STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OLIVER HILL, SR.,

Petitioner,

vs.

TALLAHASSEE HOUSING AUTHORITY,

Respondents.

Case No. 08-6178

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held on April 2, 2009, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Edward J. Grunewald, Esquire
Jamie Ito, Esquire
The North Florida Center
for Equal Justice, Inc.
2121 Delta Boulevard
Tallahassee, Florida 32303

For Respondent: Linda G. Bond, Esquire
Rumberger, Kirk & Caldwell
215 South Monroe Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

Whether Respondent Tallahassee Housing Authority is guilty of a failure to reasonably accommodate Petitioner's disability,

thereby violating the Florida Fair Housing Act, by discriminating in the terms, conditions, and privileges of the rental of a dwelling as set out in the Petition for Relief.

PRELIMINARY STATEMENT

Petitioner dual-filed a Housing Discrimination Complaint with the Florida Commission on Human Relations (FCHR) and the United States Department of Housing and Urban Development (HUD). HUD referred the timely-filed complaint to FCHR on or about August 6, 2008. On October 7, 2008, FCHR entered a Determination: No Cause, which was mailed to Petitioner on or about October 10, 2008. On or about November 10, 2008, Petitioner filed a timely Petition for Relief, and the cause, pursuant to Chapter 760, Florida Statutes, was referred to the Division of Administrative Hearings (DOAH) on or about December 12, 2008.

DOAH’s case file reflects all pleadings, notices, and orders intervening before the final evidentiary hearing on April 2, 2009.

Although required by law and custom to provide a means of preserving the record herein, FCHR abrogated that duty and obligation by failing to provide tape, CD, or video recording of the April 2, 2009, disputed-fact hearing, and by failing to provide a court reporter. The parties hired a court reporter, and a Transcript was produced.

At hearing, Petitioner presented the oral testimony of Angela Hill and testified on his own behalf. Petitioner had Exhibits P-1 through P-25, P-27 through P-35, and P-39 through P-44, admitted in evidence. Exhibit P-22, is the deposition of Dr. Mark Cuffe. Respondent presented the oral testimony of Claudette Cromartie and had Exhibits R-1 through R-33 admitted in evidence.

At hearing, the parties stipulated that Claudette Cromartie was a party only in her official capacity as Executive Director of the Tallahassee Housing Authority (THA), and not in her individual capacity. (TR-14-15) Therefore, "Respondent" is used throughout this Recommended Order to refer only to THA, and the style of this cause has been amended as set out above.

A two-volume Transcript was filed on April 21, 2009. By an agreed Motion, the parties extended their oral stipulation for the filing date of their Proposed Recommended Orders to May 12, 2009, and the undersigned concurred by telephone, without entry of a written order. Petitioner's Proposed Recommended Order was timely-filed on May 12, 2009. Respondent's Proposed Recommended Order was filed May 13, 2009. Petitioner did not move to strike Respondent's late proposal, so both proposals have been considered simultaneously in preparation of this Recommended Order.

The parties’ prehearing stipulations, Section E: 1-44, of the Joint [Prehearing] Stipulation have been utilized as agreed-to by the parties (TR-12-13), with some minor adjustments for grammar, form, and clarity, and to avoid giving specific street addresses.

FINDINGS OF FACT

1. Petitioner is a disabled person who collects a monthly disability payment. (Prehearing Stipulation 1.) He is 66 years old and suffers multiple disabilities, including cerebral palsy, severe arthritis, a reading disability, a speech impediment, and nerve damage and numbness in his hands.

2. Petitioner’s physicians have informed THA that Petitioner is a disabled person under the definition used in the Fair Housing Act: a person with a physical or mental impairment which substantially limits one or more major life activities. (Prehearing Stipulation 2.)

3. Petitioner’s physicians have informed THA that Petitioner requires a live-in aide to assist him with his daily activities. (Prehearing Stipulation 3.)

4. THA provided Petitioner with a unit to accommodate a live-in aide, in accordance with HUD guidelines. (Prehearing Stipulation 4.)

5. Respondent THA is a quasi-governmental agency which provides housing assistance for low, to very low-moderate income

individuals and families. These services are provided through public housing and through the HUD Section 8 Housing Choice Voucher Program. All of THA's policies and procedures are monitored and audited by HUD and are required to be consistent with HUD policies.

6. At any and all times material, THA has had approximately 1500 people on a waiting list for public housing, and approximately 3,000 people on a waiting list for Section 8 housing. Accordingly, it is necessary for THA to be a "good steward" of its resources, so that it can provide shelter for as many low income families as possible.

7. To this end, THA almost universally apportions bedrooms as follows: one bedroom for the head of a household, to be shared with a spouse if applicable; one bedroom for all female children; and one bedroom for all male children. A family of two adults and five dependents would still, almost certainly, be provided only a three-bedroom house or apartment. However, THA's Public Housing Occupancy Guidebook, and various other HUD/THA documents recognize that a disabled person's live-in aide may require a separate bedroom. Chapter 55 of the Guidebook also recognizes that a person with a disability may have a large and bulky apparatus related to the disability which requires an extra bedroom if that is the only location where the apparatus can be stored.

8. THA has two major functions. The first is to implement HUD policy at the local level, owning the buildings in which eligible families live for public housing. The second is a Section 8 Housing Choice Voucher Program, which subsidizes families to rent from private landlords in the community. Part of THA's Section 8 thrust includes a Section 8 Home Ownership Program, whereby THA provides a qualified person with a voucher which subsidizes that person's mortgage with a private lender for up to 15 years, unless the qualified person is elderly or handicapped, in which case, the voucher extends up to 30 years. THA administers the Family Self-Sufficiency Program for both public housing and Section 8.

9. Briefly, the way the voucher system for home purchase works is as follows: the low-income applicant must qualify for a mortgage with an independent third-party lender, such as a bank. The lender unilaterally determines whether to grant the applicant a mortgage, understanding that 30 percent of the mortgage will be paid by the applicant's income and 70 percent of the mortgage will be paid by the Housing Voucher Program, but the independent lender must agree to accept the voucher from the applicant. Once the independent lender agrees to accept the voucher, THA gives the qualified applicant the voucher, which the applicant passes on to the independent lender.

10. THA does not provide first mortgages to finance home purchases. (Prehearing Stipulation 15.) However, sometime prior to 2008, THA's Board authorized a $25,000, "soft" second mortgage system. THA's soft second mortgage system only comes into play after a first mortgage is guaranteed by an independent lender. From the institution of this program, THA's Board of Commissioners has had a firm policy not to sell any of its property below the independent appraisal value.

11. The Petition for Relief alleges only that Respondent failed to accommodate Petitioner's disability by requiring that he move into a two-bedroom apartment, rather than allowing him to remain in a three-bedroom home he had occupied for six years. Thereby, Petitioner sought a finding of disability discrimination, prohibition of the discriminatory practice, relocation of Petitioner to a specific three-bedroom house on Connector Drive, Tallahassee, Florida, which he had occupied for six years, and reimbursement for all moving expenses, attorney's fees, and costs.

12. Petitioner's Proposed Recommended Order additionally asserts that discrimination occurred by Respondent's failing to provide Petitioner with a requested grievance hearing to which he was entitled. The assertion that Respondent failed to follow its own grievance procedure and the evidence admitted which was directed to the grievance issue was not a surprise to Respondent

(See Pre-Hearing Stipulation.) Also, the assertion that Respondent failed to follow its own grievance procedure does not alter the basic category of "disability" discrimination alleged initially.

13. Petitioner has resided in pubic housing through THA since 1971. He has long been an activist with an occupants' rights group. At some point, he served on THA's Board. For about 30 years, he lived in a three-bedroom unit that was part of the Orange Avenue Apartments. For several years, his wife and three children (both genders) resided with him, but the last two years he lived alone in that three-bedroom unit.

14. In 2002, THA obtained a letter from Dr. Mark Wheeler dated September 30, 2002, stating:

> To whom it may concern:
> Mr. Hill has multiple chronic medical conditions in which he requires the aid of a caregiver for some daily activities (buttoning shirt, etc.) Please give him due consideration and allowances. (Prehearing Stipulation 29.)

15. In 2002, Petitioner applied for, and received, a HUD Section 8 voucher for home ownership for a disabled person to use through the home ownership program administered by THA. (See Finding of Fact 9.) Of the houses shown him by THA, Petitioner selected a three-bedroom house on Connector Drive.

16. Petitioner moved from public housing at Orange Avenue and into the home on Connector Drive in 2002, in anticipation of

purchasing the home on Connector Drive. (Prehearing Stipulations 14 and 30 synopsized and merged.)

17. The house at Connector Drive is a scattered-site, single family home owned by THA. (Prehearing Stipulation 12.)

18. The base area of the house at Connector Drive is 1102 square feet, and the area of the garage is 464 square feet. (Prehearing Stipulation 16.)

19. The house at Connector Drive had features in place to accommodate Petitioner's disability. (Prehearing Stipulation 17.)

20. The house at Connector Drive has three bedrooms and a garage. (Prehearing Stipulation 13.)

21. The house at Connector Drive had one bathroom adjacent to the master bedroom and a second bathroom on the other side of the house with the other two bedrooms. This layout provided some privacy for a live-in aide.

22. For awhile, Petitioner lived alone in the three-bedroom house on Connector Drive. He was assisted by a fiancée who did not live with him.

23. Petitioner participated in workshops put on by THA to qualify to purchase a home, but he was unable to present THA with a lender which would finance his purchase of the Connector Drive property at the required price.

24. In 2002, there were programs available that would have allowed Petitioner to purchase another home through Bethel Community Development Corporation for less than the independently appraised value of the Connector Drive property, or to build a two-bedroom house, but Petitioner wanted to purchase the Connector Drive three-bedroom house.

25. In 2002, at a meeting in connection with purchasing the Connector Drive home, Ms. Cromartie, Executive Director of THA, inquired of Petitioner why he did not just rent the Connector Drive home from THA for the rest of his life and not bother with home ownership. Petitioner optimistically took this inquiry as a guarantee that THA could/would never move him from that location.

26. However, at all times material, Petitioner's standard lease agreement with THA provided, in pertinent part, as follows:

> 11. REDETERMINATION OF RENT, DWELLING SIZE AND ELIGIBILITY
>
> 11 A. The status of each resident's family eligibility is to be redetermined at least once a year, but also at interim periods if requested by THA in accordance with any information received by THA which may reasonably affect the determination of rent or household composition for Resident. Resident agrees to furnish to THA at least once a year, or at an interim redetermination upon request by THA, accurate information as to household income, and assets, number of persons residing in

the household and employment verification for THA's use in determining whether Resident's rent should be adjusted and whether the size of the dwelling is still appropriate for Resident's needs. . . .

* * *

11.G. Should there be a determination by THA that the household composition no longer conforms to THA's "Admission Policy" in effect at that time, Resident agrees to transfer to an appropriate size dwelling, whether in Resident's complex or elsewhere on THA's property. Resident shall be notified of any transfer to another dwelling as a result of the annual redetermination, or interim, [sic] shall state that Resident may ask for an explanation stating the specific grounds of the THA determination and that if Resident does not agree with the determination, Resident may request a grievance hearing concerning the determination in accordance with THA's grievance procedure. Resident shall have at least six (6) days following the notice to transfer to the new dwelling. Prior to transfer, Resident agrees to pay all outstanding charges due THA. Resident security deposit may be transferred to the new dwelling provided THA does not claim all or part of the security deposit as provided herein. Resident shall pay all or any part of the security deposit for the original dwelling, or any balance remaining after any claims are made by THA. Resident shall be responsible for all expenses incurred in the transfer. Resident agrees to execute a new Dwelling Lease Agreement in advance of the transfer.

12. RESIDENT OBLIGATIONS
Resident agrees to be obligated as follows:

* * *

Z. To transfer to an appropriate size dwelling upon notification from THA.

27. Also, at all times material, Section 5.5 of the Public Housing Occupancy Guidebook also recognized that:

> A very common failing in the area of Occupancy Standards occurs when PHAs permit long-time residents to remain in units that are significantly too large for their families even though there is demand for the size of unit in which the family is over housed. The only situations in which a family should occupy a unit with more bedrooms than family members would be:
>
> * As a reasonable accommodation to a person with a disability (e.g., a resident with a disability has large and bulky apparatus related to the disability in the apartment and an extra bedroom is the only location where it can reasonably be stored); or
>
> *Because there is currently no demand for the unit size the family occupies (although in this situation the family must understand that they would be required to transfer if a family with the number of persons requiring the unit size qualifies for housing); or
>
> *A resident has a Live-in-Aide who needs an extra bedroom.

28. In 2004, Petitioner had neck surgery and was told he would need a live-in aide.

29. In 2004, Petitioner's daughter, Angela, moved from Atlanta, Georgia, to assist him. She brought with her a "Total Gym" resistance exercise machine. This is a piece of exercise equipment that testimony shows measures about seven-and-a-half feet long, three feet wide, and 42 inches tall, when opened and laid out on the floor for use, and weighs over 50 pounds. By

the photographs in evidence, the undersigned estimates that it occupies at most a two-foot-by-two-foot square of floor space and stands about five feet tall when folded-up and stored vertically.

30. Since 2004, Petitioner's daughter has resided with Petitioner as his live-in aide and has assisted him with dressing himself, household cleaning, doing his exercises, grocery shopping, reading and writing, and going to doctors' appointments and other necessary activities. (Amplified Prehearing Stipulation 5.)

31. Petitioner also has computer equipment that assists him with reading. (Prehearing Stipulation 6.)

32. Angela Hill works at a full-time position at FedEx, earning more than $14.00 per hour, but her income is not included in determining Petitioner's housing subsidy. (Prehearing Stipulation 7.) Under THA/HUD guidelines, her income is not calculated against Petitioner for public housing, but her presence as a live-in aide is calculated in his favor for assigning more space as a larger family unit. (See Finding of Fact 7.)

33. Prior to his 2004 surgery and his daughter's arrival, Petitioner had exercised at Florida A & M University and then used an incline bench, weights, and springs at home.

34. Petitioner exercised using the "Total Gym" resistance machine, a sit-up bench, free weights and wall mounted springs when he lived on Connector Drive. (Prehearing Stipulation 8.) He also had another incline exercise bench.

35. Petitioner required assistance with these exercises. (Prehearing Stipulation 9.)

36. The area required for Petitioner to store and use his equipment, including the "Total Gym" resistance machine, with assistance from another individual, is about the size of a 12-foot-by-12-foot room, or 144 square feet. (Prehearing Stipulation 11.)

37. On Connector Drive, Petitioner stored his exercise equipment in the third bedroom or the garage.

38. No medical physician prescribed the Total Gym for Petitioner's use. He and his daughter just tried it one day, and they decided it was easier and less stressful for him to use than free weights because once his daughter places his arms on its bar, Petitioner can use the bar to move his arms via his oppositional body weight on the glider portion below the bar.

39. When Petitioner was in rehabilitation for a 2007 surgery, he received therapy from occupational and rehabilitation therapists, both in their facility and in his home on Connector Drive. His daughter told them that Petitioner used a Total Gym to work out. Apparently, the therapists were

enthusiastic about the Total Gym, but did not advise that the Total Gym was necessary to exercise Petitioner's upper body. They told the daughter to use light weights and assist Petitioner with arm extensions.

40. On Connector Drive, Petitioner also walked for exercise, rode a bicycle on a stand in the garage, and drove a car.

41. Petitioner lived on Connector Drive from 2002 to 2008. From 2004 to 2008, his daughter lived with him, assisting him. His situation has been annually reviewed and recertified for eligibility by THA throughout that period of time.

42. THA has provisions in its leases for right-sizing residents so that families live in a housing property appropriate for their family size. (See Finding of Fact 26.) "Over-housed" means the unit is too large for the family. "Under-housed" means the unit is not large enough for the family.

43. In September 2007, Respondent realized that a number of residents, including Petitioner, were not living in appropriate size units.

44. On September 19, 2007, THA notified all residents that appropriate bedroom size would be determined at annual recertification review. (Prehearing Stipulation 20.)

45. Two scattered-site families were reviewed for being under-housed, and eight scattered-site families, including Petitioner, were reviewed for being over-housed. Of the four families who were moved, including Petitioner, three were described as "disabled" or "disabled and elderly"; one that was moved was apparently neither disabled nor elderly. (R-3 and R-23.) Disabled and non-disabled lessees were relocated from other categories of housing as well.

46. Petitioner attended an annual recertification interview on January 17, 2008. (Prehearing Stipulation 21.) At that time, he was told he needed to get new medical letters documenting his disability and need for a live-in aide.

47. Respondent determined Petitioner should be relocated to a two-bedroom unit at the apartment complex of his choice. (Prehearing Stipulation 22.)

48. Petitioner was offered a two-bedroom apartment and selected one at Brighton Road in the old Orange Avenue location. (Amplified Prehearing Stipulation 23.)

49. Petitioner was notified on March 24, April 10, and May 5, 2008, that he would be moved to the two-bedroom unit at Orange Avenue due to a determination that he was "over-housed." (Prehearing Stipulation 24.)

50. Petitioner made a request for an accommodation in letters to Ms. Cromartie, dated March 24, April 16, and

April 21, 2008, asking that he not be moved from Connector Drive. (Prehearing Stipulation 25.)

51. Ms. Cromartie acknowledged that THA's and HUD's rules and regulations allow THA to make an accommodation by waiving or adjusting a rule or qualification for a disabled person. (See Finding of Fact 7.)

52. The Public Housing Occupancy Guidebook provides in pertinent part:

> . . . A "reasonable accommodation" is a change, exception, or adjustment to a rule, policy, practice or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces. Since rules, policies, practices, and services may have a different effect on persons with disabilities than they have on individuals without disabilities, treating persons with disabilities exactly the same as others will sometimes deny them an equal opportunity to use and enjoy a dwelling. . . .
>
> To show that a requested accommodation may be necessary, there should be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability. An accommodation will not be considered reasonable if it constitutes a fundamental alteration of the provider's program, or constitutes an undue financial burden.

53. The Reasonable Accommodation Verification Form THA sends to physicians to verify whether an accommodation proposed

by a resident is medically necessary contains the following language:

> SAHA is required by law to provide reasonable accommodations to disabled applicants/residents that will provide them with equal opportunity to use and enjoy our housing programs, their unit and/or common areas. SAHA does not provide reasonable accommodations when the request is a matter of convenience or preference only.

54. Petitioner asked Ms. Cromartie that he be considered for the home ownership program through THA in letters dated March 24, April 16, and April 21, 2008. (Prehearing Stipulation 31.)

55. Petitioner made requests for a grievance hearing in writing on March 24, and April 21, 2008, and in person on April 16, 2008. (Amplified Prehearing Stipulation 37.)

56. THA has a written grievance policy. (Prehearing Stipulation 35.)

57. Section 11.G. in Petitioner's lease agreement states, in regards to transfers, that "If Resident does not agree with the determination, Resident may request a grievance hearing concerning the determination in accordance with THA's grievance procedure. (Prehearing Stipulation 36.) (See Finding of Fact 26.)

58. Petitioner's lease also specifically provides:

> 22. GRIEVANCE/APPEAL PROCEDURE
> All grievances, disputes and appeals arising under this Agreement, including but not limited to the obligation of resident or THA's as approved or established by HUD, shall be resolved in accordance with THA grievance procedure, as approved or established by HUD, in effect at that time, posted in the Property Management Office or resident's complex. If there is not a Property Management Office the Central Office of THA shall serve as designated location. Such grievance procedure is incorporated herein, either by attachment or reference. THA reserves the right to exclude the grievance procedure under circumstances outlines [sic.] in this Agreement and applicable provisions of Federal laws and regulations.

59. Section III (B) (1) and (2) of THA's Grievance Procedure permits management to not apply the grievance procedure only in cases of a termination or eviction involving criminal activity or drugs.

60. Ms. Cromartie testified that she interpreted Petitioner's complaints and correspondence to be a request to be permitted to purchase the Connector Drive unit via the voucher system or to purchase it at a price which was no higher than the amount THA had paid for the house in 1997.

61. Petitioner's letters also could legitimately be interpreted to be requests to be allowed to remain in the Connector Drive house under the same terms as before, at least until his grievance was resolved, or until THA increased his

voucher for purchase, or until THA sold him the house at a price he could afford. In his April 16, 2008, letter, Petitioner mentioned he needed space to exercise, but one could not glean therefrom that Petitioner was asking for space to use or store specific exercise equipment that could not be stored in a two-bedroom unit. Clearly, the accommodation Petitioner was seeking was not just to be placed in any three-bedroom unit so that he could do his exercises. He wanted to be "accommodated" for his handicap by being permitted to purchase or otherwise remain in the particular three-bedroom house on Connector Drive.

62. Ms. Cromartie replied to Petitioner's March 24, 2008, letter on March 26, 2008, but did not address his request for a grievance hearing. (Prehearing Stipulation 38.) As of March 26, 2008, Petitioner was told the Brighton Road/Orange Avenue unit would only be held for him for 45 days, which would have been May 10, 2008.

63. On April 1, 2008, Linda Brown, Petitioner's site manager, sent an e-mail to Ms. Cromartie stating in part, "he [Petitioner] is upset because you have not responded to him concerning his grievance request." (Prehearing Stipulation 40.)

64. On April 1, 2008, Ms. Cromartie sent an e-mail to Linda Brown, agreeing to provide Petitioner, in Petitioner's new Brighton Road/Orange Avenue location, with the Americans with Disabilities Act (ADA) toilet he had requested and with other

non-disability-related requests he had made and explained the situation regarding Petitioner's purchase of a home. She also stated:

> If Mr. Hill refuses to be relocated, Joan will need to provide him with a non-compliance notice, then serve him with eviction papers should it go that far. (Amplified Prehearing Stipulation 41.)

65. On April 13, 2009, Linda Brown sent an e-mail to Ms. Cromartie, explaining Petitioner's dissatisfaction with the changes made and stating, in part, "His main complaint again was that he has not been granted a grievance hearing." (Prehearing Stipulation 42.)

66. Ms. Cromartie wrote Petitioner on April 16, 2008, and did not respond to his request for a grievance hearing. (Prehearing Stipulation 39.)

67. On April 16, 2008, Ms. Cromartie advised Petitioner that a lending institution, not THA, would have to determine whether Petitioner could qualify for a mortgage to purchase the home on Connector Drive. (Prehearing Stipulation 32.) She also gave him extensive information about financing to buy through THA's system.

68. Petitioner has never come to THA or Ms. Cromartie with a qualified lender who would accept a voucher from THA. He did not qualify to buy the home he wanted.[1/]

69. Although through the previous years and in 2008, Petitioner was unsuccessful in purchasing the Connector Drive house, his situation concerning buying a public housing home is not necessarily unusual or related to his disability. Of 36 homes made available by THA at the same time as the Connector House initially became available for purchase in 1997, only three low/low-moderate income applicants have been successful in qualifying and purchasing one of those 36 homes.

70. Respondent had received a letter from Dr. Claudia Perdei, dated April 10, 2008, documenting Petitioner's need for a live-in aide.

71. THA had received correspondence from Dr. Mark Cuffe dated April 16, 2008, stating that Petitioner "requires a facility where he can exercise to keep in shape so that he can avoid falling or a room big enough for him to keep his own exercise equipment." (Prehearing Stipulation 26.)

72. THA [Ms. Cromartie] sent a letter to Dr. Cuffe, dated April 23, 2008, asking for clarification on Petitioner's need for a caregiver and "the type of room or facility required for Mr. Hill's exercise equipment." (Prehearing Stipulation 27.)

73. THA received correspondence from Dr. Cuffe, dated April 25, 2008, stating that Petitioner's exercise equipment could be "kept in his room, if necessary." (Prehearing Stipulation 28.)

74. Therein, Dr. Cuffe specifically opined:

> Mr. Hill has multiple neurological problems that require assistance indefinitely. He requires an area that he can exercise and keep in shape. He can use a treadmill, a stationary bicycle, walking, 5-10 lb. hand held weights. He needs assistance with these exercises. This equipment can be kept in his room if necessary.

75. At this time, Petitioner had not seen Dr. Cuffe since November 2007. (Prehearing Stipulation 10.)

76. Petitioner signed the lease for the Brighton Road house on May 12, 2008, because he feared being evicted and having no place to live if he did not. (See Findings of Fact 62 and 64.) This is the date Petitioner claims discrimination took place.

77. Ms. Cromartie testified that Petitioner did not get his grievance hearing because she assumed he no longer wanted a hearing when he signed-off on his new unit at Brighton Road. Given the chronology of the parties' exchanges and the time frame for grievance hearings, as established by the lease, her testimony on this issue is somewhat disingenuous, but it is not clearly linked in any cause and effect or retaliatory sense to Petitioner's disability. After all, Petitioner had not brought her a willing and able lender, and the on-going dialogue with Petitioner about the accommodations he wanted in the Brighton Road unit (ADA toilet seat, payment of moving expenses, etc.)

had largely been granted before Petitioner moved in. (See Findings of Fact 60, 62, and 64.)

78. Petitioner never waived his right to a grievance hearing in writing. (Prehearing Stipulation 44.)

79. Petitioner never got a grievance hearing. (Prehearing Stipulation 43.)

80. Petitioner was involuntarily transferred to the Brighton Road unit at Orange Avenue in May 2008, when his lease at Connector Drive terminated, and following a determination that he did not qualify for a three-bedroom unit. (Amplified Prehearing Stipulation 33.)

81. THA paid all Petitioner's relocation expenses. (Amplified Prehearing Stipulation 34.)

82. The housing unit at Brighton Road is a two-family attached unit that is part of the Orange Avenue Complex owned by THA. (Prehearing Stipulation 18.)

83. The heated area of the apartment at Brighton Road is 671 square feet, with no garage. (Prehearing Stipulation 19.)

84. Approximately two months prior to hearing, but well after any time material to Petitioner's move from Connector Drive to Brighton Road or the filing of his complaint herein, Petitioner's daughter discussed Petitioner's exercises with a physical therapist. The physical therapist recommended exercise for Petitioner's upper body. The daughter is able to assist

Petitioner at the Brighton Road address in performing all the exercises recommended.

85. At the Brighton Road unit, Petitioner can do leg lifts, arm curls, and arm extensions with light weights on a chair in the living room or seated on his bed. In so doing, his daughter lifts his arms over his head.

86. At Brighton Road, Petitioner has no garage in which to put his bicycle up on a stand, but he can ride a bicycle. He is still able to go for walks. He continues to drive a car.

87. When Petitioner moved to Brighton Road, he gave away his two weight benches. He retained his free weights, his bicycle, and his daughter's Total Gym. His free weights are now in his bedroom in the new unit (P-44), and the Total Gym is folded and stored vertically in the kitchen.

88. At Connector Drive, Petitioner's master bedroom was 15 feet-two inches by 11 feet-one inch. At Brighton Road, the master bedroom is 12 feet by 11 feet.

89. At Connector Drive, the daughter's/aide's room was 13 feet-five inches by 11 feet-two inches. At Brighton Road, it is 12 feet by eight feet.

90. At Connector Drive, the dining room/kitchen was 17 feet-two inches by nine feet-five inches. At Brighton Road, the kitchen/dining area is 12 feet by 12 feet-six inches.

91. At Connector Drive, the living room was 13 feet-three inches by 14 feet-two inches. At Brighton Road, there is a five foot-six inch by four foot-six inch hall, combined with a living room that is 12 feet-six inches by 13 feet. (The 13 feet includes the four feet-six inch hall width.)

92. Throughout the Brighton Road house, Petitioner and his daughter/aide have the same amount of furniture as before. They share the single bathroom. They want a second bathroom for greater privacy.

93. Due to his furniture and the size and configuration of the Brighton Road unit's rooms, it is unlikely that anyone would want to leave the Total Gym continuously set up for use there. The daughter stated she can open and set up the Total Gym by herself, but she would not want to do it daily. Petitioner wants to have a third bedroom so he can leave the Total Gym set up for ease of use at any time he chooses.

94. Petitioner cannot open the Total Gym by himself, but he cannot use the Total Gym entirely by himself, anyway. (See Finding of Fact 38.) He and his daughter claim the Total Gym is safer for him to use than free weights, because he cannot drop the Total Gym weights like he can free weights, but Petitioner cannot exercise either with the Total Gym or with the free weights without his daughter's/aide's help.

95. Petitioner and his daughter claim that Petitioner cannot use the Total Gym anywhere in the new apartment.

96. Dr. Cuffe is a neurosurgeon who has been treating Petitioner since 1993. He has performed surgery on Petitioner many times, most recently in 2004, for cervical fusion to address tingling and numbness in Petitioner's arms and hands.

97. When deposed the month before final hearing for purposes of this litigation, Dr. Cuffe felt that Petitioner was "as good as he is going to get," physically. He deferred to any physical therapist, occupational therapist, lifestyle expert, or ergonomic specialist as far as exercise for Petitioner is concerned. He stated he was not the one to consult on that issue, thereby suggesting that his April 16, and April 25, 2008, correspondence concerning Petitioner's exercise needs was not intended to prescribe exercise. (See Findings of Fact 70, 72, and 73.)

98. No physical therapist, occupational therapist, lifestyle expert, or ergonomic specialist has offered an opinion concerning Petitioner and exercise.

99. No physician has said Petitioner has had a decline of physical condition since moving to the Brighton Road Address but Petitioner and his daughter feel he has. Petitioner and his daughter believe that he has declined, but Petitioner conceded

any decline could relate back to the recovery period from surgery in 2007.

CONCLUSIONS OF LAW

100. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause, pursuant to Sections 120.569, 120.57(1), and 760.20-760.37, Florida Statutes (2008).

101. Section 760.23 (8), Florida Statutes (2007), provides:

> It is unlawful to discriminate against any person in the terms, conditions, or privileges of the sale or rental a dwelling, or in the provision of services or facilities in connection with such dwelling because of a handicap of (a) that buyer or renter.

102. Herein, it is alleged that Respondent has discriminated against Petitioner by refusing "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." See § 760.23(9)(b). Accord, 42 U.S.C. § 3604 (3) (B).

103. Florida's Fair Housing Act tracks the Federal Fair Housing Act, which in turn was adopted from Section 504, of the Rehabilitation Act, 29 U.S.C. Section 791, and is closely akin to other similar anti-discriminatory laws, such as the Americans With Disabilities Act. Therefore, related federal cases derived

from all similar federal Acts are instructive as to how Florida's law is to be interpreted. Hawn v. Shoreline Phase I Condo. Ass'n., 2009 U.S. Dist LEXIS 24846; Schwarz v. City of Treasure Island, 544 F. 3d 1201 (11th Cir. 2008); Loren v. Sasser, 309 F. 3d 1296 (11th Cir. 2002); Dorbach v. Holley, 854 So. 2d 211 (Fla. 2d DCA 2002.)

104. "Whether a requested accommodation is required by law is 'highly fact-specific, requiring case-by-case determination.'" Loren v. Sasser, supra, quoting Groner v. Golden Gate Gardens Apartments, 250 F.3d 1039, 1044 (6th Cir. 2001). Accordingly, great care has been taken to lay out all relevant facts which could impinge on a decision in this case.

105. In order to prevail herein, Petitioner must establish (1) that he is disabled or handicapped within the meaning of the statute, and that Respondent knew or should have known of that fact; (2) that an accommodation was necessary to afford him equal opportunity to use and enjoy the dwelling; (3) that such an accommodation is reasonable; and (4) that Respondent refused to make the requested accommodation. See generally Schwarz v. City of Treasure Island, supra. See also United States v. California Mobile Home Park Management Co., 107 F.3d 1374, 1380 (9th Cir. 1997); Stassis v. Ocean Summit Ass'n, Inc., 2008 U.S. Dist. LEXIS 31856 (S.D. Fla. 2008); Jacobs v. Concord Village

Condominium X Ass'n, Inc., 2004 U. S. Dist. LEXIS 4876, 2004 WL 741384, (S.D. Fla.) 17 Fla. Weekly Fed. D. 347.

106. Herein, Petitioner is acknowledged as disabled or handicapped under the applicable statute. Respondent knew this, and Respondent refused to make either of two requested accommodations, to sell Petitioner the house he wanted at below cost and contrary to all of Respondent's rules, regulations, and policies or to allow him to remain in the house he wanted when there were families larger than his which needed the space. The only controversy at all is whether or not Petitioner's requested accommodations were "reasonable."

107. Petitioner bears the burden of showing that the requested accommodations are "reasonable." In order for a requested accommodation to be reasonable, it must first be shown to be necessary to afford Petitioner an equal opportunity to use and enjoy a dwelling. See § 760.23 (9) (b), Fla. Stat.; 42 U.S.C. § 3604 (f) (3) (B), and Schwarz, supra.

108. Assessments of the Federal Acts hold that a reasonable accommodation is one that is necessary to afford the handicapped individual an equal opportunity to use and enjoy a dwelling (accord, Section 760.23(9)(b), Florida Statutes) and that the requested accommodation does not constitute a fundamental alteration of the nature of the provider's program or constitute an administrative or financial burden on the

provider. Schwarz, supra.; Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d 781, 795-96 (6th Cir. 1996).

109. Pursuant to the Rehabilitation Act, an "[a]ccommodation is not reasonable if it either [1] imposes undue financial and administrative burdens on a grantee or [2] requires a fundamental alteration in the nature of the program." School Board of Nassau County v. Arline, 480 U.S. 273, 288 n. 17, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987) (quotation marks, alteration, and citations omitted); Harris v. Thigpen, 941 F.2d 1495, 1527 n. 48 (llth Cir. 1991); Alexander v. Choate, 469 U.S. 287, 300, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1995).

110. The term "necessary" is linked to the goal of affording an equal opportunity to the handicapped. Smith & Lee Assocs., Inc., supra. It envisions the concept, expressed in THA's Guidebook, that a reasonable accommodation may require something different than treating the handicapped person identically to a non-handicapped person. (See Finding of Fact 52.) However, it does not contemplate superior treatment for the disabled. Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains, 284 F.3d 442, 460 (3d Cir. 2002); Forest City Daly Housing, Inc. v. Town of North Hempstead, 175 F.3d 144, 152 (2d Cir. 1999).

111. Herein, Petitioner requested two accommodations and was denied a grievance hearing on them. Petitioner's request

for a grievance hearing clearly prohibits Respondent from now claiming it had no opportunity to accommodate Petitioner through its established procedures (See Schwarz at page 1219), but Respondent has not raised such a defense. THA's denial of a grievance hearing is an egregious breach of THA and HUD rules, policy, and procedure, as well as a breach of Petitioner's lease, but it was not demonstrated to be linked to discrimination on the basis of handicap/disability, and a full and complete hearing now having been provided Petitioner on all issues, a grievance hearing at this point would serve no purpose.

112. Petitioner submits that the instant case is controlled by Jacobs v. Concord Village Condominium Association, supra, to the effect that where an accommodation has been in effect for several years without incident, and there has been no change in the needs of the accommodated tenant, the accommodation is presumptively "reasonable." In other words, Petitioner suggests that, having allowed Petitioner and his live-in aide to live in a three-bedroom, two-bath unit at Connector Drive for six years, Respondent is, in effect, estopped to deny the reasonableness of the accommodations requested.

113. This argument has limited validity as to allowing Petitioner to remain as a Section 8 renter at Connector Drive.

It has no validity as to the argument that Respondent should have been permitted to purchase the Connector Drive home below market value, without meeting any of the requirements of THA's home ownership program, in violation of HUD standards. No landlord is required to discriminate against all other tenants or potential buyers in order to accommodate a single tenant or buyer. Specifically, as to any disability accommodation, Respondent had no obligation to alter its entire program (rules, policies, practices, or services) in order to accommodate one tenant/buyer. A proposed accommodation amounts to a [non-required] "'fundamental alteration' if it would eliminate an 'essential' aspect of the relevant activity." See Schwarz, at page 1219, and cases cited therein.

114. In Jacobs, supra, the U.S. District Court for the Southern District of Florida found that the plaintiff had made a prima facie showing of the need and necessity for an accommodation where her condominium association had known of her disability (weakness from prior polio requiring use of a wheelchair) for 22 years and had allowed the accommodation (a wheelchair ramp to a generator closet) for the first 20 years without question, but thereafter would not allow the plaintiff to replace the ramp when a person or persons unknown tore down the ramp. The court held that where the defendant association had acquiesced in the plaintiff's handicap for 20 years, failed

to question the nature and extent of her disability for 20 years, and the accommodation had been in place for 20 years without incident, the condo association must have known that the ramp was necessary for the plaintiff to use and enjoy her dwelling, and therefore the association was, in effect, estopped from contesting the extent to which the plaintiff's disabilities affected her major life activities. The court held, "The fact that the Defendant allowed the Plaintiff to have a ramp for 20 years and now refuses to allow it to be replaced supports Plaintiff's contention that the Defendant acted intentionally to preclude the ultimate enjoyment of her condominium in violation of the Fair Housing Act." Id. at 4883.

115. In so ruling, the U.S. District Court was addressing knowledge in the condominium association of Ms. Jacobs' meeting the statutory and case law definitions of "handicap," knowledge of her specific need for a ramp as a reasonable accommodation, and its failure for 20 years to either investigate or open a dialogue to determine those issues (qualification as handicapped and reasonableness of the specific accommodation) if it had any doubt.

116. In public housing, we have a very different situation.

117. When Petitioner was transferred, many other tenants, both disabled and able-bodied, were also transferred.

Respondent's action did not single out Petitioner or any disabled person.

118. For six years, Respondent herein has always acknowledged that Petitioner is handicapped and that he needs one extra bedroom to house his live-in aide. Petitioner's annual lease and other documents had, for six years, always advised him that Respondent reserved the right to re-size living arrangements at any time in accord with its policy to house as many low income people as possible (See Finding of Fact 26.) and that Petitioner would have to prove entitlement to the space annually, at a minimum. The Guidebook clearly states that handicapped persons may be left in over-housed situations when no other tenant needs the location, but must expect to move when the space is needed for a larger-sized family. (See Finding of Fact 27.) The fact that Petitioner was allowed to remain at Connector Drive for six years probably had something to do with THA's hope he could eventually purchase it, but even if his over-housing situation was merely a repeated oversight at annual recertifications, that prolonged over-housing did not establish Petitioner's right to remain or represent Respondent's acquiescence in Petitioner's use of one bedroom and the garage to store his exercise equipment forever.

119. Until alerted, and alerted obliquely at that (See Findings of Fact 60-61) Respondent had no reason to know that

Petitioner was using the third bedroom at Connector Drive to house exercise equipment. In 2008, when Petitioner requested, to purchase, THA provided him with relevant information, and Petitioner did not follow-through. THA opened a dialogue with Petitioner about what accommodations he would need at the new location: ADA toilet, etc. THA also opened a dialogue with Petitioner's physician and received information concerning Petitioner's exercise equipment that Ms. Cromartie reasonably interpreted as insufficient to justify leaving Petitioner in a three-bedroom house. "'The duty to make a reasonable accommodation does not simply spring from the fact that a handicapped person . . . wants such an accommodation made,' but rather 'Defendants must instead have been given an opportunity to make a final decision with respect to Plaintiff's request, which necessarily includes the ability to conduct a meaningful review of the requested accommodation to determine if such accommodation is required by law.' Id. at 12581 (citations omitted), Hawn v. Shoreline Towers Phase I Condominium Assoc. Inc., supra, quoting Prindable v. Association of Apartment Owners of 2987 Kalakaua, 304 F. Supp. 2d 1245 (D. Hawaii 2003), affirmed sub. nom. Dubois v. Assoc. of Apartment Owners of 2987 Kalakaua, 453 F.3d 1175 (9th Cir. 2006).

120. When Petitioner was right-sized and transferred to Brighton Road, many other tenants, both disabled and able-

bodied, were also right-sized and transferred. Petitioner was not singled-out.

121. Petitioner wanted more space and an extra bathroom so his daughter/aide could have more privacy and space, but presented no evidence that housing guidelines were applied inequitably or that her situation was different than that of any other live-in aide.

122. THA can only be charged with the information provided it at the time of the alleged discrimination, and that information reasonably led Ms. Cromartie to believe that Petitioner could store his exercise equipment in his bedroom at the Brighton Road address.

123. Even given the additional information provided and found as fact in this hearing, Petitioner's Total Gym is not the equivalent of Mrs. Jacobs' wheelchair. "The concept of necessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995). Petitioner has not shown that the Total Gym meets this standard. Petitioner can perform all exercises recommended by professionals without using the Total Gym. If Petitioner wants to use the Total Gym to the exclusion of the prescribed free weights and other apparatus, his daughter can set it up and take

it down for him. She has to help him with both free weights and with the Total Gym. The space in which to use the Total Gym, seven-and-a-half feet long, by three feet wide, by 42 inches high, plus some room for the daughter to assist, is not entirely prohibited for intermittent use by the floor plan of the Brighton Road House. The Brighton Road House's configuration is inconvenient and does not provide 144 square feet, which would handle all the exercise equipment Petitioner had at the Connector Road House together with the aide assisting with exercises, but use of all the equipment simultaneously has not been the thrust of this case, anyway.

124. Petitioner has not established a prima facie case of a reasonable accommodation, and his case of discrimination accordingly fails.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a Final Order dismissing the Petition for Relief and Charge of Discrimination.

DONE AND ENTERED this 8th day of July, 2009, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of July, 2009.

ENDNOTE

1/ Moreover, the Connector Drive unit had been purchased by THA for approximately $73,000 in 1997. In 2003, it had been independently appraised at $97,900. It would reasonably be worth more in 2008. In 2002, the Tallahassee Lender's Consortium, a group that partners with THA to help applicants qualify to buy homes, had qualified Petitioner for a $19,800, mortgage. In or around the same time frame, THA's Board authorized THA to issue soft second mortgages to qualified applicants who had obtained a qualified first mortgage from an independent lender. There was no proof that a $25,000, soft second mortgage was ever authorized by THA's Board for this particular Petitioner, but even if it had been, Petitioner's available funds in 2008, would only have been $4,800, which was substantially below the Connector Drive unit's assessed value. Also, at all times material, THA's Board had a firm policy not to sell any of its properties below its independently appraised value. (See Finding of Fact 10.) Also, Petitioner was unable to demonstrate that P-39, qualified him for $72,750, through THA, or was more than a demonstrative item for explaining the home purchase voucher process to him.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.