to all applicants for housing at the Apartments. The Government and the Intervenors, either singly or together, contend that: (1) Respondents should have retained copies of their records because they were on notice of the complaint filed by Mr. and Mrs. Bye; (2) Respondents have not demonstrated that they have made any effort to retrieve the records from the court-appointed receiver; (3) Respondents failed to make copies of the records because they believed HUD's claim would be discharged through Respondent Sparks' bankruptcy proceeding; (4) Respondents failed to allege prejudice based on missing records in their Answer to the Charge filed in 1996; and (5) Respondents' argument has no merit because HUD has copies of "many" or "most" of Respondents' "relevant" business records.

Regarding (1) and (2) above: Neither the Government nor the Intervenors cite

any law and none has been found to support the proposition that an alleged housing discriminator has a duty to retain copies of his records indefinitely after receiving notice that a discrimination complaint has been filed against him. Nor has any law been cited to support the proposition that Respondents have a duty to search for records that have not been in their possession for more than eight years as a result of a court order.

Regarding (3) above: No evidence supports the supposition that Respondents failed to make copies of their records in the belief that Complainants' claim would be discharged in bankruptcy. But if such a belief in fact explains Respondents' behavior, the Government must be held at least partly responsible. After all, in 1992 HUD joined Respondents in the belief that Respondent Sparks' bankruptcy proceedings barred prosecution of the claim. If Respondents failed to make copies of records based on their faith in the legitimacy of a legal position that the Government appeared to endorse, they cannot be faulted by the Government.

Regarding (4) above: When Respondents failed to allege prejudice based on missing records in their Answer to the Charge filed in 1996, they did not waive their right to allege prejudice thereafter.

Regarding (5) above: The contention that HUD has "many" or "most" of Respondents' records necessarily concedes that records are missing–which is precisely Respondents' point.[16] Finally, HUD is obviously not competent to decide which of the records in the agency's possession are "relevant" to Respondents' defense.

If this case had been prosecuted to completion in 1992-93 (before Respondents' records were transferred to the court-appointed receiver), all of Respondents' records would have been readily available for litigation.

<u>Missing and impaired witnesses</u>

At least five employees of Respondent Corporation responded to efforts in 1992 by Complainants and by testers from the Leadership Council to rent housing at the Apartments: Eloise Humphrey, Judith Rosenthal, Susan Dubois, and two unidentified persons. Respondents contend that these witnesses are critical to their

---

[16]It must be noted that HUD does not even have all of HUD's records concerning this case. HUD has conceded that it does not have a copy of the so-called 100-day letter that allegedly was sent to Respondents approximately 100 days after Complainants filed their complaint.

defense.

Eloise Humphrey was a property manager at the Apartments in 1992. She is now 82 years old and suffering from arthritis. Both of her hips were replaced approximately eight years ago. She has been advised by a physician that both of her knees should be replaced. Her mobility is extremely limited. She walks only with a cane or walker and generally avoids stairs. She lives approximately 25 miles from downtown Chicago, which she has visited once in the last ten years. Her memory apparently has not deteriorated with the passage of time any more than the memory of the average adult of any age.

Respondents have not demonstrated that Ms. Humphrey is incapable of appearing and testifying at hearing. If necessary to accommodate her disabilities, she could be deposed at a location convenient to her. Although testifying now would be more difficult for Ms. Humphrey than it would have been ten years ago, her physical condition does not pose an insurmountable obstacle to a fair hearing.

There is no merit to the Government's contention that Respondent Corporation's other rental agents are unimportant to the defense. Judith Rosenthal was employed as a rental agent for the Respondent Corporation in 1992 and until sometime before October 1994, when she left the company's employ. Respondent Sparks believes that Ms. Rosenthal married more than two years ago and no longer resides in Illinois, based on information received from a recent inquiry. Neither HUD nor Respondents know her current address.

According to the Charge, Ms. Rosenthal told Mr. Bye on May 13, 1992, that only one two-bedroom unit would be available for rent in June, but she failed to tell him that other units would become available in July and August. The implication of these allegations is that Ms. Rosenthal and Respondents were disinclined to rent an apartment to Complainants. If Ms. Rosenthal is not available to testify regarding what she told Mr. Bye, Respondents would find it difficult if not impossible to defend these allegations. Furthermore, in her capacity as a rental agent for the Apartments, Ms. Rosenthal would be able to testify regarding the rental policies and practices at the Apartments. It is apparent from the face of the Charge that without her, Respondents' defense would suffer.

The Charge also alleges that when a White male tester visited the Apartments on June 12, 1992, an unidentified rental agent told him that "there would be no problem finding a two-bedroom unit by July 1," whereas when Complainant Leatrice E. Smith (a Black female tester) visited the Apartments on June 14, 1992, an unidentified rental agent told her that no two-bedroom units would be available on July 1 when two such units were, in fact, available.[17] Again, from the face of the

[17]The Government's argument on this point identifies the agents who told Ms. Smith (apparently on June 14, 1992) what units would be available on August 1, 6, and 7 (facts not alleged in the Charge), but the argument does not identify the agent who told Ms. Smith that no two-bedroom units would be available on July1, as alleged in the Charge.

Charge it is clear that without these two unidentified rental agents it would be difficult if not impossible for Respondents to mount a defense to these allegations. The unidentified rental agents also would be able to testify regarding the rental policies and practices at the Apartments.

Respondent Sparks and Eloise Humphrey do not remember the names of any of the rental agents employed by Respondent Corporation in 1992, with the exception of Judith Rosenthal. Respondent Sparks' efforts to find Ms. Rosenthal have been unsuccessful, and none of the parties knows the addresses of the other rental agents who were involved in the housing transactions alleged in the Charge.

The memories of all potential witnesses for all of the parties necessarily have deteriorated since 1992 when the allegedly discriminatory events occurred. If this case had been prosecuted in 1992-93, no witnesses would have been missing, and the memories of all witnesses would have been fresh. *Cf. Baumgardner v. HUD,* 960 F.2d 572, 577 (6th Cir. 1992) (conciliation time limit designed to ensure that parties "negotiate or conciliate with events fresh in the minds of witnesses").

Material prejudice

This case falls within the purview of the United States Court of Appeals for the Seventh Circuit, which has yet to address a case where it is alleged that HUD's undue delay in prosecuting a case under the Act has caused material prejudice to the defense. In the absence of controlling precedent under the Act, analogous cases decided under employment discrimination law (Title VII) provide appropriate guidance. *See, e.g., Hall v. Meadowood,* 7 Fed. Appx. 687, 689 (9th Cir. 2001); *Dicenso v. Cisneros,* 96 F.3d 1004, 1008 (7th Cir. 1996); *HUD v. Blackwell,* Fair Housing-Fair Lending Rptr. (P-H) ¶25001, 25005 (HUDALJ 1989) *aff'd,* 908 F.2d 864 (11th Cir. 1990); *Shellhammer v. Lewallen,* 1 Fair Housing-Fair Lending Rptr. (P-H) ¶15,472 (N.D. Ohio 1983), *aff'd without opinion,* 770 F.2d 167 (6th Cir. 1985).

In *Occidental Life Ins. Co. v. EEOC,* 432 U.S. 355 (1977), the Supreme Count stated that federal courts have discretionary equitable power to provide relief to a defendant when suit has been delayed by the Equal Employment Opportunity Commission ("EEOC") causing prejudice to the defendant, notwithstanding the absence of a specific statute of limitations.

> **It is, of course, possible that despite these procedural protections [referring to various safeguards in Title VII and EEOC regulations] a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate delay in filing the action after exhausting its conciliation efforts. If such cases arise the federal courts do not lack the power to provide relief. This Court has said that when a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a**

> **particular case, the trial court may restrict or even deny backpay relief. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 424-425. The same discretionary power "to locate a just result in light of the circumstances peculiar to the case," *ibid.,* can also be exercised when the EEOC is the plaintiff.[18] [432 U.S. at 373]**

A year after the Supreme Court handed down *Occidental Life,* the Eighth Circuit Court of Appeals relied upon it in *EEOC v. Liberty Loan Corp.,* 584 F.2d 853 (8th Cir. 1978), and held that a District Court has discretionary equitable power to dismiss a case brought by the EEOC "where there has been an inordinate EEOC delay in filing suit and this delay has unduly prejudiced the position of the defendant." 584 F.2d at 857. The Circuit Court found that a delay of four years and four months gave rise to an inference of unreasonableness requiring an explanation from the EEOC.

In *Jeffries v. Chicago Transit Authority,* 770 F.2d 676 (7th Cir. 1985), the Seventh Circuit Court of Appeals was confronted with a ten-year delay in filing suit caused by the EEOC. After Mr. Jeffries filed a complaint with EEOC charging defendant with racial discrimination, the EEOC notified defendant of the complaint but took no further action for eight years. Eventually EEOC issued Jeffries a right-to-sue letter, and he timely filed suit. The trial court granted defendant's motion for summary judgment, holding that Jeffries' claim was barred by laches. The appellate court affirmed, holding that because defendant suffered material prejudice as the result of a manifestly unreasonable and inexcusable delay, laches barred the claim, notwithstanding the absence of a statute of limitations. 770 F.2d at 679-681.

The *Jeffries* Court found that defendant had suffered material prejudice because an important witness who had left the company during the delay period was 70 years old and thought to be living out of state, other witnesses' whereabouts were unknown, and relevant records had been destroyed or lost. The Court rejected contentions that defendant was required to show that witnesses were unavailable,

---

[18]**The Supreme Court recently cited this language with approval in *Amtrak v. Morgan,* 536 U.S. 101, 127 (2002).**

and instead adopted the standard articulated by the Eighth Circuit Court in *Liberty Loan,* 584 F.2d at 858: Material prejudice is shown if defendants "face the hardship of locating the former employees and procuring their testimony . . . ." *Jeffries,* 770 F.2d at 681.

The Seventh Circuit Court of Appeals also rejected Jeffries' argument that because defendant had a duty under EEOC regulations to retain records, defendant could not claim prejudice based on missing records that defendant had destroyed under a records retention-destruction schedule. The Court said that defendant "had no duty to mitigate the prejudice occurring over time." *Id.* at 681.

The longer the delay in presenting a case for adjudication, the less prejudice the defense must establish. *Id.* at 680; *Goodman v. McDonnel Douglas Corp.,* 606 F.2d 800, 807 (8th Cir. 1979); *Brundage v. United States,* 205 Ct. Cl. 502, 504 F.2d 1382, 1384-87 (1974), *cert. denied,* 421 U.S. 998 (1975).

Applying the principles relied upon by the Seventh Circuit Court of Appeals in *Jeffries* to the case at bar, I find that HUD's ten-year delay in bringing this case to adjudication has caused Respondents to suffer material prejudice because (1) records necessary to defend the Charge are missing through no fault of Respondents; (2) witnesses critical to the defense left the employ of Respondent Corporation years ago; (3) the whereabouts of several defense witnesses are unknown (one is thought to be out of state); (4) even the identities of two or more essential defense witnesses are unknown; (5) Respondents would suffer hardship if they were required to locate former employees of Respondent Corporation and secure their testimony; and (6) the memories of all witnesses have naturally deteriorated over the last ten years.

Other mandatory procedural requirements

Respondents argue that HUD not only prejudicially delayed prosecution of this case but also failed to comply with other procedural requirements under the Act.

100-day notice letter

Section 3610(a)(1)(C) of the Act (42 U.S.C. §3610(a)(1)(C)) provides in part that: "If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint . . . the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so." HUD's records indicate that

the agency sent the so-called "100-day letter" to Respondents on November 5, 1992. However, the computer record indicating that the letter was sent also contains the cryptic entry, "No reason data entered," suggesting that the letter was not in fact sent. Furthermore, a copy of the 100-day letter cannot be found in HUD's records, and Respondents claim not to have received it at a time when HUD unquestionably had the correct business address for Respondents and their counsel. Although HUD concedes in argument that the letter may not have been sent, for purposes of Respondents' motion, I will assume that the letter was in fact sent.

Conciliation

Section 3610(b) of the Act (42 U.S.C. §3610(b)) provides that "[d]uring the period beginning with the filing of [a] complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint." HUD recognized its statutory duty in 1992 when the agency sent Respondents a letter advising them that "during the pendency of this Complaint, you will have the opportunity to reach a satisfactory resolution through conciliation efforts." In November 1992 HUD attempted to conciliate the case, but Respondents' counsel refused, stating that he was unwilling to discuss conciliation at that time because of the bankruptcy proceeding and because the Complainants had made no specific settlement demand. Four years later, after the bankruptcy proceeding had ended, HUD filed a Charge without first making a settlement demand or attempting to conciliate the complaint.[19] Although Respondents' resistance to HUD's conciliation efforts in 1992 based on the pending bankruptcy proceeding made settlement unfeasible in 1992, that impediment disappeared in 1996 when Respondent Sparks received his bankruptcy discharge. Before filing the Charge in October 1996, HUD was required by the Act to attempt conciliation. The agency failed to do so and repeated its failure in 1998 and 2002 when the Charge was refiled.

HUD's duty to attempt conciliation is mandatory, and the failure to properly discharge that duty is ground for reversal of a discrimination finding, vacation of a damage award, and remand of the case with orders to conciliate. *Mountainside Mobile Estates Partnership v. HUD,* 56 F.3d 1243, 1249-59 (10th Cir. 1995); *Kelly v. HUD,* 3 F.3d 951, 957-58 (6th Cir. 1993). The *Kelly* court relied in part on legislative history that clearly reveals Congress' intent: "[C]onciliation [is] to remain a primary feature of fair housing enforcement. Resolving a complaint in the early stages of the process benefits all parties." H.R. REP. No. 100-711, reprinted in U.S. Code Cong. & Adm. News, 2d Sess., 2195. Respondents are "entitled to an objectively reasonable effort by the agency to bring about a settlement of the

[19]HUD's counsel asserts that he believes conciliation was "discussed in early conversations" with Respondents' counsel "after the filing of the complaint in 1996," but he has no notes to corroborate his memory. If such conciliation efforts in fact occurred, they did not satisfy the statutory requirement. Conciliation must occur before, not after, the filing of a Charge.

charge." *Baumgardner v. HUD*, 960 F.2d 572, 579 (6th Cir. 1992). HUD did not make an objectively reasonable effort to conciliate this case before issuing the Charge.

Consequences to Respondents of HUD's failure to conciliate

The Government complains that Respondents have not demonstrated how HUD's failure to conciliate has damaged them. Respondents need not spell out how they have been harmed, because the harm is manifest. Once a Charge has been issued, all respondents engaged in the housing business suffer at least some harm to their personal and professional reputations, the positions of the parties harden, the cost of counsel escalates, the cost of settlement increases, and the chance of settlement decreases. These consequences are essentially irreparable damages, the direct result of being deprived of a right granted by the Congress. Respondents in this case have been deprived forever of their right to have a genuine opportunity to resolve the complaint quickly, efficiently, and with minimal expense *before* issuance of the Charge.[20]

Several authorities have found that HUD has failed to complete its investigation of a discrimination complaint within the statutorily required 100 days, failed to timely send a 100-day letter, failed to engage in meaningful conciliation, and failed to provide proper service. Nevertheless, with one exception, no court has determined that such derelictions are jurisdictional, requiring dismissal of the case.[21] *See, e.g., Kelly v. HUD,* 3 F.3d 951(6th Cir. 1993)(defects in service, timeliness of investigation, and conciliation); *Baumgardner v. HUD,* 960 F.2d 572 (6th Cir. 1992)(defects in notice, timeliness of investigation, and conciliation); *United States v.*

---

[20]Even though HUD did not have the correct address for Respondents in 1996, the agency could have attempted to conciliate the complaint with counsel for Respondents before attempting to serve the Charge.

[21]The only decision to hold otherwise was later vacated. *United States v. Aspen Square Management Co.,* 817 F. Supp. 707 (N.D. Ill. 1993)(defects in notice of delay and timeliness of investigation). *See United States v. Beethoven Associates Limited Partnership,* 843 F. Supp. at 1260. Because the *Aspen Square* decision was issued by a United States District Court and later vacated, it is not controlling precedent in this proceeding.

Sea Winds of Marco, Inc., 893 F. Supp. 1051, 1054-55 (M.D. Fla. 1995)(defects in notice of delay, timeliness of investigation, and conciliation); _United States v. Barberis,_ 887 F. Supp, 110, 115-16 (D. Md. 1995)(defects in naming and serving parties, timeliness of charge); _United States v. Beethoven Associates Limited Partnership,_ 843 F. Supp. 1257 (N.D. Ill. 1994)(defects in notice of delay and timeliness of investigation); _United States v. Orlander,_ Fair Housing–Fair Lending Rptr. (P-H) ¶15,909 at p.25,909.2 (N.D. Ohio 1994)(defects in notice of delay and timeliness of investigation); _HUD v. Courthouse Sq. Co.,_ Fair Housing–Fair Lending Rptr. (Aspen) ¶25,155 at p.26,232 (HUDALJ 2001)(defects in timeliness of investigation and conciliation); _HUD v. Corrigan,_ Fair Housing–Fair Lending Rptr. (P-H) ¶25,084 at p.25,770 (HUDALJ 1994)(defects in conciliation);

HUD v. Ocean Parks Condo. Ass'n, Inc., **Fair Housing–Fair Lending Rptr. (P-H) ¶25,054 at p.25,528 (HUDALJ 1993)(defects in notice of delay and timeliness of investigation).**

Although HUD's derelictions in the instant case are not fatal jurisdictional defects, equitable principles compel dismissal of the Charge.

CONCLUSION

Because HUD's unreasonable and inexcusable delay in presenting this case for adjudication has materially prejudiced the defense, the Charge of Discrimination must be dismissed, notwithstanding the absence of a statute of limitations.[22]

Dismissal as to Government requires dismissal as to all

---

[22]**This decision relies upon the equitable power described in *Occidental Life,* referenced in *Jeffries,* and used in *Liberty Loan* to dismiss a claim brought by the Government. This decision does not hold that laches may be asserted against HUD, notwithstanding *dicta* in *Jeffries* indicating that it would be permissible to do so. The Seventh Circuit Court cited *Occidental Life* for the proposition that the EEOC itself–that is, the Government–may be barred by laches from filing a Title VII lawsuit. *Jeffries,* 770 F.2d at 679. However, the Supreme Court in the recent case of *Amtrak v. Morgan* did not read its decision in *Occidental Life* to authorize the assertion of laches against the EEOC. The Court stated in a footnote,** "Nor do we have occasion to consider whether the laches defense may be asserted against the EEOC, even though traditionally the doctrine may not be applied against the sovereign. We note, however, that in *Occidental* there seemed to be general agreement that courts can provide relief to defendants against inordinate delay by the EEOC." ***Amtrak,*****536 U.S. at 127, n.14.**

Intervenors argue that even if the Charge must be dismissed as to the Government, it should not be dismissed as to the Intervenors because they were not derelict in their attempts to move the case toward prosecution and because they reasonably relied upon the Government to find and serve Respondents. These arguments cannot be addressed. For the reasons set out above, the Charge must be dismissed as to the Government. Once the Government is removed from the case, this forum no longer has jurisdiction to adjudicate the claim. In other words, the Act confers jurisdiction on administrative law judges to resolve housing discrimination charges brought by the Government, but the Act does not confer jurisdiction on this forum to resolve disputes between private parties.

ORDER

The Charge of Discrimination is hereby ORDERED dismissed with prejudice.

THOMAS C. HEINZ
Administrative Law Judge

J:\Final\Sparks.dec.wpd